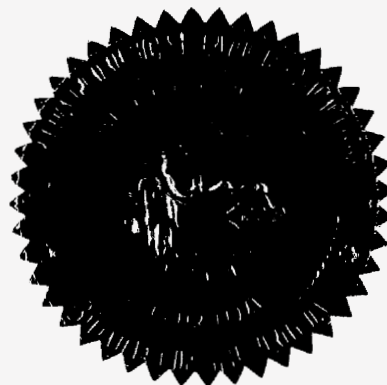


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040601-TP

In the Matter of:

PETITION BY DIECA COMMUNICATIONS,  
INC. d/b/a COVAD COMMUNICATIONS  
COMPANY FOR ARBITRATION OF ISSUE  
RESULTING FROM INTERCONNECTION  
NEGOTIATIONS WITH BELLSOUTH  
TELECOMMUNICATIONS, INC., AND  
REQUEST FOR EXPEDITED PROCESSING.



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PROCEEDINGS:           AGENDA CONFERENCE  
ITEM NO. 6

BEFORE:                 CHAIRMAN BRAULIO L. BAEZ  
                          COMMISSIONER J. TERRY DEASON  
                          COMMISSIONER LILA A. JABER  
                          COMMISSIONER RUDOLPH "RUDY" BRADLEY  
                          COMMISSIONER CHARLES M. DAVIDSON

DATE:                   Tuesday, October 5, 2004

PLACE:                 Betty Easley Conference Center  
                          Room 148  
                          4075 Esplanade Way  
                          Tallahassee, Florida

REPORTED BY:           JANE FAUROT, RPR  
                          Chief, Office of Hearing Reporter Services  
                          FPSC Division of Commission Clerk and  
                          Administrative Services  
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1 PARTICIPATING:

2 NANCY WHITE, ESQUIRE, representing BellSouth  
3 Telecommunications, Inc.

4 CHARLES E. WATKINS, representing Covad Communications  
5 Company.

6 VICKI GORDON KAUFMAN, McWhirter Law Firm,  
7 representing Covad Communications Company.

8 ADAM TEITZMAN, ESQUIRE, representing the Florida  
9 Public Service Commission Staff.

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CHAIRMAN BAEZ: We are now on Item 6.

MS. SALAK: Chairman, it has just been requested by the parties -- on Item 6, there are some discussions taking place, and they want to move if we can move this until after 7.

CHAIRMAN BAEZ: We can jump over and move on to Item 7, I'm sorry. We will give them a few minutes.

Can you alert me when you are ready to come back on it?

MS. SALAK: Yes, sir. Thank you.

COMMISSIONER JABER: Mr. Chairman, I just wanted to state for the record that those kinds of discussions are looked upon favorably, and parties should feel comfortable taking all the time they want this morning.

CHAIRMAN BAEZ: There is no discomfort in skipping over an item if discussions are still taking place. That much should be clear. Thank you.

\* \* \* \* \*

MS. SALAK: Mr. Chairman, the parties to Item 6 are ready to proceed.

CHAIRMAN BAEZ: They are ready to proceed. So then let us do so. Commissioners, we are back on Item 6.

COMMISSIONER JABER: And they are ready to tell us they have found a solution.

CHAIRMAN BAEZ: Good news awaits us, I hope.

1 MS. SALAK:

2 COMMISSIONER JABER: We have good news.

3 COMMISSIONER BRADLEY: Are we back on Item 6?

4 CHAIRMAN BAEZ: We are back on Item 6, Commissioner  
5 Bradley.

6 Mr. Teitzman, what is the best way to tee this up.  
7 Perhaps it is with you, I don't know.

8 MR. TEITZMAN: Commissioners, Item 6 is staff's  
9 recommendation in Docket 040601-TP. Although filed as an  
10 arbitration, the parties have jointly requested the Commission  
11 rule on whether or not BellSouth has a continuing obligation to  
12 provide access to new line sharing arrangements.

13 There are two preliminary matters that need to be  
14 addressed before discussion of the recommendation. The first,  
15 both parties have requested official recognition of certain  
16 documents. Covad has requested official recognition of PSC  
17 Order Number PSC-02-1304-FOF-TL, which was issued in Docket  
18 960786A-TL, and that order is the Commission's consultative  
19 order in the BellSouth 271 docket. Staff would recommend  
20 denying the request as it is unnecessary for the Commission to  
21 recognize its own orders.

22 COMMISSIONER JABER: Move staff's recommendation.

23 COMMISSIONER DEASON: Second.

24 CHAIRMAN BAEZ: Moved and seconded. All those in  
25 favor say aye.

1 (Unanimous affirmative vote.)

2 CHAIRMAN BAEZ: That official recognition is denied,  
3 but we are at the same place on that one. Go ahead. There is  
4 another one, I guess.

5 MR. TEITZMAN: There is an additional, BellSouth has  
6 requested official recognition of the FCC's brief filed with  
7 the D.C. Circuit Court of Appeals in connection with the  
8 USTA II proceeding. Staff recommends granting this request as  
9 it is considered a court record pursuant to Florida Statute  
10 90.202, Subsection 6.

11 COMMISSIONER JABER: Move to grant the request for  
12 official recognition.

13 COMMISSIONER DEASON: Second.

14 CHAIRMAN BAEZ: Moved and seconded. All those in  
15 favor say aye.

16 (Unanimous affirmative vote.)

17 CHAIRMAN BAEZ: Thank you. Commissioners.

18 MR. TEITZMAN: There is an additional preliminary  
19 matter, Chairman. Although noticed originally as participation  
20 by Staff and Commissioners only, Covad has filed a letter with  
21 the Commission Clerk requesting an opportunity to address the  
22 Commission on this item. Although staff believes it would have  
23 been appropriate to request oral argument upon the filing of  
24 briefs, staff does not believe oral argument is prohibited at  
25 this time. Consequently, staff believes it is within the

1 Commission's discretion to allow the parties to address the  
2 Commission on this matter. Staff does note that BellSouth was  
3 provided ample notice of Covad's request.

4 COMMISSIONER JABER: Mr. Chairman, for whatever it is  
5 worth to you, I would very much welcome oral argument on this  
6 issue.

7 CHAIRMAN BAEZ: All right. Well, that is two votes.  
8 Out of courtesy, obviously we are going to go ahead and allow  
9 them, but do the Commissioners have a suggestion or does staff  
10 have a suggestion as to what the time limit on oral argument  
11 should be?

12 COMMISSIONER JABER: Short and precise.

13 CHAIRMAN BAEZ: Otherwise we go back to the default,  
14 I don't know.

15 MR. TEITZMAN: Well, it is certainly within the  
16 Commission's discretion. I think usually ten minutes would be  
17 sufficient.

18 COMMISSIONER JABER: Ten minutes would be fine.

19 CHAIRMAN BAEZ: We see some nodding. Great. Ten  
20 minutes per side. Thank you, Mr. Teitzman.

21 MS. WHITE: We will do it in less, if possible.

22 CHAIRMAN BAEZ: As always your efficiency and brevity  
23 is key.

24 Ms. Kaufman, go ahead.

25 MS. KAUFMAN: Thank you, Chairman and Commissioners.

1 Vicki Gordon Kaufman of the McWhirter Reeves law firm. I am  
2 hear on behalf of Covad Communications. With me is Mr. Gene  
3 Watkins, who is the senior counsel to Covad, and he is going to  
4 be making the argument to you. And while he is beginning, I  
5 have a document to distribute.

6 CHAIRMAN BAEZ: Thank you, Ms. Kaufman. Good  
7 morning, Mr. Watkins.

8 MR. WATKINS: Good morning, Mr. Chairman. Good  
9 morning, Commissioners.

10 Let me start by saying that Covad -- the issue before  
11 the Commission today is does BellSouth have an obligation under  
12 Section 271 to continue to provide line sharing to Covad,  
13 access to line sharing to Covad after October, after yesterday,  
14 of this year.

15 Covad strongly believes they do. However, we also  
16 strongly believe that the parties, Covad and all the ILECs,  
17 should work together to reach commercial agreements to address  
18 this issue permanently so that we don't need to be before you  
19 arguing this.

20 Covad has entered into such a commercial agreement  
21 with Qwest, with SBC, and we have agreed with Verizon to extend  
22 through January in hopes of reaching an agreement with Verizon.  
23 BellSouth remains the lone holdout of the Regional Bell  
24 Operating Companies on this issue, though we have been in  
25 negotiations with them for over a year.

1           At the outset we hope we may be able to short cut  
2 this, and pending before the FCC right now with an October 22nd  
3 deadline is a petition for forbearance from Verizon seeking  
4 forbearance on all broadband 271 issues. The FCC is under a  
5 statutory deadline of October 22nd to reach a decision on that  
6 petition. As the staff has recognized in their recommendation,  
7 all the parties anticipate that that order will give a great  
8 deal of guidance on this subject.

9           In Louisiana, BellSouth has agreed in the sister  
10 proceeding of this one, to extend through November 10 of this  
11 year the status quo in order to give that Commission time to  
12 consider its decision. That was before there was any  
13 consideration of this petition for forbearance that is pending  
14 at the FCC.

15           COMMISSIONER JABER: Mr. Watkins, was that -- if I  
16 could interrupt you while the thought is fresh, was that  
17 decision in Louisiana made by the Commission, or was that a  
18 voluntary agreement between your two companies?

19           MR. WATKINS: It was made by the Commission after the  
20 representation from BellSouth by a letter, that I have with me  
21 here today, that they would extend the status quo through  
22 November 10, which was the next Commission meeting.

23           Given the October 22nd deadline, and the probability  
24 and the rumor that there is an order floating around at the  
25 FCC, there may be some guidance provided by the FCC on the



1 subject matter of 271 and broadband.

2 COMMISSIONER JABER: And extending the status quo  
3 until November, what authority did they cite to, what rationale  
4 did they give?

5 MR. WATKINS: The agreement of the parties.

6 COMMISSIONER JABER: I'm sorry?

7 MR. WATKINS: The agreement of the parties.  
8 Unfortunately that was what we were out there talking about,  
9 and the parties have not come to an agreement yet about this  
10 particular -- about asking the Commission to defer deciding  
11 this issue beyond that.

12 I can address what we believe the legal problems are  
13 with the staff recommendation now, or we can discuss whether  
14 you want to defer this for a period of time to see what the FCC  
15 may say about this. Now, I can't promise that the FCC is going  
16 to say anything or that it will be the model of clarity, which  
17 I think is always a representation I'm willing to make.

18 CHAIRMAN BAEZ: Before you move, Commissioner  
19 Davidson, you can go ahead before my question.

20 COMMISSIONER DAVIDSON: And this is an interesting  
21 and put-you-on-the-spot question, irrelevant, but we had  
22 dissenters at the FCC who really wanted line sharing, and we  
23 had some in the majority who are speculated to have wanted line  
24 sharing, but sort of didn't go that route in order to craft  
25 what they thought would be an enforceable opinion. And this is

1 just sort of interest to me. What do you predict to be the  
2 politics of this? I mean, if you had to, sort of, count the  
3 votes at the FCC, what do you predict?

4 MR. WATKINS: Well, we have four FCC Commissioners  
5 who have made public statements in support of line sharing.  
6 Now, whether that support will take the form of 251(c)(3) --  
7 (inaudible comment) -- exactly. Unfortunately that turns out  
8 to be two Democrats and two Republicans, and there was a lot of  
9 politicking going on in which we were kind of were the  
10 sacrificial lamb. On the last go-around there has been --

11 CHAIRMAN BAEZ: Now, now.

12 MR. WATKINS: -- there has been some discussion of it  
13 coming up again, because a lot of the basis for finding  
14 nonimpairment, which was the availability of line splitting  
15 with the disappearance of UNE-P and some public statements by  
16 major partners of ours on what they are doing with UNE in the  
17 residential market, may result in a refinding of impairment in  
18 the next go-around. All of that, however, is highly  
19 speculative and also partially dependent on the outcome of a  
20 presidential election that is currently in a dead heat. So, it  
21 would be the height of speculation to guess where and how  
22 things are going to flesh out.

23 COMMISSIONER BRADLEY: Well --

24 CHAIRMAN BAEZ: Commissioner Bradley, if you will  
25 just indulge me for a second. I need to get this question out,

1 because otherwise I will -- my confusion might continue. Going  
2 back to the Louisiana agreement, I just want to get it clear in  
3 my head it was an agreement between Covad and BellSouth?

4 MS. WHITE: Excuse me. Mr. Chairman, yes, apparently  
5 so. I was not aware of it until this morning, but apparently  
6 it was, yes.

7 CHAIRMAN BAEZ: And I just want to clarify, I guess,  
8 the practical effect of that agreement. And that is BellSouth  
9 and Covad agreed to withhold or defer pursuing some resolution  
10 to this particular issue that you have based on the FCC's  
11 decision on Verizon's petition for forbearance, is that  
12 correct?

13 MR. WATKINS: Let me clarify, because Covad never  
14 received a call from BellSouth on this matter. There was a  
15 letter sent to a Commissioner of the Louisiana Commission  
16 saying BellSouth agrees to maintain --

17 CHAIRMAN BAEZ: And you may not be the right person  
18 to answer, maybe Ms. White knows enough about it.

19 MS. WHITE: Well, it is my understanding that the  
20 staff recommendation on the line sharing issue in Louisiana  
21 came out the day before that Commission's agenda session, so it  
22 was one of those things that --

23 CHAIRMAN BAEZ: Hurry, hurry. Yes.

24 MS. WHITE: Yes, so we agreed to do it. We agreed to  
25 defer, I guess is the right word.

1 COMMISSIONER JABER: We should have thought of that.

2 MS. WHITE: I know.

3 CHAIRMAN BAEZ: I'm not so much interested in  
4 whatever exigencies existed that may have pushed it that far,  
5 I'm trying to understand in practice what it is that -- where  
6 you have placed your bet. And that is, in essence, on the  
7 deferral, at least, you are waiting for a decision on a Verizon  
8 petition, is that -- Mr. Criser, is that fair to say?

9 MR. CRISER: I will take a stab at this. I hope I  
10 don't make it worse. Based on some quick homework that we  
11 tried to do this morning, a couple of things that I think are  
12 different from the instant case. One is that in Louisiana the  
13 specific reason for the agreement to extend was because the  
14 staff recommendation had come out just before the Commission's  
15 decision, so there was a feeling that the Commission had not  
16 had an opportunity to review the analysis of their staff. And  
17 that is my understanding, at least, of the reason why we agreed  
18 to provide more time in Louisiana.

19 Secondly, I don't know that we agree that the pending  
20 Verizon order will address or resolve this issue in the next 30  
21 days. My understanding is that the FCC does have a procedural  
22 remedy that would allow them to get past that deadline. I will  
23 be honest and tell you I'm not prepared to explain all of that.  
24 And, in part, I guess, some reluctance on our part to come in  
25 here this morning and tell you all to wait, because sometimes

1 saying wait because the FCC is about to do this, or may do  
2 this, or, you know, I don't know that that is necessarily the  
3 right posture to bring into this state when you have got a  
4 fairly well-reasoned thought through recommendation in front of  
5 you with really -- I don't want to hold out promise that we  
6 think this thing would be resolved. If it would be resolved,  
7 that is obviously in everyone's best interest.

8           CHAIRMAN BAEZ: And that is fair. But I guess my  
9 question is much, is much more focused. I guess I'm trying  
10 to -- I'm trying to understand what the Verizon petition for  
11 forbearance, what kind of role is it playing here exactly. Is  
12 it just waiting on, by chance, some additional guidance that  
13 may change a recommendation, may help a decision along at the  
14 state level, or --

15           MS. WHITE: It is my understanding that essentially  
16 what Verizon is asking for the FCC to do is to issue an order  
17 that says with regard to broadband, there are no Section 271  
18 obligations. And if they said that, if the FCC agreed to say  
19 that, then the line sharing issue would be gone. Now, that is  
20 what Verizon wants. What the FCC does and how broadly it does  
21 it --

22           CHAIRMAN BAEZ: I think we have gone to great lengths  
23 to say how little we can speculate on what the FCC is going to  
24 do. But I guess what I'm trying to focus on is whether there  
25 is an impending decision out there that may wrap all of this

1 up, and trying to gauge the value of that impending decision to  
2 all the parties involved. And I'm asking those questions to  
3 lay it out there for the Commissioners, as well. Because I  
4 think, you know, that may play into some kind of discussion. I  
5 had questions along those lines with your particular petition,  
6 as well, but I think we might be able to save that discussion  
7 for later.

8 COMMISSIONER JABER: Mr. Chairman, I know  
9 Commissioner Bradley had a question, and after --

10 CHAIRMAN BAEZ: And my apologies, Commissioner  
11 Bradley, I have kept you waiting for way too long. You go  
12 ahead and ask your question.

13 COMMISSIONER JABER: Mr. Chairman, after Commissioner  
14 Bradley I have a follow-up.

15 COMMISSIONER BRADLEY: And maybe I have missed  
16 something, but we have had somewhat of a discussion about the  
17 politics at the FCC, and maybe what the prognosis is with  
18 respect to what they may or may not do. And maybe I missed  
19 this, but what will the FCC, what are they considering, line  
20 sharing under 251 or line sharing under 271? And I heard  
21 someone allude to 271, but --

22 MR. WATKINS: The petition for forbearance is under  
23 Section 160 of the act, which is if the FCC decides that 271  
24 has been fully implemented and it is in the public interest not  
25 to oblige a Regional Bell Operating Company, like BellSouth, to

1 provide access under these independent checklist items, like  
2 line sharing, or loops, or transport switching, it can forbear  
3 from enforcing that obligation.

4 CHAIRMAN BAEZ: Put simply, the question before the  
5 FCC is whether 271 obligations, at least respecting broadband,  
6 are going to survive despite what would have otherwise been a  
7 deletion of sorts, or a negation of sorts under 251. Is that  
8 fair enough to tee up?

9 MR. WATKINS: Yes.

10 COMMISSIONER BRADLEY: My question is, I mean, what  
11 is the FCC -- I heard what was stated about Verizon and what  
12 they have put before the FCC, but I'm going back to  
13 Commissioner Davidson's statement and question. Is the FCC  
14 going to given consideration to -- well, is their decision  
15 going to be based on 251 or 271?

16 MR. WATKINS: Commissioner Davidson was kind of  
17 asking, I think, about the next round of rules, and that will  
18 be probably on both. In fact, I believe the public notice of  
19 rulemaking said that they will address 271 obligations and  
20 revisit some of those obligations that were vacated by the  
21 circuit court in the District of Columbia.

22 BellSouth's petition for forbearance is not under the  
23 same time crunch as the Verizon. Verizon's was filed much  
24 earlier. But BellSouth says expressly we are asking for  
25 exactly the same thing that the Verizon petition asked for. So

1 ruling on that one is essentially ruling on the BellSouth one.

2 CHAIRMAN BAEZ: Ms. White, this is an opportunity to  
3 confirm what Mr. Watkins has said. Is his statement fair that  
4 you, in essence, are requesting that your request for  
5 forbearance or your petition for forbearance before the FCC is  
6 essentially the same?

7 MS. WHITE: Yes. It is essentially the same. But he  
8 is absolutely correct, it is not on the same time line as  
9 Verizon's.

10 CHAIRMAN BAEZ: Understood. Okay.

11 Commissioner Bradley, did you have more questions?

12 COMMISSIONER BRADLEY: Well, does anyone know what  
13 the price model is going to look like if the FCC decides that  
14 line splitting should remain intact?

15 MR. WATKINS: If the FCC decides under 251(c)(3), it  
16 will be the UNE prices, the TELRIC prices that the Commission  
17 has already addressed and exist. If it finds either in the  
18 response to the petition for forbearance or in the new  
19 proceedings that line sharing should continue to exist as a 271  
20 obligation, that would be under the just and reasonable rate  
21 that they have set out some general parameters for identifying  
22 what that is in the triennial review order. That was not  
23 appealed or addressed by the parties or addressed by the  
24 Circuit Court in the District of Columbia. So whether that is  
25 higher, lower, or somewhere in between we don't know, but may



1 get to later.

2 COMMISSIONER BRADLEY: The reason why I asked that  
3 question is if we decide that line splitting needs to be at  
4 least in place temporarily until the FCC renders a decision,  
5 I'm trying to figure out which price model might be suggested.  
6 It seems like TELRIC is out. How would we cost out?

7 MR. WATKINS: Mr. Chairman, may I address that? This  
8 is not necessarily a legal answer, but it is a very functional  
9 answer. The parties are in arbitration over the continued  
10 access to line sharing, or the provision of line sharing after  
11 two days ago, or yesterday. This is round one in our  
12 arbitration. It is a legal question that has been submitted to  
13 the Commission. We have got a lot more to go through before --  
14 in a functional sense, BellSouth has agreed to live by its  
15 interconnection agreement until legally changed. The  
16 interconnection agreement is not being changed by the order  
17 that we are talking about today. It is simply going to help  
18 guide the parties towards a resolution.

19 And so in a functional sense, we are probably at  
20 least a month, probably a lot more away from any change to line  
21 sharing, its pricing, or anything else. At which time we may  
22 have this kind of rolling new regulatory world that we are  
23 going to be living in. If the FCC forbears expressly from line  
24 sharing, and we have got a very different debate going on  
25 between the parties than has been going on to date.

1   Conversely, if they expressly say line sharing is a 271  
2   obligation and we are not forbearing from it, we still have a  
3   very different negotiation going on between the parties. And  
4   that negotiation will go on and has gone on for a long period  
5   of time. So in a functional sense, we are probably going to be  
6   reaching the final rules from the FCC, absent something  
7   extraordinary, by the time that we are implementing the change  
8   of law associated with line sharing that we are here at the  
9   beginning of right now.

10           CHAIRMAN BAEZ: Commissioner Jaber, you had a  
11   question.

12           COMMISSIONER JABER: A series of questions, Mr.  
13   Chairman, and then I think I would be ready to take action if  
14   the other Commissioners were.

15           Mr. Criser, you came up to the bench, that is always  
16   dangerous, but I want to ask you something based on what you  
17   said. You said we would hate to ask you, as a state, to wait  
18   on the FCC. But you have, in the past, on very similar issues.  
19   And I'm trying to get straight in my mind why this would be a  
20   different situation. And I will give you the foundation for my  
21   question, and then I have some follow-ups.

22           The foundation is this. Where we knowingly are aware  
23   that there are actions pending at the FCC that could result in  
24   our state action being undone, or creating uncertainty, I think  
25   we all should work collaboratively to wait for that certainty.

1 You have to adjust your business model, and your business  
2 strategy, and they have got to adjust their business model and  
3 their business strategy. I'm concerned about. I'm concerned  
4 about taking that away from both companies.

5 It seems to me that there is an opportunity here to  
6 maintain status quo in the interest of allowing, or not getting  
7 in the way of market stabilization. So react to that and then  
8 I've got some follow-up questions.

9 MR. CRISER: I guess, first of all, I will say -- and  
10 I probably should have recognized who I am when I first came up  
11 here, and I apologize for that. For the court reporter, I'm  
12 Marshall Criser with BellSouth.

13 If I said we would hate to ask you, I apologize for  
14 that. I wasn't practicing my words coming up here. What I  
15 really did want to convey, though, is that sometimes it is  
16 dangerous to suggest to you that you should wait. And my  
17 concern was that I'm not convinced that the finality that is  
18 being suggested is out there. I'm not convinced that the order  
19 that has not been seen yet that is not scheduled on an FCC  
20 agenda at this time is going to resolve this matter in 30 days.

21 COMMISSIONER JABER: What about 60 days?

22 MR. CRISER: I understand that there are procedural  
23 remedies that would allow -- from what I heard in some brief  
24 homework this morning there are procedural remedies that could  
25 allow the FCC to take more than 30, more than 60, I don't know

1 how many more days to do that. I honestly couldn't represent  
2 to you what that process would look like.

3 I will say this, though. Our intent was to not come  
4 in here this morning and suggest to you that if you wait 30  
5 days all of this will be resolved and we can get past this  
6 issue. With that said, if this Commission believes that, you  
7 know, waiting an additional 30 days to see if this order  
8 resolves this, you know, which is a fairly narrowly defined  
9 issue, but if it is -- you know, 30 days, I will get caught at  
10 some point as to what point I'm being unreasonable -- but if 30  
11 days solves this, if this Commission would like to take the  
12 benefit of 30 days to see what happens if this FCC order does  
13 come out by their deadline, and if it does lend some light on  
14 this issue, BellSouth is not opposed to that.

15 COMMISSIONER JABER: Mr. Criser, let me just say,  
16 because I don't want you to misunderstand. I don't agree that  
17 30 days will solve it. So let's think about that. If I were  
18 to support the notion of maintaining the status quo until the  
19 end of the year, what would your reaction be?

20 MR. CRISER: My suggestion to you would be that I  
21 believe you have got an issue in front of you that ought to be  
22 resolved, and that I think it is fairly narrow, and it has been  
23 well articulated, well discussed, and that the staff  
24 recommendation in front of you is the appropriate response to  
25 it.

1           COMMISSIONER JABER: Okay. Let's do some follow-ups  
2 on FCC proceedings. Someone needs to remind me, and, Covad, at  
3 the right time I do want you to respond to all of this. I  
4 could have sworn that the Chairman of the FCC came out after  
5 the triennial review order was issued and said that he was very

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15           COMMISSIONER JABER: And wasn't there a commitment  
16 made that that order could be issued by the end of the year?

17           MR. WATKINS: The stated goal of Chairman Powell, I  
18 believe, is that the end of December is the -- they want to try  
19 to get the final rules out by the end of December. I think in  
20 their briefings to the district court in response to the  
21 mandamus petition from USTA, they were saying that they were  
22 aiming to get this out by the end of December.

23           COMMISSIONER JABER: And, Mr. Criser, the last series  
24 of questions go to the market stabilization and certainty. Do  
25 you agree with me that it is quite possible if we take action

1 today we could put ourselves in a situation where -- and I  
2 don't know what the vote would be, obviously, but where it is  
3 conceivable that we find you have a 271 obligation. Let's set  
4 pricing aside, but you have a 271 obligation to provide access,  
5 and that brings you in under the RBHC umbrella and 271  
6 obligations, but that access wouldn't be something that a  
7 Verizon or Sprint would have to comply with. That is quite  
8 conceivable. That we take action today that applies to you but  
9 not to the other ILECs.

10 MR. CRISER: I would agree that any decision that is  
11 in front of you, you know, the possibility is there that it  
12 would go contrary to what my company's position is, and that  
13 that decision may affect my company differently than it does  
14 other companies.

15 COMMISSIONER JABER: But is that the case at the FCC?  
16 If we try to facilitate a decision today that maintains status  
17 quo, isn't it true that the FCC is looking at it more globally,  
18 more nationally, and whatever policy they come up with will  
19 impact all companies, should impact all companies alike?

20 MR. CRISER: I would agree that the FCC is looking at  
21 this issue. The only correction I would make to what Covad has  
22 represented to you is that I know that the FCC has also put a  
23 plan in place in the event that they don't make a decision by  
24 the end of the year.

25 COMMISSIONER JABER: Which is?

1 MR. CRISER: Which is they have set up a staggered  
2 rate structure that essentially says if we don't make a  
3 decision by a set date, then here is the rules that will be in  
4 place for the following six months.

5 COMMISSIONER JABER: And didn't that come with an  
6 NPRM?

7 MR. CRISER: Yes, ma'am.

8 COMMISSIONER JABER: So it is not really final.

9 MR. CRISER: I will certainly acknowledge that there  
10 is a lot of discussion that is going on in Washington right now  
11 that relates to these issues. And I'm very uncomfortable  
12 trying to tell you when I think there would be a decision that  
13 is dispositive on this particular issue.

14 COMMISSIONER JABER: Mr. Chairman, I'm done with my  
15 questions, but I need to allow Covad to respond to the  
16 questions I have asked.

17 CHAIRMAN BAEZ: Mr. Watkins, if you will just hold on  
18 for two seconds, I promise I will get to you. Commissioner  
19 Bradley, I heard Commissioner Bradley speak up, he had a  
20 question.

21 COMMISSIONER BRADLEY: Right. And I don't know if  
22 Commissioner Jaber was alluding to this or not, but basically  
23 what we are dealing with here is the fact that the FCC has done  
24 away with line sharing or line splitting. The FCC also, as a  
25 part of that, created a transition period of three years to

1 allow DSL companies to make a transition. I think that is  
2 probably what Mr. Criser alluded to. Is that what you were  
3 alluding to was the three-year transition period?

4 MR. CRISER: Yes, sir.

5 COMMISSIONER BRADLEY: Where are we right now with  
6 respect to the three-year transition period, and what is the  
7 impact of the transition upon the market forces out there?

8 MR. CRISER: I believe we are in the second year of  
9 the three-year process. And what they have established is  
10 cut-off points at points when new customers can be added and  
11 grandfathered, and then rate structures that can be used going  
12 forward.

13 COMMISSIONER BRADLEY: Okay. Now, my other question  
14 is this, and I really don't like to crystal ball anything, but  
15 can anyone tell me what the FCC is going to do?

16 MR. WATKINS: That was actually going to be the first  
17 thing I was going to say, because I want to make sure that it  
18 is crystal clear.

19 COMMISSIONER BRADLEY: Does anyone know what the FCC  
20 is going to do?

21 MR. WATKINS: The one thing I can say is that line  
22 sharing will certainly be addressed by the time the final rules  
23 come out. I can guarantee that somehow line sharing will be  
24 addressed in the final rules. Whether it gets in the petition  
25 for forbearance that we are talking about coming up soon, I



1 cannot say. Whether by the end of the year they are going to  
2 get their final rules out that it is going to say it then, I  
3 cannot say. Whether the petition for forbearance, if it does  
4 come out, is a model of clarity and says anything about line  
5 sharing, I cannot say.

6 On the statutory maximum, my understanding is for the  
7 petition for forbearance, October 22nd is the deadline. If  
8 they cannot get the votes to have an order out, they have got  
9 to vote for up to a 90-day extension, and that is the maximum.  
10 That is my understanding. I talked to my counsel this morning  
11 about that. So I believe the maximum period on Verizon's  
12 petition for forbearance, which is the one that BellSouth has  
13 copied, the maximum you are looking at would be October 22nd  
14 plus 90 days for an order on that subject.

15 COMMISSIONER BRADLEY: Okay. So can you predict that  
16 the FCC is going to pass an order that would allow for the  
17 continuation of line sharing, or that the FCC might pass an  
18 order that upholds the status quo?

19 MR. WATKINS: No. I wish I could. And if I could  
20 promise anybody that they would extend line sharing in the  
21 final rules in the petition of forbearance, we would have a  
22 significantly higher stock price.

23 I mean, but in addition -- I mean, part of the  
24 concern here is that we have got 10,000 line sharing customers  
25 in the state of Florida. A large number of those have been

1 added in the past year. Under the transition mechanism, the  
2 price for those people is not based on a UNE price. There is a  
3 lot of grandfathered people, and they are living with the UNE  
4 price. But for the people who have gotten it in the last year,  
5 those people who have decided -- and this is through all of our  
6 partners, AOL, EarthLink, they don't know that it is Covad a  
7 lot of times. They are going to get a call, if we have these  
8 transition mechanisms in place, that that price is going to  
9 start getting ratcheted up for them. Because that goes from  
10 line sharing to a stand-alone loop, which is significantly more  
11 expensive, and not realistically a product that can be serving  
12 residential broadband in a line sharing circumstance.

13 COMMISSIONER BRADLEY: Right. And this is a free  
14 market force question. Is there a possibility that Covad and  
15 BellSouth can have a discussion that results in an agreement  
16 that resolves this issue.

17 MR. WATKINS: Yes. We are in those talks right now.  
18 We have been in those talks for coming up on over a year. And  
19 we have come to those agreements with the other three Regional  
20 Bell Operating Companies in this country. It is our strongest  
21 desire and belief that that is the way that the parties should  
22 resolve this.

23 COMMISSIONER BRADLEY: Okay. Well, let me ask you  
24 one other question. Why haven't you all resolved the issues so  
25 that we will not have to participate in this discussion?

1 CHAIRMAN BAEZ: Yes, why?

2 MS. WHITE: If I had the answer to that, I would be a  
3 very, very wealthy woman in Nice, France somewhere, and I  
4 wouldn't be here.

5 CHAIRMAN BAEZ: Me, I just want to win the football  
6 pool once. That's all.

7 MS. WHITE: But I would like to say that, you know,  
8 Mr. Watkins mentions the customers that they have added in the  
9 past year, but Mr. Watkins and his company have been very aware  
10 of this transitional plan and what was going to happen since  
11 August of 2003, so it is not like it is brand new to them.

12 MR. WATKINS: That gets directly to what your  
13 question was, and that is we have been aware of what the FCC  
14 ordered for ILECs under 251. The question is for RBHCs who  
15 have, we believe, a very clear 271 obligation, what is their  
16 obligation? And we have been passing like ships in the night  
17 over that subject. And, you know, I can't say what the status  
18 of the negotiations are, what holds them up. But, I mean, we  
19 have got two very different opinions about what the status of  
20 line sharing is. And if you can wait one year and be done with  
21 it, you don't have a lot of incentive to negotiate. Because  
22 why enter into a three-year negotiation when you can be done  
23 with your competitor in one year.

24 CHAIRMAN BAEZ: And that is why the questions are  
25 teed up all over town.

1 Commissioner Deason.

2 COMMISSIONER DEASON: If we give you guidance today,  
3 is that going to facilitate your negotiations to a market rate  
4 settlement of the issue?

5 MR. WATKINS: It could, it definitely could. Because  
6 we do business with BellSouth in seven states, Florida is one  
7 of them.

8 COMMISSIONER BRADLEY: If we give them what?

9 COMMISSIONER DEASON: If we give them guidance today  
10 by making a decision, would that facilitate --

11 MR. WATKINS: I'm sorry.

12 COMMISSIONER DEASON: I was just explaining --

13 MR. WATKINS: We have staff recommendations from  
14 Louisiana and North Carolina that go our way, we have an  
15 unclear vote from the Tennessee Regulatory Authority that at  
16 least seems to be ordering the parties to implement the  
17 transition period. So the reality is no matter which way this  
18 Commission goes, whether it holds off, votes yes or no on this  
19 subject, we are going with to have differing -- apparently  
20 differing orders from commissions coming up.

21 COMMISSIONER DEASON: And that leads me to my second  
22 question. What is the practical effect of a decision that is  
23 made today, what happens?

24 MR. WATKINS: The parties will go back and negotiate  
25 with each other. We have agreed, and we have represented to

1 the staff that we will take the order as it comes down. We  
will move for reconsideration. There will be a period of the  
normal legal wranglings. But then after that we will  
definitely -- well, before that we will be sitting down with  
5 BellSouth as we have been trying to do for over a year now to  
6 try to come up with a solution that is permanent on line  
7 sharing.

8 COMMISSIONER DEASON: The third part of my question.  
9 Assuming we make a decision today, and six months from now the  
10 FCC does something contrary to what we have decided, what  
11 effect does that have on our order and how does that effect you  
12 as a competitor?

13 MR. WATKINS: It would trigger the change of law  
14 provisions in the parties interconnection agreement, and we  
15 would have to come back and say the order that we have gotten  
16 in the arbitration on how to amend the interconnection  
17 agreement has now been reversed in its legal basis by the FCC,  
18 and go through this whole rigmarole again, and go through the  
19 whole process again.

20 COMMISSIONER DEASON: Our decision today, it would  
21 have effect until the FCC makes a decision, or is the FCC  
22 decision retroactive back to where our decision has no meaning?

23 MR. WATKINS: In the triennial review order, the FCC  
24 expressly declined to do that type of thing. They have in the  
25 interim order, however, stated that they are not going to

1 retroactively apply the new rates.

2 COMMISSIONER DEASON: So our decision would have an  
3 effect maybe for a short period of time, but nevertheless would  
4 most likely have an effect.

5 MR. WATKINS: If implemented following the remainder  
6 of this arbitration and order, we would certainly be having to  
7 reserve, at least, for those customers who have gotten line  
8 sharing since October of last year at a minimum. At a maximum,  
9 we would have to start notifying them that they may be --

10 COMMISSIONER DEASON: But if you negotiate an  
11 agreement which provides you paying a rate which BellSouth  
12 accepts and they agree to provide you the service that you  
13 need, it doesn't matter what we say or what the FCC says,  
14 correct?

15 MR. WATKINS: That is correct. You will see me far  
16 less, fortunately and unfortunately.

17 CHAIRMAN BAEZ: Thank you, Commissioner.  
18 Commissioner Davidson.

19 COMMISSIONER DAVIDSON: Thank you, Chairman.

20 Mainly a few comments. At the outset, I support some  
21 type of whether we call it deferment or postponing the issue  
22 for some amount of time. I think at least a colorable claim  
23 has been made that there are 271 obligation. Whether that  
24 claim prevails or not, I don't know.

25 As I have stated from the get-go, I think it is very

1 important to have a national policy on these issues as opposed  
2 to a patchwork of different state approaches. And I think that  
3 applies with equal force not to just the switching issue, but  
4 also to sort of broadband policies. I think it applies  
5 specifically to this 271 versus 251 issue. So I think having  
6 some national policy is an important state goal, and I hope we  
7 can get to that at some point in the next decade. I know we  
8 have had round after round.

9 But I think Florida's interest is both in having a  
10 national framework, but also in avoiding major disruptions to  
11 its own market and to its customers. I think we have an  
12 obligation that we have tried to meet to provide for a  
13 manageable transition of the market, to the extent we have a  
14 role, from where it is now to wherever it should be.

15 Companies have relied on vehicles such as line  
16 sharing and UNE-P in providing services. And, in my view, we  
17 don't want to sort of flash-cut from now to some new model  
18 without providing some sort of manageable transition. I think  
19 what we risk if we just say, okay, well, the law has changed  
20 with USTA I, USTA II, after the appeal, if we try and react  
21 really quickly after those decisions we run the risk of putting  
22 some company, and thus its customers, the consumers of the  
23 state of Florida, at harm. Also, I recognize completely that  
24 BellSouth has strong arguments on this point. Covad has strong  
25 arguments on this point.

1           In my view, we ought to -- and this is not really a  
2 motion yet -- but we ought to sort of refrain and defer this  
3 issue until some date certain. Me, personally, I don't have a  
4 problem with deferring some of these transitional issues until  
5 such time as the final rules come out, because until the final  
6 rules come out we don't know what the rules will be. And if we  
7 react and change Element X or change Element Y and we are  
8 ultimately wrong, it may be very hard for somebody to come back  
9 into the market. I mean, so if we today sort of said, all  
10 right, BellSouth, you win on the line sharing issue, and then  
11 we are ultimately wrong, well, it may be too bad for the  
12 consumers of Covad. So I throw that out there. I am more  
13 focused now on the time frame for this deferment of decision.

14           CHAIRMAN BAEZ: If you are gearing -- I don't know  
15 that we need a motion, an actual motion to defer, Commissioner,  
16 but if that is what you are gearing up with, I want to get a  
17 couple of questions out only because I have been holding them  
18 in for all of this time.

19           First, Mr. Criser, you mentioned earlier that there  
20 was -- you made a comment about the finality of this. I mean,  
21 we obviously had a lot of questions about these pending  
22 petitions for forbearance, and I think you did a good job of  
23 not holding our hopes, getting our hopes up that this would be  
24 the end-all be-all as part of a decision, but I would ask the  
25 question another way. Do you recognize the potential for those



1 decisions to undo, somehow, the Commission, the state  
2 commission's work?

3 MR. CRISER: I believe that, yes, a federal decision  
4 could preempt the state commission's decision. I think I would  
5 also, though, go back to a point that I think was made earlier  
6 which is, you know, we are, in fact, in the middle of a  
7 transition period on this policy. And it is the ability to  
8 continually look to the future for resolution that really keeps  
9 us from the table in terms of being able to negotiate  
10 commercially and come to some kind of an agreement in terms of  
11 the terms of what this business ought to look like.

12 You know, with that said, part of the reluctance  
13 coming in is that, if I took this in stages, you know, there is  
14 an expectation that the FCC will have an order out by October  
15 22nd. Certainly if we absolutely believe that that was going  
16 to happen, and that is what I was trying to determine this  
17 morning, if there was some evidence that that was actually out  
18 there, that would be one thing.

19 I think there is another issue, which is if we came  
20 back in front of an agenda and there was actually an order out  
21 there that someone could look at and say that addresses this  
22 issue. You know, we can take this in stages. But I'm  
23 concerned, by the same token, that that is the signal to  
24 continue to sort of throw in the next question, and we stay  
25 away from the ability to sit down and really work out

1 commercial agreements on how this business ought to be run.

2 CHAIRMAN BAEZ: And on the question of commercial  
3 agreements, and I have, I guess, any one of -- Mr. Watkins, or  
4 Ms. White, or Mr. Criser can answer this question. Mr.  
5 Watkins, you alluded to other similar decisions in other  
6 jurisdictions some of which went one way, some of which went  
7 another. Do I detect some kind of score keeping? I mean, I'm  
8 assuming that you all are -- Covad negotiates on the BellSouth  
9 footprint, not in Florida, not in Mississippi, not in Georgia,  
10 specifically, and I'm pretty sure that's true.

11 MR. WATKINS: Yes, the negotiations for the state.  
12 The region, excuse me.

13 CHAIRMAN BAEZ: So I guess I have to ask -- and I'm  
14 only being half facetious here -- is it going to matter at some  
15 point on what column we fall as a Commission? Because I really  
16 am trying to gauge what the value of all of this is. I will be  
17 candid with you. My concern, as has been expressed by, I  
18 think, at some point all the Commissioners up here, and a few  
19 that are no longer with us on the bench, that there is a great  
20 sense of frustration over a back and forth. I mean, yes,  
21 putting out -- that is true, I will only speak for myself.  
22 But, you know, putting out today's fire or not, you know, and  
23 then just having all that hard work undone. And I think, you  
24 know, we had an item earlier this morning that is at least in  
25 part brought about by this regulatory cha-cha. You know,

1 having to react, or do or undo as the FCC goes. I mean, you  
2 get my meaning.

3 MR. WATKINS: Absolutely.

4 CHAIRMAN BAEZ: So I guess I'm trying to gauge  
5 exactly what value is. If we are negotiating, in fact, on a  
6 BellSouth footprint, then exactly how does our decision one way  
7 or another affect the tide, or the momentum in that kind of  
8 negotiation.

9 MR. WATKINS: The commercial negotiations are taking  
10 place at a pay grade well above me, and so I cannot say what --

11 CHAIRMAN BAEZ: I'm sorry to hear that.

12 MR. WATKINS: You know, from your mouth to God's  
13 ears.

14 CHAIRMAN BAEZ: I'm trying to help.

15 MR. WATKINS: But the reality is this Commission is  
16 very well respected in the nation. And what the staff has  
17 recommended you order here would be the first in the nation on  
18 this subject. The first to go that way, which is they don't --  
19 line sharing has never been in Checklist Item 4, which is what  
20 the staff recommendation is. I handed you something, and I'm  
21 ready to talk about it if we need to, but all of those states  
22 that I have referenced, the Tennessee Regulatory Authority has  
23 not said it is not a Checklist Item 4, they just simply --  
24 their debate and their vote, I think the transcript has been  
25 provided to you, was not very clear about what they were voting

1 on or why they were voting on it. Well, it's true.

2 CHAIRMAN BAEZ: Jane, can we get that struck somehow?  
3 I don't know.

4 COMMISSIONER BRADLEY: I want to ask staff a  
5 question.

6 CHAIRMAN BAEZ: I see your point.

7 Commissioner Bradley, go ahead.

8 COMMISSIONER BRADLEY: You mentioned the scorecard,  
9 or at least someone did. Which states have decided to continue  
10 line splitting, and which ones have decided to not continue  
11 line splitting. And maybe I'm confused about what was just  
12 stated, but he said that Florida would be the first, if we  
13 follow staff's recommendation. And that wasn't my  
14 understanding.

15 MS. WHITE: Commissioner, essentially Maine has  
16 decided that it doesn't need to reach the 271 issue. North  
17 Carolina and Louisiana have not ruled yet. **Tennessee**  
18 essentially ordered the transition plan, but said we are not  
19 going to reach the 271 issue. Georgia said we are going to  
20 defer and talk about the 271 issue in a whole another docket.  
21 Kentucky has been argued but no vote yet. And Pennsylvania,  
22 essentially that was a little bit of a strange one because  
23 Verizon had a tariff in place, and essentially that Commission  
24 said we are not going to let Verizon withdraw that piece, that  
25 line sharing from their tariff until the FCC addresses the

1 issue of whether 271 still requires Verizon to do it. So, yes,  
2 everybody is keeping score, but it is not an easy score card.

3 CHAIRMAN BAEZ: I'm sorry to interrupt, but does  
4 anybody have qualms about having a state commission make a  
5 determination on interpreting a federal -- what requirements  
6 are in a federal act on an issue that we were only authorized,  
7 or only had authority to render an advisory opinion for  
8 acceptance by the FCC in the first place? I mean, I'm not  
9 sure. I hate to throw this question out there after we have  
10 been at it for maybe an hour or so, but why are we blessed with  
11 having to make this decision, why are we so honored.

12 COMMISSIONER JABER: Because you are a highly  
13 respected Commissioner.

14 CHAIRMAN BAEZ: Beyond the highly respected part.  
15 And I've got to tell you, if it were that way, the folks in  
16 Washington would say, well, Florida said this, hey, sounds  
17 good. Let's not --

18 MR. WATKINS: The Commission's jurisdictional basis  
19 to consider this type of question is conferred in the federal  
20 act under Section 252 as part of the Commission's overall  
21 authority to approve and examine and arbitrate interconnection  
22 agreements. This particular issue comes to you because the  
23 parties agreed to talk about it in the context of the  
24 negotiations over the amendment itself.

25 CHAIRMAN BAEZ: And does the animal exist that cannot

1 be presented or couched within the context of an arbitration?  
2 Because I think if it does, this one starts looking like it.

3 MS. WHITE: Yes. I mean, essentially it is an  
4 arbitration brought by Covad. This is an issue that came up  
5 within that arbitration, of course you have authority over  
6 arbitrations. And this is an issue, unfortunately, that is  
7 kind of one of those bad ones all the way around, and involves  
8 the FCC, and it involves other states.

9 CHAIRMAN BAEZ: Because I can hear the arguments one  
10 way or the other, you know, three months from now, saying, you  
11 know, Florida, you had no authority to do this. This is  
12 interpretation of a -- I mean, this is interpretation of a  
13 federal statute. I mean, where is the authority for that.

14 MR. WATKINS: To the extent that the Act, itself,  
15 charges you with its implementation, then absent either a court  
16 or the FCC doing the interpreting for you and saying here is  
17 what we think this means, or here is how we plan to implement  
18 this as part of the statutory scheme, this Commission has that  
19 obligation. Or not obligation, excuse me, authority under 252  
20 to arbitrate this issue. Then you need to follow what the  
21 court or the FCC says, in our opinion.

22 CHAIRMAN BAEZ: But isn't really that question  
23 answered by the fact that you can petition for forbearance from  
24 271 obligations to the FCC? I mean, doesn't that fix the  
25 location of where this question properly has to be? And,

1 again, I mean, I think, you know, the word arbitration gives us  
2 a lot of license, and sometimes it is a good license to have,  
3 sometimes it is not. I'm not convinced that in this case --  
4 you know, I've got to be honest with you, I'm with Commissioner  
5 Davidson on this, I'm not sure that we need to be answering --  
6 certainly not now -- I'm not sure that we need to be answering  
7 this question at this point. But, you know, there it is.

8 MR. WATKINS: The forbearance petition only applies  
9 if it is an obligation. And the debate between the parties is  
10 is it an obligation. And so that is, again, this whole  
11 circular problem that we are in with the negotiation, legal  
12 requirements.

13 CHAIRMAN BAEZ: A wise person earlier said it is a  
14 chicken and egg question. Well, you know --

15 COMMISSIONER JABER: I can make a motion, and take  
16 discussion on it, because I welcome feedback on the motion.

17 CHAIRMAN BAEZ: Commissioner Bradley.

18 COMMISSIONER BRADLEY: Before you make a motion, I  
19 would like to put something out there.

20 COMMISSIONER JABER: Commissioner Bradley, can I ask  
21 a clarifying question, and it is this: Ms. White, and to  
22 staff, if we were to consider holding off for some period of  
23 time, procedurally speaking, what is it you need the motion to  
24 be to address that October 1st date? Or, alternatively, if you  
25 thought that is what the vote would be, is there something you

1 would consider doing voluntarily? Let me let you all talk  
2 about that, think about that.

3 The question to staff is procedurally, if that were  
4 the will of the Commission, it seems like you need something  
5 more than a deferral to address that October 1st date.

6 Commissioner Bradley, I apologize. I thought that  
7 that was sort of important to the discussion.

8 COMMISSIONER BRADLEY: Right. And what I was going  
9 to put out there is -- well, what I consider as being three  
10 options. We could choose to defer action, or defer a decision  
11 on this docket until the FCC decides the petition, and I don't  
12 know if that is the correct thing to do, or we could grant  
13 Covad continued use of line splitting, or go to the staff  
14 recommendation making it clear that our decision will and could  
15 change depending on how the FCC decides.

16 But I see some risk in trying to predict what the FCC  
17 is going to do. Bodies send all sorts of messages. But until  
18 they actually make a concrete and specific decision, then we  
19 really don't know what we are dealing with. And I will tell  
20 you why I'm making my statement. If we decide to defer, and  
21 the FCC decides to maintain the status quo, what position does  
22 that put Covad in in terms of its financial obligations to  
23 BellSouth? If we defer and the FCC decides to maintain line  
24 splitting, what does that do to the financial obligations that  
25 are going to be created?



1           And what I'm seeing is there is going to be a  
2 disagreement between the two parties regardless of what we do.  
3 That's why I suggested that maybe you all might want to get  
4 together and work out an agreement or some language that both  
5 of you can live with during the interim. And I think pricing  
6 would have to be a part of that discussion. But I just can't  
7 predict what the FCC is going to do, so I am inclined to go --

8           CHAIRMAN BAEZ: You're not alone.

9           COMMISSIONER JABER: Commissioner Bradley, for  
10 whatever it is worth to you, I agree with you. But I also  
11 agree with everything Commissioner Davidson said with regard to  
12 even trying to understand what the ultimate final rules will  
13 be. I think it goes even beyond these forbearance petitions.  
14 Something, thankfully, we haven't touched on today, but I'm  
15 concerned about it, once the FCC issue is resolved as it  
16 relates to forbearance, that has not yet addressed -- those  
17 vehicles do not yet address whether state commissions have  
18 their independent state authority to unbundle elements. And  
19 I'm not suggesting we get into that discussion today.

20           My point is this: I think that until these  
21 strategies are decided once and for all through final rules --  
22 really, all kidding aside, these companies having put in a very  
23 awkward situation through, to some degree, no fault of their  
24 own, but certainly through no fault of state commissions. The  
25 FCC promised all of you certainty. And you know what, I want

1 them to give that to you. So I intend to make a motion to give  
2 them --

3 CHAIRMAN BAEZ: Commissioner.

4 COMMISSIONER JABER: -- exactly the opportunity.

5 Now, what I need answered for me is procedurally what kind of  
6 motion should that be.

7 CHAIRMAN BAEZ: And while they are figuring up the  
8 answer, Mr. Dowds, I know that Commissioner Deason had a  
9 comment or a question.

10 COMMISSIONER DEASON: Well, I appreciate the  
11 discussion we have had, but I think we need to move along. And  
12 I just want to make kind of a brief comment. In my humble  
13 opinion, it is not the job of this Commission to try to predict  
14 what the FCC is going to do. We are placed in this situation  
15 because of a failure of the FCC to provide clarity to this  
16 issue. We are here under our arbitration jurisdiction. So be  
17 it. I think we need to make a decision. We need to move this  
18 forward. It gives some clarity, maybe it a minute amount of  
19 clarity in this very murky issue, but for whatever benefit it  
20 may have, it gives some clarity to the issue, it perhaps breaks  
21 the stalemate to some extent to allow the negotiations to go  
22 forward that we all want to have.

23 So I'm going to be against any type of deferral.  
24 This is within our jurisdiction. It has been placed before us.  
25 It is here because the FCC has not acted. We cannot predict

1 what the FCC is going to do. We need to do what we think is  
2 right, and then let the parties react accordingly, and then let  
3 the FCC do whatever they are going to do when they do it.

4 CHAIRMAN BAEZ: Commissioner.

5 COMMISSIONER DAVIDSON: Mr. Chairman.

6 CHAIRMAN BAEZ: Are you rising for a motion or --

7 COMMISSIONER DAVIDSON: No, I just wanted to offer a  
8 comment in response to Commissioner Deason, if that is  
9 appropriate.

10 CHAIRMAN BAEZ: Go ahead.

11 Mr. Dowd, I know we are going to get to you  
12 posthaste. Thank you.

13 COMMISSIONER DAVIDSON: I agree with 95 percent of  
14 what Commissioner Deason said. I would support a motion for a  
15 deferral, and here is why. I agree with Commissioner Deason,  
16 but I feel that we cannot address, sort of, this issue in  
17 isolation. There are lots of issues related to the TRO, the  
18 transition, what our responsibilities are for managing the  
19 transition from the old regime to the new regime. And in my  
20 view, we can't just sort of have a two-party docket piecemeal  
21 by piecemeal to address, all right, is there a transition, what  
22 do we need to do about UNE-P, what do we need to do about hot  
23 cut, what do we need to do about the 271 issue.

24 I agree that we have issues that we will have to  
25 decide. We can't always punt. I agree with you

1 wholeheartedly. But I will support a deferral, because I don't  
2 think sort of a two-party docket is the vehicle by which we  
3 should be making, sort of, these declarations. I would much  
4 rather see, and I don't know if it is appropriate at some  
5 point, a generic docket to deal with these issues, because we  
6 have lots on the plate with regard to implementing the TRO, and  
7 we are going to have more as soon as the final rules are out.

8 I mean, we have certain things now with the interim,  
9 we will have more with the final. But I can support some  
10 deferral because I think making a decision today is a very,  
11 sort of, piecemeal approach to an issue that is not at all  
12 piecemeal. It is sort of a comprehensive communications policy  
13 that we have to focus on.

14 CHAIRMAN BAEZ: Thank you, Commissioner Davidson.

15 COMMISSIONER JABER: Mr. Chairman, it might be  
16 deferral is not the right word, that's why I was asking those  
17 procedural questions.

18 CHAIRMAN BAEZ: Yes, maybe that is not the proper  
19 word. Mr. Teitzman or Mr. Dowd, you have a question before  
20 you.

21 MR. TEITZMAN: Yes. If BellSouth indicates that it  
22 will continue providing access to new line sharing arrangements  
23 pursuant to their interconnection agreement, then a simple  
24 deferral would be adequate. If BellSouth indicates that it  
25 does not intend to continue providing access to new line

1 sharing arrangements, I would like to point out that the  
2 parties interconnection agreement does not expire until  
3 December 19th, 2004. So the Commission could defer the item  
4 and require BellSouth to maintain the status quo pursuant to  
5 the parties' interconnection agreement.

6 COMMISSIONER JABER: Ms. White, do you agree with all  
7 of that? The question posed to you was procedurally if you  
8 thought the will of the majority was to come up with a motion  
9 to maintain status quo, what would you suggest?

10 MS. WHITE: I would say that -- two caveats and we  
11 could live with that. One is that we would not be waiving any  
12 of our arguments.

13 COMMISSIONER JABER: I'm sorry, I didn't hear you?

14 MS. WHITE: We would not be waiving any of our  
15 arguments. And, two, is that if the FCC comes out and says  
16 BellSouth and the other RBHCs never had a 271 obligation to  
17 provide line sharing and the 251 obligation no longer exists,  
18 then they will have added new customers during that time period  
19 at a rate -- this gets into Commissioner Bradley's price  
20 issue -- that, first of all, we didn't have to provide it to  
21 them. So I guess I would want some kind of, I'm not sure if it  
22 is a true-up or if it would be a look at what is owed for those  
23 customers that were added on during that time period of the  
24 deferral, if that makes sense.

25 COMMISSIONER JABER: Mr. Watkins, your reaction to

1 that.

2 MR. WATKINS: We have no problem with them preserving  
3 their arguments, pending a more definitive statement from the  
4 FCC on this subject. As far as the quote, unquote, true-up,  
5 there is a transition period with pricing for customers that  
6 have been added in the past year, that is being reserved right  
7 now by Covad. So in terms of taking care of the ability to  
8 pay, what would happen, we will live with whatever orders are  
9 provided by the FCC, this Commission, or any other state  
10 commission on that subject. In terms of my ability to hear or  
11 agree that BellSouth gets whatever it is, dependent on what the  
12 FCC says and how clearly they say it, it would be incredibly  
13 speculative on my part, but also irresponsible. I would have  
14 to see what the order says we have to do, and why we have to do  
15 it, and how we have to do it. We will live --

16 COMMISSIONER JABER: Let's flesh this out a little  
17 bit more, because I hear more in common than there are  
18 differences now. What I think you just said for the remaining  
19 year transition, there is already a pricing structure that you  
20 have to live with.

21 MR. WATKINS: But no new orders.

22 COMMISSIONER JABER: I'm sorry?

23 MR. WATKINS: But no new orders. Orders under the  
24 transition.

25 COMMISSIONER JABER: Well, if BellSouth agrees today

1 to maintain status quo, what pricing structure would you be  
2 supportive of going forward?

3 MR. WATKINS: The interconnection agreement itself,  
4 until amended, has to be lived with by the parties. The FCC is  
5 fully cognizant of the arguments and debates that are going on  
6 in the states over this subject. They are also fully cognizant  
7 of all the other agreements that have been entered into by  
8 other parties, and how those agreements will be interplayed  
9 with by the new federal rules. And they have expressly  
10 identified this interplay. I believe that they will be  
11 addressing that question.

12 CHAIRMAN BAEZ: But Ms. White mentioned a scenario  
13 where the 271 obligations, at least on this, were void from the  
14 beginning. I mean, they never existed. That creates some  
15 conflict with -- and maybe you disagree, but it seems to  
16 create, at least, some question of what did you do in the  
17 interim leading up to that. Maybe the prices that were  
18 applicable, you know, there is some retroactivity there of  
19 sorts. Now, you have inserted that there is a transition rate  
20 that would apply. I mean, is that --

21 MR. WATKINS: Mr. Chairman, we have a contract with  
22 BellSouth that has the rates in it. We have not ordered a  
23 single customer under any 271 theoretical obligation of  
24 BellSouth. BellSouth has represented on the national level,  
25 and they have represented in several state commissions that

1 they will live by their interconnection agreements until they  
2 are lawfully amended. That is the representation that we would  
3 ask that they live by until they were lawfully amended.

4 CHAIRMAN BAEZ: Whatever that means?

5 MR. WATKINS: Absolutely. If the FCC says that gets  
6 retroactively trued up, then retroactively trued up is what it  
7 is.

8 COMMISSIONER JABER: Chairman, let me tell you why I  
9 can live with that as a motion. It seems to me that both  
10 parties have equal risks that way. If you are worried that the  
11 FCC ultimately finds that there was no 271 obligation, then as  
12 a side note, I don't know why we had to take great pains to  
13 test it, but if they ultimately find that 271 was not, that  
14 line sharing was not a 271 obligation, then you take a risk  
15 continuing to market your same platform to new customers. They  
16 have taken a risk by agreeing here today to continue to provide  
17 line sharing access to you. I can live with that, Mr.  
18 Chairman.

19 And my motion would be recognizing the statements  
20 made by BellSouth and their commitment to continue to provide  
21 access to line sharing, I don't know if we need to deny staff  
22 and accept that as a motion, but I'm willing to do that.

23 CHAIRMAN BAEZ: Can staff clear us up on -- I mean, I  
24 guess I'm unclear as to whether that is a condition that is  
25 being proposed, or is that something that, you know, reliance



1 on the parties' representations is sufficient, or how does all  
2 of that get folded into a decision for consideration, at least  
3 a motion for consideration?

4 MR. MELSON: If I understood BellSouth's position, it  
5 was that if you deferred they would continue to make new line  
6 sharing arrangements available to Covad until there was some  
7 future decision. I heard BellSouth saying they wanted a caveat  
8 about a true-up. If you start going with all of those caveats,  
9 you're almost going to have to, it seems to me, get into a  
10 motion type situation, in which case the more appropriate  
11 motion might be the one that Mr. Teitzman referred to, which  
12 is, essentially, defer and say that the parties have an  
13 existing interconnection agreement that is good through the  
14 19th of December. Unless and until there is some subsequent  
15 change, they will live by that agreement. That leaves open to  
16 the parties to argue about whether a true-up is required if, in  
17 fact, there is some other FCC decision or some other change.

18 COMMISSIONER DEASON: But what happens come December  
19 19th and there is no guidance from the FCC?

20 MR. MELSON: I suspect the parties are back here.

21 MR. WATKINS: Commissioner Deason and Mr. Chairman,  
22 in Georgia --

23 CHAIRMAN JABER: The issue of a true-up, and I guess,  
24 you know, a true-up can work both ways. It can be less or it  
25 can be more. And I'm trying to figure out why Covad is

1 somewhat, it would appear to me, to be against the true-up.

2 MR. WATKINS: Well, Commissioner Bradbury, we  
3 actually have true-ups in our interconnection agreement for  
4 certain items that are kind of out there in fluctuation. I  
5 don't know if this is some of them or not.

6 CHAIRMAN BAEZ: But before we --

7 CHAIRMAN JABER: I was just wondering if Covad is  
8 maybe predicting what the FCC is going to do by maybe not  
9 agreeing to a true-up.

10 CHAIRMAN BAEZ: I don't know. But I will tell you  
11 what, before we go down the true-up road, I'm not even sure  
12 that we could order that. I don't know that we have that  
13 authority to begin with. So I would caution against even  
14 making that part of any discussion. Because I don't think that  
15 is properly neither before us or left up to us, in my opinion.

16 COMMISSIONER BRADLEY: Well, let me ask this  
17 question.

18 CHAIRMAN BAEZ: I don't know if we need it.

19 COMMISSIONER BRADLEY: And I know we are trying to  
20 decide what the motion might look like, but if we go with  
21 staff's recommendation, doesn't that mean that -- I mean, that  
22 means also that the agreement is still going to be in force  
23 until December. And if we all believe that there is a  
24 possibility that the FCC might act between now and December,  
25 that is more than 30 days.

1           COMMISSIONER DAVIDSON: You mean staff's  
2 recommendation on the motion, not staff's written  
3 recommendation on the agenda item.

4           COMMISSIONER BRADLEY: I'm referring to the  
5 recommendation in the agenda item.

6           COMMISSIONER JABER: Then that is not correct.  
7 Because staff's recommendation, as written, would actually  
8 modify the agreement somewhat to eliminate line sharing.

9           COMMISSIONER BRADLEY: Right, it does. But they have  
10 an agreement that goes through December, so --

11           COMMISSIONER JABER: But it wouldn't --

12           COMMISSIONER BRADLEY: -- would staff's  
13 recommendation --

14           COMMISSIONER JABER: Supersede the part about line  
15 sharing.

16           COMMISSIONER BRADLEY: -- make that agreement null  
17 and void?

18           COMMISSIONER JABER: The part about line sharing.

19           MR. WATKINS: This is an arbitration to amend the  
20 existing agreement. We are in negotiations now for the new IA,  
21 and the arbitration window for that opens in November. We are  
22 in a weird world, because we will also be probably negotiating  
23 this same subject in that if we don't reach a commercial  
24 agreement. Again, commercial agreement is where we want to go,  
25 commercial is where we are trying to go. The fact that the

1 other -- none of the Qwest states ruled on this subject, and  
2 the parties entered into a commercial agreement. None of the  
3 SBC states ruled on this subject, and the parties entered into  
4 a commercial agreement. Georgia sent this question to a  
5 generic docket.

6 COMMISSIONER JABER: Mr. Watkins, I don't want to  
7 digress.

8 (Simultaneous conversation.)

9 COMMISSIONER JABER: Commissioner Bradley, help me  
10 out. Let me throw some language out and let's see where the  
11 source of disagreement may be. If I were to make a motion to  
12 deny staff on Issue 1 and allow the current agreement in its  
13 entirety, which expires December 19th, 2004, to remain in  
14 effect, recognizing that if the FCC were to make a finding that  
15 line sharing was never a 271 obligation, there might be a  
16 true-up mechanism, that that should remain on the table. That  
17 that is an option that might come back to us.

18 Mr. Melson, what have I forgotten about what you and  
19 Mr. Teitzman said? Does that capture everything you all said?

20 MR. MELSON: I believe it does, Commissioner Jaber.

21 The other alternative that -- and doing that, I  
22 think, requires us to write an order that lays all of that out.  
23 What I am not 100 percent clear is if the Commission simply  
24 voted to defer, which does not require an order, would the  
25 parties, as a practical matter, get to the same place and not

1 need us to write a lot of unnecessary words.

2 COMMISSIONER JABER: Well, I think this is  
3 complicated enough, important enough that we should pose that  
4 question to the parties.

5 Ms. White, I know I put you on the spot by asking you  
6 procedurally what it was you needed to recognize your  
7 willingness to try to maintain status quo. Do you have a  
8 preference in terms of deferral or order?

9 MS. WHITE: With all due respect, I think we would  
10 prefer the order.

11 COMMISSIONER JABER: You know, and I don't have a  
12 problem with that, Mr. Chairman.

13 COMMISSIONER BRADLEY: Well, I think that the order  
14 gives some clarity to our decision. And also, you know, giving  
15 consideration to the fact that if the FCC rules in December, we  
16 can always go back and make modifications or changes based on  
17 what they do if they do, in fact, render a decision.

18 COMMISSIONER JABER: And, Mr. Watkins, I left you out  
19 of that question, deferral or order. It seems like both  
20 parties would want the order for whatever clarity you all feel  
21 like it would provide.

22 MR. WATKINS: We would prefer an order. Just two  
23 points. The first is the Georgia Commission sent this question  
24 to a generic docket for the very reasons that have been  
25 discussed here. That will be considered probably well after

1 December 19th, and also to address all the other transitional  
2 mechanisms that are going on and will be coming in the final  
3 rules. That is just point number one.

4 Point number two is when we went through the  
5 nine-month docket, there was this question because of the  
6 JSTA II order and what was happening with the nine months at  
7 the FCC. The parties all agreed, you know, we will come back  
8 when we get something that is more clear and as things  
9 progress. And we, I think, agreed that we would have an  
10 informal conference call with the staff every month or two  
11 months and say, okay, what's happening, what can we do.

12 That seems to me to be a way in which we can -- and I  
13 would be very surprised if BellSouth wouldn't be willing to  
14 say, okay, if an order on a petition for forbearance comes out,  
15 let's both read it. If it is clear, we will come with a joint  
16 proposed order that we can come up with that would resolve this  
17 issue and you will never have to reach it.

18 COMMISSIONER BRADLEY: Mr. Chairman.

19 CHAIRMAN BAEZ: Commissioner Bradley.

20 COMMISSIONER BRADLEY: I'm prepared to second the  
21 motion in that is the will of the body.

22 CHAIRMAN BAEZ: And let's try and fix the motion; or  
23 maybe it's that I wasn't listening, and I apologize, but I'm  
24 not sure that I heard one.

25 COMMISSIONER JABER: Ms. White, based on what I was

1 prepared to move, what do you think you are agreeing to?

2 MS. WHITE: I think I'm agreeing to a motion --  
3 well, I'm not sure I'm agreeing to anything. But I believe  
4 what you are moving -- let me make sure of that. Let me make  
5 that clear first. I believe your motion was to defer --

6 COMMISSIONER BRADLEY: Not defer.

7 MS. WHITE: Not defer. But to state that the parties  
8 agreement remains in place until December 19th -- 17th, 2003.

9 COMMISSIONER JABER: December 19th, 2004.

10 MS. WHITE: I'm sorry.

11 COMMISSIONER JABER: Let me articulate, you tell me  
12 if you understand clearly. Which is to continue to provide  
13 access to line sharing until the expiration of the contract,  
14 recognizing that a true-up may be appropriate if the FCC  
15 affirmatively removes the 271 obligation.

16 MS. WHITE: Yes, ma'am, that is what I understood.

17 COMMISSIONER JABER: That would be my motion, Mr.  
18 Chairman.

19 COMMISSIONER BRADLEY: And I will second the motion.

20 CHAIRMAN BAEZ: There is a motion and a second. And  
21 as stated, all those in favor say aye.

22 COMMISSIONER BRADLEY: Aye.

23 COMMISSIONER JABER: Aye.

24 CHAIRMAN BAEZ: Aye. Those opposed?

25 COMMISSIONER DEASON: Nay.

1 CHAIRMAN BAEZ: Thank you, Commissioners.

2 MR. WATKINS: Thank you, Mr. Chairman.

3 CHAIRMAN BAEZ: That disposes of Item 6. Thank you  
4 all for the discussion, it was very helpful. We are going to  
5 break for ten minutes.

6 MR. TEITZMAN: Mr. Chairman.

7 CHAIRMAN BAEZ: Yes, Mr. Teitzman.

8 MR. TEITZMAN: There was a second issue, should the  
9 docket be closed.

10 COMMISSIONER JABER: What do you want? Do you want  
11 it to close, or it can't now?

12 MR. TEITZMAN: There are other issues between the  
13 parties, so I believe the docket should remain open.

14 CHAIRMAN BAEZ: Very well. So moved. Motion and  
15 seconded. All those in favor say aye.

16 (Unanimous affirmative vote.)

17 CHAIRMAN BAEZ: Thank you.

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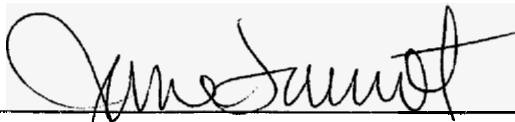
COUNTY OF LEON )

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 12th day of October, 2004.



JANE FAUROT, RPR  
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