

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION TO ESTABLISH GENERIC  
DOCKET TO CONSIDER AMENDMENTS  
TO INTERCONNECTION AGREEMENTS  
RESULTING FROM CHANGES IN LAW,  
BY BELLSOUTH TELECOMMUNICATIONS, INC.

Docket No. 041269-TP

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EMERGENCY PETITION OF GANOCO, INC.  
d/b/a AMERICAN DIAL TONE, INC. FOR  
COMMISSION ORDER DIRECTING BELLSOUTH  
TELECOMMUNICATIONS, INC. TO CONTINUE  
TO ACCEPT NEW UNBUNDLED NETWORK ELEMENT  
ORDERS PENDING COMPLETION OF NEGOTIATIONS  
REQUIRED BY "CHANGE OF LAW" PROVISIONS  
OF INTERCONNECTION AGREEMENT IN ORDER  
TO ADDRESS THE FCC'S RECENT TRIENNIAL  
REVIEW REMAND ORDER (TRRO).

Docket No. 050171-TP

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EMERGENCY PETITION OF GANOCO, INC.  
D/B/A AMERICAN DIAL TONE, INC. FOR  
COMMISSION ORDER DIRECTING VERIZON  
FLORIDA, INC. TO CONTINUE TO ACCEPT  
NEW UNBUNDLED NETWORK ELEMENT ORDERS  
PENDING COMPLETION OF NEGOTIATIONS  
REQUIRED BY "CHANGE OF LAW" PROVISIONS  
OF INTERCONNECTION AGREEMENT IN ORDER  
TO ADDRESS THE FCC'S RECENT TRIENNIAL  
REVIEW REMAND ORDER (TRRO).

Docket No. 050172-TP



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PROCEEDINGS:                   AGENDA CONFERENCE  
  ITEM NO. 4

1 BEFORE: CHAIRMAN BRAULIO L. BAEZ  
COMMISSIONER J. TERRY DEASON  
2 COMMISSIONER RUDOLPH "RUDY" BRADLEY  
COMMISSIONER CHARLES M. DAVIDSON  
3 COMMISSIONER LISA POLAK EDGAR

4 DATE: Tuesday, April 5, 2005

5 PLACE: Betty Easley Conference Center  
Room 148  
6 4075 Esplanade Way  
Tallahassee, Florida

7 REPORTED BY: LINDA BOLES, RPR  
8 Official FPSC Hearings Reporter  
(850) 413-6734

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1 PARTICIPATING:

2 R. DOUGLAS LACKEY, ESQUIRE, representing BellSouth  
3 elecommunications, Inc.

4 DONNA C. MCNULTY, ESQUIRE, representing MCImetro  
5 ccess Transmission Services, LLC.

6 NORMAN H. HORTON, JR., ESQUIRE, representing NuVox,  
7 spedius and KMC Telecom.

8 BRIAN CHAIKEN, ESQUIRE, appearing telephonically,  
9 epresenting Supra Telecommunications & Information Systems,  
10 nc.

11 RICHARD CHAPKIS, ESQUIRE, representing Verizon.

12 MATT FEIL, ESQUIRE, representing Florida Digital  
13 etwork.

14 RICK MELSON, ESQUIRE, ADAM TEITZMAN, ESQUIRE, PAT  
15 .EE, and TODD BROWN, representing the Florida Public Service  
16 ommission Staff.

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## P R O C E E D I N G S

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2 CHAIRMAN BAEZ: And we are back on Item 4.

3 Mr. Chaiken, are you on?

4 MR. CHAIKEN: Yes, sir, I'm here.

5 CHAIRMAN BAEZ: Okay. Thank you.

6 Mr. Teitzman, do you want to lead us through?

7 MR. TEITZMAN: Adam Teitzman on behalf of the  
8 Commission. Item 4 is staff's recommendation in Docket Numbers  
9 041269-TP, 050171-TP and 050172-TP. The issue before the  
10 Commission is whether the Triennial Review Remand Order's  
11 prohibition on new add orders for the delisted UNEs identified  
12 by the FCC is self-effectuating on March 11th, 2005, the  
13 effective date of the Triennial Review Remand Order.

14 Staff's recommendation as filed discussed two options  
15 which were contingent on whether or not clarification of  
16 reconsideration of the TRO -- TRRO, sorry, was sought from the  
17 FCC. Since the filings of this recommendation -- since the  
18 filing of this recommendation, several entities have filed  
19 petitions for reconsideration or clarification, at least two of  
20 which request clarification of this very issue.

21 In light of those filings, staff recommends the  
22 Commission find that BellSouth and Verizon must continue to  
23 accept new adds for delisted UNEs pursuant to the rates, terms  
24 and conditions set forth in their interconnection agreements  
25 and subject to a true-up to an appropriate rate if the FCC is

1 later to clarify that new adds were to stop on March 11th.

2 Commissioner, Chairman, I believe there's several  
3 parties here to address this issue, and Mr. Chaiken with Supra  
4 s on the phone.

5 CHAIRMAN BAEZ: Okay. Thank you, Mr. Teitzman. And  
6 just have a procedural question. Issue 1 is actually on a  
7 motion to, to consolidate. I don't know if, I don't know if  
8 BellSouth wants to argue that motion at this point. There is,  
9 here is a recommendation that, that we can -- I don't know  
10 what your pleasure is.

11 MR. LACKEY: If you're talking -- sir, I'm Doug  
12 Lackey representing BellSouth. If the question is related to  
13 the question of consolidating the three or four dockets that  
14 all address this same matter, it would seem to make  
15 administrative sense to us to consolidate them, but it probably  
16 doesn't need to be decided this morning.

17 COMMISSIONER DAVIDSON: Well, on that basis I would  
18 oppose consolidation.

19 CHAIRMAN BAEZ: A compelling argument, wouldn't you  
20 say?

21 (Laughter.)

22 MR. LACKEY: That's the kind of year I've been  
23 having.

24 CHAIRMAN BAEZ: Well, Commissioners, I mean --

25 COMMISSIONER DAVIDSON: I think consolidation makes

1     ense. I mean, if we -- sort of on these issues, do we need to  
2     hear from Verizon or anyone else or --

3             CHAIRMAN BAEZ: Well, I, I think it was BellSouth's  
4     motion. And I guess really the reason I brought it up is to  
5     clear and short-circuit or get this issue on out of the way. You  
6     do have staff's analysis, on, on the issue.

7             COMMISSIONER DAVIDSON: Move to consolidate.

8             CHAIRMAN BAEZ: You have a motion to deny staff. Is  
9     that -- all right. There's a motion to deny staff. Is there,  
10    is there a second?

11            COMMISSIONER BRADLEY: Second.

12            CHAIRMAN BAEZ: And a second. All those in favor,  
13    say aye.

14            (Unanimous affirmative vote.)

15            CHAIRMAN BAEZ: All right. We -- all right. We have  
16    accepted consolidation. Mr. Teitzman, I don't know  
17    procedurally what it is that, that you all need to do based on  
18    our, based on our -- Ms. Salak is going, I don't know.

19            MR. TEITZMAN: Well, certainly it would be noted in  
20    the order that the dockets will be consolidated.

21            CHAIRMAN BAEZ: All right. So there's nothing --  
22    there, there is no change essentially to now the ensuing  
23    discussion that we may have concerning that?

24            MR. TEITZMAN: No, Chairman. All the dockets were  
25    handled in this recommendation.

1           CHAIRMAN BAEZ: Very well. All right.  
2           ommissioners, we're on, we're on Issue 2, and Mr. Teitzman  
3           ave us a brief description of the staff recommendation. And I  
4           uess I would propose just going down the line and starting  
5           ith Mr. Lackey and let them, let them comment on it.

6           Mr. Lackey.

7           MR. LACKEY: I'll be happy to do it, Mr. Chairman,  
8           ut it is the CLECs' motion to --

9           CHAIRMAN BAEZ: Oh, I'm sorry. Well, you --

10          MR. LACKEY: -- their emergency motion to compel us  
11          o continue providing new adds.

12          CHAIRMAN BAEZ: Right. So then can I start -- all  
13          right. Mr. Horton. I apologize. I'm merely looking at the  
14          ssue question, and there doesn't seem to be the word "motion"  
15          on it, period, so.

16          MR. LACKEY: I'll be happy to do it any way you want,  
17          of course.

18          CHAIRMAN BAEZ: Well, I think your suggestion is fair  
19          and accurate, I guess. Mr. Horton.

20          MR. HORTON: And we're happy to go forward. Thank  
21          you, Commissioners. I'm Norman H. Horton, Jr., Messer,  
22          Caparello & Self, appearing on behalf of the joint petitioners,  
23          Xspedius, KMC and NuVox.

24          We are parties to the BellSouth generic docket that's  
25          one of the dockets before you today. We're also, also have a

1 petition for arbitration with BellSouth that's pending and will  
2 be, has been set for hearing, will be heard later this month.  
3 It was scheduled for last month but was changed.

4 We filed a petition March 1st of this year because of  
5 Bell's notification that they considered provisions of the  
6 remand order, FCC remand order to be self-effectuating as of  
7 March 11th, and as of that date they said they would not accept  
8 any new adds. That has been changed to a different date. Your  
9 staff has discussed the background and some of the factual  
10 material, and I'm not going to go into that.

11 In our petition we --

12 COMMISSIONER DAVIDSON: A point of -- I just wanted  
13 to ask a question here.

14 When you say they said they wouldn't accept any new  
15 adds, you mean any new UNE-P adds.

16 MR. HORTON: I think their letter actually included a  
17 number of -- I believe they were, they were going to start  
18 processing new orders for certain high-capacity loops in, in  
19 some specified areas, dedicated and dark fiber transport,  
20 unbundled switching, UNE-P, and I think they added some, some  
21 other items to that after, after that original letter.

22 CHAIRMAN BAEZ: Well, do they all fall, do they all  
23 fall in the category of what's delisted, at least purported to  
24 be delisted elements?

25 MR. HORTON: I couldn't -- I'm sorry. I couldn't



1 hear you.

2 CHAIRMAN BAEZ: Are all those items that you just  
3 outlined for us, do they all fall in, in the, I guess the bin  
4 of, quote, delisted items that will be subject to the change of  
5 law?

6 MR. HORTON: That's --

7 CHAIRMAN BAEZ: So there's, there's no, there's no  
8 argument here that there are additions outside of what would  
9 normally be --

10 MR. HORTON: No.

11 CHAIRMAN BAEZ: Okay.

12 COMMISSIONER BRADLEY: Thank you, Mr. Chair. I have  
13 one other question.

14 Is that at the TELRIC rate or does that also include  
15 the TELRIC as well as commercial?

16 MR. HORTON: I'm having trouble hearing. I'm sorry.

17 COMMISSIONER BRADLEY: Okay. Commissioner Davidson  
18 asked the question, is this a dispute as it relates to,  
19 negotiation as it relates to UNE-P? And my question is is this  
20 issue about negotiation at the TELRIC rate or at the commercial  
21 rate?

22 MR. HORTON: Commission, this entire dispute is with  
23 respect to the fact that Bell wants to unilaterally amend,  
24 abrogate the contracts.

25 The -- our contracts contain a provision, the change

1 of law provision, the existing interconnection agreement that  
2 would provide for a negotiated process to incorporate these  
3 changes brought about by the remand order into our, into those  
4 agreements. That's what, what it's all about.

5           COMMISSIONER DAVIDSON: Well, to the extent the order  
6 is not self-effectuating, there are numerous provisions of the  
7 order that state that the order is self-effectuating that in  
8 essence, in my view, would trump a change of law provision that  
9 might somehow be ambiguous. There probably are some provisions  
10 that would be subject to negotiation. But where something is  
11 self-effectuating and the rule is clear, it's clear.

12           I have a question though for, for Florida Digital  
13 Network in this. Has -- I know that you all rely upon  
14 BellSouth loops and transport in certain areas. Has BellSouth  
15 refused to provision loops to you?

16           MR. FEIL: Not yet. But they have this self-imposed  
17 deadline of April 17th, and they have, indeed, threatened  
18 high-cap loops and transport, as they have UNE-P.

19           MR. HORTON: Commissioner, if I, if I might respond  
20 to Commissioner Davidson with respect to the self-effectuating  
21 term, it is part of my presentation, but since you brought it  
22 up, that term appears one time in the remand order, and that's  
23 in the introductory, an introductory paragraph. So I'm not  
24 sure that I would agree with you that, that it's throughout  
25 that it's clear that these are self-effectuating.

1 MS. McNULTY: If you don't mind, I would like to  
2 interject one more point related to Paragraph 3 with respect to  
3 self-effectuating. That paragraph is simply making the point  
4 that the FCC is not subdelegating decisions to state  
5 commissions as a result of the USTA 2. There's simply no basis  
6 to apply the term "self-effectuating" selectively to new adds.  
7 I'll let Doc continue.

8 CHAIRMAN BAEZ: Mr. Horton.

9 MR. HORTON: Thank you. There were two, two parts to  
10 our, our petition. The first, first part we've already touched  
11 on, and that is that we asked you to declare that the  
12 provisions of the remand order are not self-effectuating but  
13 are effective only when the existing documents and agreements  
14 are, are superseded as a result of arbitration.

15 And also the joint petitioners and BellSouth have an  
16 abeyance agreement in place which was entered in the  
17 arbitration docket, and that requires BellSouth to honor the  
18 existing rates, terms and conditions of the existing agreement  
19 until they are superseded. And that, that abeyance agreement  
20 should be, should be enforced.

21 Bell is obligated to implement the provisions of the  
22 remand order pursuant to Section 252 of the Act. That cannot  
23 be more clear, despite what Bell may say.

24 In Paragraph 233 of the remand order, the FCC says,  
25 and I would quote, we expect that incumbent LECs and competing

1 carriers will implement the Commission's finding as directed by  
2 Section 252 of the Act. Thus, carriers must implement changes  
3 to their interconnection agreements consistent with our  
4 conclusions in this order. There are no qualifications to  
5 that. It says that the carriers will implement it as, as  
6 provided or as directed by Section 252. **They will, they will**  
7 negotiate changes to the existing agreements.

8           That language is included in a section of the remand  
9 order that's titled, Implementation of the Unbundling  
10 Determinations. It's a general statement. There are no  
11 caveats, no except for, but for. It's very clear.

12           Bell argues that the provisions regarding new adds is  
13 not part of the negotiation process. Their argument is that  
14 they are self-effectuating. And as we earlier indicated, that  
15 phrase appears one time, and that's in Paragraph 3 of the  
16 remand order, which is introductory provisions of the order,  
17 and it, it is speaking to the overall framework of the process  
18 which the FCC went through.

19           As Ms. McNulty pointed out, that means you don't  
20 have -- they're not delegating anything to you. They have,  
21 they have issued their order and those terms are  
22 self-effectuating. It doesn't say that, that these individual  
23 things, it doesn't say that they've abrogated or taken away the  
24 contractual rights and the contracts of the parties.

25           In order to accept Bell's position, you have to

1 accept that the FCC intended to abrogate hundreds of  
2 interconnection agreements. What that means is that they  
3 would, you would have to be totally disregarding contracts that  
4 were entered into between the parties, and there's no, there's  
5 no indication of that. Bell argues that the FCC has the legal  
6 authority under the Mobile-Sierra doctrine to create  
7 self-effectuating changes to existing agreements. Under the  
8 Mobile-Sierra doctrine, which is a series of cases, the  
9 Commission may revise terms of a private contract, but only  
10 when the terms adversely affect the public interest. There's  
11 an extremely high standard that has to be met in order for the  
12 FCC to effectuate changes in contracts. There is a, there is a  
13 sanctity, if you will, of a contract.

14           Moreover, the Mobile-Sierra doctrine doesn't even  
15 apply to interconnection agreements. The FCC in the  
16 IDB Mobile versus Comcast case in a footnote indicated and  
17 noted that the Mobile-Sierra doctrine does not apply to  
18 interconnection agreements. And it's also important to note  
19 that the Mobile-Sierra doctrine applies only to contracts that  
20 are filed with the FCC. These are not filed with the FCC.  
21 They're filed here.

22           We have a situation where we have existing contracts,  
23 which even Bell acknowledges, and it is then their position  
24 that the no new adds provision is self-effectuating, that the  
25 FCC intended to change the terms of the, of the existing

1 contracts. But that is not indicated anywhere in the remand  
2 order. In fact, Paragraph 233 and throughout in other  
3 paragraphs the FCC says, we intend the parties to negotiate  
4 changes to their existing agreements. There is nothing in the  
5 TRRO that supports the FCC abrogating hundreds of contracts.

6 COMMISSIONER DAVIDSON: Chairman -- thank you,  
7 Chairman. If I may, Title 47 of the Code of Federal  
8 Regulations was amended to provide that requesting carriers may  
9 not obtain new local switching as an unbundled network element.  
10 Paragraph 3 of the TRRO provides that the impairment framework  
11 is self-effectuating. Paragraph 5 of the TRRO states clearly  
12 that incumbent LECs have no obligation to provide competitive  
13 LECs with unbundled access to mass market local circuit  
14 switching. It further provides this transition plan applies  
15 only to the embedded customer base and does not permit  
16 competitive LECs to add new switching UNEs.

17 Paragraph 204 of the TRRO provides that we determine  
18 not only that competitive LECs are not impaired in the  
19 deployment of switches, but that it's feasible for competitive  
20 LECs to use competitively deployed switches to serve mass  
21 market customers throughout the nation. And this is used to  
22 justify a nationwide bar on such unbundling. The order has  
23 numerous other provisions.

24 So focusing just for a minute on switching, what is  
25 your argument that the TRRO is not clear in what it's providing

1 with regard just to switching for the moment?

2 MR. HORTON: Commissioner, I think the position is  
3 the same. Paragraph 233 of the order, which applies to the  
4 entire, the entire FCC order, is very clear that the parties  
5 are to negotiate changes to their interconnection agreements.

6 The, the language with respect to the no new --

7 COMMISSIONER DAVIDSON: There's nothing on the  
8 switching point though to negotiate. The FCC has made clear  
9 what the rules are with regard to switching. It ends as of the  
10 effective date. There may be provisions, other provisions that  
11 you negotiate, but the FCC provides a very clear transition  
12 period. And it makes clear in numerous provisions that UNE-P  
13 is no longer a viable option and the industry is to transition  
14 off.

15 MS. McNULTY: Commissioner Davidson, if you don't  
16 mind, I would like to respond to that question.

17 COMMISSIONER DAVIDSON: Sure.

18 MS. McNULTY: What the FCC stated is that it is not  
19 obligated under Section 251. Carriers such as MCI believe  
20 there are other federal law and possibly state law in different  
21 jurisdictions that would require BellSouth to continue  
22 providing these, and that's exactly why it is very important  
23 that the parties follow the existing change of law provisions  
24 in their interconnection agreements. If they cannot --

25 COMMISSIONER DAVIDSON: The FCC stated that there's a

1 nationwide bar on such unbundling.

2 MS. McNULTY: Under Section 251. And that's exactly  
3 why it is important to allow the parties to negotiate. If they  
4 cannot reach a negotiated agreement, I suspect you will see  
5 these issues before you again.

6 COMMISSIONER DAVIDSON: Mr. Feil, what is FDN's  
7 position on just the switching issue?

8 MR. FEIL: Actually, I was going to defer to the  
9 movants on that question, including Mr. Chaiken, who wanted to  
10 speak on behalf of Supra.

11 CHAIRMAN BAEZ: Mr. Horton, are you done with your  
12 comments, sir?

13 MR. HORTON: I've got, I've got a few more. But if  
14 you want to go ahead and, and --

15 COMMISSIONER DAVIDSON: No. I'm fine.

16 CHAIRMAN BAEZ: Let's, let's finish with your  
17 comments and we can move on to the other movants.

18 MR. HORTON: And I'll see what I can leave out here.

19 With respect to new adds, the remand order does speak  
20 to a transition mechanism, but with respect to new adds and,  
21 and that mechanism, there's -- the order contemplates that  
22 existing interconnection agreements would not be abrogated,  
23 that that would be handled through negotiations, if the, the  
24 transaction, transition plan, excuse me, in the order is a  
25 default mechanism. If the parties are unable to negotiate the



1 changes to their agreements, then the transition plan outlined  
2 in the remand order would be implemented. But, again, it is  
3 clear throughout that, that the FCC intended that the CLECs  
4 would, and ILECs would negotiate the changes to their  
5 agreements. There's absolutely nothing to indicate that the  
6 FCC intended to abrogate in any way the existing  
7 interconnection agreements.

8 Briefly, let me, let me address the abeyance  
9 agreement between the joint petitioners and BellSouth. On  
10 July 20th BellSouth and the joint petitioners filed a motion,  
11 which we now call the abeyance agreement. That was filed in  
12 the arbitration docket. It was approved by the Commission by  
13 order issued August 19th.

14 A key part of that agreement was that the parties --  
15 the parties' decision to avoid a separate and redundant process  
16 because of the remand order and subsequent events. The  
17 agreement reflects that the parties would continue to operate  
18 under existing agreements until we could switch to a newly  
19 arbitrated agreement reflecting the change of law, change of  
20 law spurred by USTA II, USTA II and its progeny. Bell claims,  
21 Bell claims that the abeyance agreement is, is, applies to the  
22 change of law obligations and is inapplicable. The abeyance  
23 agreement does apply to the change of law, and it specifically  
24 addresses UNE changes of law stemming from USTA II and its  
25 progeny. But they're wrong when they say that it's

1 napplicable in this proceeding.

2 Bell also claims that the parties never agreed to  
3 expand the abeyance agreement to include the remand order. We  
4 didn't have to agree to expand the abeyance agreement to  
5 include the TRO; it already did. The TRRO is a direct  
6 descendent of the circuit's USTA II decision. It's -- it is a  
7 progeny of the, of the process. This fits within any meaning  
8 of the word "progeny."

9 BellSouth is simply, simply incorrect in this  
10 instance. Perhaps the best evidence of that is that we have  
11 included in our arbitration some issues which, which address  
12 the change of law in the TRRO, and that's being taken up in the  
13 generic as well. But we do have that abeyance and agreement in  
14 place. And with that, I would, I would conclude.

15 CHAIRMAN BAEZ: Ms. McNulty, did you have comments to  
16 add; isn't that what you said?

17 MS. McNULTY: Yes, sir.

18 CHAIRMAN BAEZ: Okay.

19 MS. McNULTY: Good morning, Commissioners. I'm Donna  
20 McNulty with MCI. MCI concurs with the comments Mr. Horton  
21 made this morning. And just so that you know, MCI is a party  
22 to the BellSouth generic change of law docket.

23 The real question before the Commission this morning  
24 is does the -- did the FCC abrogate the interconnection  
25 agreement change of law provisions with respect to new orders

1 or delisted UNEs such as UNE-P?

2 In evaluating this question today, I ask that you  
3 consider the following questions. In the remand order, did the  
4 FCC express clear intent to abrogate the change of law  
5 provisions? In the remand order did the FCC articulate that  
6 abrogation of the change of law provision is in the public  
7 interest? Ask yourselves, does the FCC have the legal  
8 authority to abrogate interconnection agreements approved by  
9 this date -- approved by this state commission?

10 Abrogation of contracts is a big deal, and that's why  
11 there's such a high standard to meet before such an  
12 extraordinary step is taken. Given the high standard that  
13 applies to justifying contract abrogation, you would expect  
14 that if the FCC had intended to abrogate the change of law  
15 provisions in the remand order, the FCC would have clearly  
16 stated that that's what it was doing. It did not.

17 For either party to implement a change of law,  
18 BellSouth or MCI has a process in place to effectuate a change  
19 of law, if it wants to do that. The parties agreed to do that  
20 when they negotiated that part of the interconnection  
21 agreement.

22 The remand order is no different. If BellSouth wants  
23 to implement a change of law pursuant to the remand order, it  
24 must follow the change of law process that's set forth in the  
25 interconnection agreement. Thank you.

1 CHAIRMAN BAEZ: Mr. Feil?

2 MR. FEIL: I assume Mr. Chaiken is still on the  
3 phone. I was going to let him go first and then --

4 CHAIRMAN BAEZ: I was going to get to Mr. Chaiken. I  
5 just want to make -- I just wanted to make sure that your  
6 original deferral just extends --

7 MR. FEIL: Yes. Yes.

8 CHAIRMAN BAEZ: All right. Mr. Chaiken?

9 MR. CHAIKEN: Yes. Good morning, Commissioners.  
10 Thank you for allowing me to speak via phone this morning.

11 I would concur with the comments of Mr. Horton and  
12 Ms. McNulty and just add a few of my own. As set forth in our  
13 notion, I would refer this Commission to the May 28th, 2004,  
14 letter sent by BellSouth to this Commission on this very issue.

15 In that letter, BellSouth stated and actually  
16 promised the Commission, and I'll quote, with respect to new or  
17 future orders, BellSouth will not unilaterally breach its  
18 interconnection agreements. If the D.C. Circuit issues its  
19 mandate on June 15th, 2004, BellSouth will continue to accept  
20 and process new orders for services, including switching,  
21 high-capacity transport and high-capacity loops, and will bill  
22 for those services in accordance with the terms of existing  
23 interconnection agreements until such time as those agreements  
24 have been amended, reformed or modified consistent with the  
25 D.C. Circuit's decision pursuant to established legal

1 : rocesses. Now I think the CLEC community is entitled to rely  
2 : pon those promises and has done so.

3           The next point I'd like to address is the staff  
4 : ecommendation as it relates to true-up. Because if this  
5 : ommission finds that the change of law provisions of the  
6 : arties' interconnection agreements must be followed, we  
7 : elieve that there's no basis, no legal authority for a  
8 : rue-up. If such authority could be pointed out, we'd be happy  
9 : o take a look at it, but to this point we have seen none.

10           Third, if this Commission orders the true-up, the  
11 : ext question is at what rate would a true-up be ordered at?  
12 : nd we would then ask this Commission to, to look at what  
13 : appened in the state of Maine. And, in fact, I believe  
14 : ellSouth cited to the Maine PUC Docket Number 2002-682. And  
15 : in that case, the Maine PUC addressed these very issues and  
16 : found, as MCI cited or pointed out this morning, that although  
17 : ellSouth through the Baby Bells no longer have an obligation  
18 : o provide mass market switching under Section 251, they do in  
19 : fact have an obligation under Section 271. And what the Maine  
20 : Commission did was set the 271 rates at the 251 rates,  
21 : basically saying that if the ILEC in that territory wanted to  
22 : raise those rates, it could file a petition and institute a  
23 : proceeding to do so. However, that obligation under 271 exists  
24 : and must be recognized by the Baby Bells, and, therefore, they  
25 : were required to continue to provide unbundled mass market

1 switching. We believe that if the Commission seeks to  
2 effectuate any change of law or seeks to effectuate a true-up  
3 in this matter, it should take the guidance of the Maine PUC.

4 Thank you very much.

5 CHAIRMAN BAEZ: Thank you, Mr. Chaiken.

6 Mr. Feil, you were going forward.

7 MR. FEIL: Yeah. I just wanted to make a few points  
8 relative to high-capacity loops and transport, if I may.

9 In the case of BellSouth, no one knows what new  
10 orders relative to high-cap loops and transport BellSouth may  
11 deny or when exactly they may deny them. BellSouth published a  
12 list of COs it believed impacted by the FCC order shortly after  
13 the order was issued. BellSouth has since conceded that that  
14 list was wrong. They issued a list just before the remand  
15 order vote. That list also was wrong. So I wanted to ask the  
16 question whether or not the CLECs or the Commission can have  
17 any confidence that any subsequent list would be correct?  
18 BellSouth wants to deny new orders based on a subsequent list  
19 not yet produced, which nobody has in their possession right  
20 now as far as I know. I do not.

21 Whether an ILEC has a published list or not, under  
22 the remand order CLECs are permitted to self-certify that their  
23 orders are eligible for UNE treatment. So aside from wishing  
24 to deny new orders, the ILECs have indicated that they would  
25 deny any self-certification that differs from the ILECs' list.

1 If the FCC intended self-certification to be only on the ILECs'  
2 terms, it would have said so, and the FCC did not say so.

3 In the case of BellSouth, again, there is no list.  
4 And if a CLEC wants to look at BellSouth's supporting data  
5 relative to self-certification on BellSouth's terms, BellSouth  
6 will not even send you the data. They have indicated in their  
7 carrier notifications that you have to go to Atlanta or  
8 Washington, D.C., just to look at it, even if you sign a  
9 nondisclosure.

10 CHAIRMAN BAEZ: Commissioner Davidson.

11 COMMISSIONER DAVIDSON: A question on this, Mr. Feil.  
12 Currently does FDN self-certify on loops and transport?

13 MR. FEIL: We have not had the necessity to do that  
14 yet.

15 COMMISSIONER DAVIDSON: How has that worked out to  
16 date?

17 MR. FEIL: Well, we have not talked with BellSouth  
18 about how to go about doing that yet because they've had their  
19 April 17th deadline. But what the FCC envisioned was a simple  
20 letter to the incumbent where you would self-certify; in good  
21 faith we believe that this CO, this loop, this transport  
22 circuit qualifies for UNE treatment.

23 COMMISSIONER DAVIDSON: On the -- I understand you  
24 deferred to your colleagues, but would you, if you had to take  
25 a position, say that there's greater clarity on the switching

1 issue than perhaps there is on the loops and transport issue?

2 MR. FEIL: I don't, I don't know that I could make  
3 that statement. The way I read the staff recommendation and  
4 the remand order is that there are contradictory statements in  
5 the remand order. And I sort of read the staff recommendation  
6 to be staff sort of throwing up their hands of we're not  
7 exactly sure what to do here because of those contradictory  
8 statements, so this is what staff advocates as a reasonable  
9 approach.

10 What I'm here to say is that permitting new orders  
11 is, is really the only practical way of dealing with the  
12 problem we have with BellSouth right now and with the  
13 self-certification conditions that the incumbents have sought  
14 to unilaterally impose.

15 COMMISSIONER DAVIDSON: Would FDN be fine if UNE-P  
16 continued for a couple of years in the state of Florida?

17 MR. FEIL: Well, now that we have a half interest in  
18 Supra, as the Commission is probably aware, I can't speak on  
19 behalf of Supra. But it's obviously -- it wouldn't necessarily  
20 be in FDN's financial interest as a part owner of Supra for  
21 UNE-P to be obliterated overnight.

22 COMMISSIONER DAVIDSON: That's all, Chairman.

23 CHAIRMAN BAEZ: Mr. Chapkis.

24 MR. CHAPKIS: I'm happy to go first, but I believe  
25 that Mr. --



1           CHAIRMAN BAEZ: Well, I sort of wanted Mr. Lackey to  
2 bat cleanup on this, if, if that's -- or if you guys --

3           MR. LACKEY: Verizon's and BellSouth's position, I  
4 think, are pretty consistent on this.

5           CHAIRMAN BAEZ: Then, Mr. Lackey, go ahead.

6           MR. LACKEY: Since I'm the one who keeps getting  
7 named down the road, probably I ought to rise to my own  
8 defense.

9           CHAIRMAN BAEZ: By all means.

10          MR. LACKEY: Mr. Chairman, Commissioners, my name's  
11 Doug Lackey. I'm an attorney representing BellSouth in this  
12 proceeding.

13                 We have a handout that may facilitate the remarks I'm  
14 going to make, if I could get someone to pass it out. It's  
15 excerpts from the TRRO, and it's a sampling of the decisions  
16 around the country on this subject matter.

17                 I'm perfectly willing to answer questions at any  
18 time. I have some prepared remarks. Please feel free to  
19 interrupt me.

20                 Let me start by saying that I think everybody agrees  
21 that the FCC without equivocation and without exception has  
22 determined that the provision of certain delisted UNEs results  
23 in anticompetitive, well, results, to repeat myself. That the  
24 existence of these delisted UNEs or the availability of these  
25 delisted UNEs has sent a disincentive or have been a

1 disincentive to competitive LECs' infrastructure development.

2           Now in this case the FCC has delisted switching and  
3 certain high-capacity loops and transport. The delisting of  
4 switching is pretty universal. They made no exceptions. The  
5 delisting of the transport and the high-capacity loops is a  
6 little more problematic because they set criteria that you use  
7 to identify specific central offices in which these will no  
8 longer be available.

9           I want to focus on the switching, so let me put the,  
10 or let me try to put the high-capacity loop and transport issue  
11 to bed.

12           We intend to appeal the FCC's order regarding the  
13 designation of the central offices. We think that they made an  
14 error in delegating it. However, while that appeal is going  
15 on, we're going to do what the FCC told us to do, which is  
16 we're going to --

17           COMMISSIONER DEASON: Excuse me, Mr. Lackey. I'm  
18 sorry. You said interrupt, so I'm going to do that.

19           When you say you're going to appeal the decision by  
20 the FCC concerning the COs --

21           MR. LACKEY: Yes.

22           COMMISSIONER DEASON: -- when it comes to  
23 high-capacity loops and transport, what's the nature of that  
24 appeal again, please?

25           MR. LACKEY: We believe that the FCC should have

1 decided explicitly which offices -- where -- identify -- the  
2 identification of the offices where no impairment existed.  
3 They failed to do that. We think they should have under  
4 JSTA II.

5           But with that aside, what I was going to say is until  
6 that's resolved, we're going to do what the FCC told us to do.  
7 The CLECs will presumably certify, we'll provision. And if we  
8 believe they've certified in an office where there's no  
9 impairment, we'll use the dispute resolution process and  
10 resolve it. So there shouldn't be an issue regarding  
11 high-capacity loops and transport here. And to the extent that  
12 hasn't been clear in our multitude of letters we've sent, we've  
13 got a court reporter, I believe, I've said it on the record,  
14 that is BellSouth's position.

15           COMMISSIONER DAVIDSON: And the proceeding you just  
16 delineated, if you could state that one more time for my  
17 clarification. I'm not as good as the court reporter. And it  
18 applies, as I understood it, to both loops and transport,  
19 that's high-capacity, the high-capacity loops and transport at  
20 issue in this docket.

21           MR. LACKEY: Under the FCC order they have set  
22 certain criteria. For instance, for DS1 high-capacity loops,  
23 the CLECs are not impaired -- I'll probably get this wrong --  
24 in central offices with 60,000 business lines and four  
25 fiber-based collocators who are receiving power. And we think

1 the FCC should have figured out which offices that was. We  
2 gave them the information. They should have said what the  
3 offices were. They didn't. We're going to take that -- I  
4 believe we're taking that up on appeal.

5 But my point is for the purpose of the ongoing  
6 provision of those UNEs or those former UNEs, we'll follow the  
7 certify provision and dispute provision that the FCC laid out.  
8 If Mr. Feil believes that he's entitled to a high-capacity loop  
9 in the main central office in downtown Miami and he can certify  
10 after a due, after exercising due diligence that he's entitled  
11 to it, we'll provision it. And if we believe he's wrong, we'll  
12 file a dispute under the interconnection agreement, which is  
13 what the FCC said to do.

14 COMMISSIONER DEASON: A dispute with whom,  
15 Mr. Lackey?

16 MR. LACKEY: Under the interconnection agreement, I'm  
17 afraid that dispute comes back to you, sir. As I said --

18 COMMISSIONER DEASON: That's what I thought you were  
19 going to say.

20 MR. LACKEY: As I said, we don't -- we're appealing.  
21 We don't -- we believe the FCC should have done that, but we're  
22 stuck with what they said at this juncture regarding that.

23 Now I say that so we can focus on the switching  
24 because I think that's the clearest and most important and the  
25 most controversial.

1           Now the FCC clearly found, as Commissioner Davidson  
2 said, that on a national basis CLECs were not impaired without  
3 access to unbundled switching. They didn't equivocate, they  
4 didn't qualify, they just said it. Then what they did is they  
5 said, but, you know, we know there's a lot of them out there.  
6 BellSouth has roughly 2.5, 2.8 million UNE-Ps out there. So  
7 the FCC said, we'll have a transition period beginning on  
8 March 11th, 2005, for those existing embedded UNE-Ps. And the  
9 FCC said, because we don't know what you're going to transition  
10 them to, whether it's going to be resale or it's going to be  
11 UNE loops or whether it's going to be something entirely  
12 different, we'll have you amend your contracts during the  
13 following 12-month period, during the transition period, to  
14 make whatever provision you're going to make for the loops  
15 you're going, or the UNE-Ps you're going to transfer. They  
16 clearly required change of law for the transition, the  
17 implementation of the transition. We don't dispute that and  
18 that's not an issue here.

19           What is at issue here is the fact that at the same  
20 time they said there's going to be a transition period that  
21 begins March 11th, 2005, for your embedded base, there will be  
22 no new adds. They said it 13 separate times: There will be no  
23 new adds.

24           Now there was discussion about the abeyance agreement  
25 and the change of law. Our position, quite frankly, is that

1 he FCC has basically made its own decision about what is going  
2 to occur with switching, and they have said no new adds. They  
3 basically have said, we don't care what's in your contract. We  
4 have made a finding on a national basis that these delisted  
5 UNEs resulted in anticompetitive results, and we're going to  
6 say there aren't going to be anymore of them. I'll get to  
7 whether they can do that legally in a minute.

8 But let me say this to you. I can reconcile, I  
9 believe, every provision of the TRO -- TRRO with our theory,  
10 and I'll show you what I mean in a moment. The CLECs cannot do  
11 that. There is no reconciliation of the language "no new adds"  
12 with their theory of this case. Their theory of this case is  
13 that we have to negotiate, reach a conclusion, enter into an  
14 amendment of our interconnection agreement, submit it to this  
15 Commission, get it approved by you all, and then there are no  
16 new adds. Our position is that the language will  
17 self-effectuate.

18 Now let's see which makes the most sense. If the FCC  
19 had said nothing, if they had said nothing, if they had said  
20 nothing about no new adds, what would we have done? We would  
21 have done exactly what we did in the TRO when they found that  
22 enterprise switching was to no longer be a UNE; that is,  
23 switching for business customers. We didn't say that was  
24 self-effectuating. We've been trying to go through the change  
25 of law process to get rid of that, which we haven't managed to

1 do yet. But in this case, in this case they didn't say that.  
2 They weren't silent on it. They said, no new adds. There is  
3 no way to take the CLEC position that says you have to go  
4 through this entire process and then get no new adds with the  
5 placement of this language. If they had been silent, the CLECs  
6 would have been correct. If they had been silent, we wouldn't  
7 be here. If they had been silent, we'd do what we did with the  
8 enterprise switching, but they weren't.

9           Now look at Paragraph 233. That's the one that the  
10 CLECs keep coming back to, and I don't blame them, because it's  
11 the only thing they've got. Let me read the sentence again.  
12 Thus, carriers must implement changes to their interconnection  
13 agreements consistent with our conclusions in this order. One  
14 of the conclusions that they made in this order was no new  
15 adds, no new adds. They didn't say in Paragraph 33, forget  
16 what we said about no new adds. You've got to implement  
17 everything here by using the change of law process. They said,  
18 we have to implement changes to the interconnection agreements  
19 consistent with our conclusions in this order. If you conclude  
20 that what they meant in this order really was no new adds, that  
21 they knew what they meant to say, then clearly our position is  
22 at ease with Paragraph 233.

23           The same thing with Paragraph 227; that's the other  
24 one they generally like. That's the one that says, "This  
25 transition period shall apply only to the embedded base and

1 does not permit competitive LECs to add new UNE-P arrangements  
2 sing unbundled access to local circuit switching pursuant to  
3 section 252(C)(3), except as otherwise specified in this  
4 order." And they say, well, you know, otherwise specified in  
5 his order, surely that means Paragraph 233. Well, it doesn't.  
6 t means Paragraph 228, the very next paragraph, where they  
7 ay -- and there are excerpts of this in your package -- where  
8 hey say, we don't mean to disrupt the provision of UNE-P via  
9 ommercial agreements through this order. They explain what  
10 hey mean.

11 Now, I suppose the next question is, does the FCC  
12 ave authority to do this? Can they just come in on their  
13 orse and override these, these contracts?

14 Well, there is the Mobile-Sierra doctrine, and I will  
15 eadily concede, as we did in our pleading, that in Footnote 50  
16 o the IBD decision, which was a contest between, I think,  
17 ither two satellite providers or a cable and a satellite  
18 rovider, that the Mobile-Sierra did not apply to  
19 nterconnection agreements because they had their own standard  
20 f review in their statute. And that's true. Because when you  
21 eview a 252 agreement, you have to make a public interest  
22 ecision. You have to -- you can only deny approval of a  
23 252 agreement if you find it not to be in the public interest.  
24 o you've technically made a public interest decision.

25 The problem with that concept here is that you've



1 already approved these agreements as being in the public  
2 interest, but the FCC has now made a decision that says the  
3 public interest, whatever you thought it was or whatever it  
4 was, clearly is now affected by this language.

5           Now, the other side argues, well, you know, they  
6 didn't make a specific public interest finding, they didn't  
7 make a specific abrogation of the contracts. How much more  
8 specific do you have to be than to say we make a national  
9 finding that these UNEs result in an anticompetitive situation?  
10 They are a disincentive to facility-based competition, which we  
11 have a national policy of supporting. How much clearer does it  
12 have to be?

13           You know, the truth of the matter though is that you  
14 don't even have to go to Mobile-Sierra. You don't even have to  
15 go to Mobile-Sierra, if you don't want to.

16           The Supreme Court said as long ago as 1965 that  
17 agencies, like courts, have the right to correct the impact of  
18 their orders that are wrong, that agencies have the same right  
19 and obligation to correct errors that they have made. And the  
20 only reason we've entered into these contracts, the only reason  
21 we've entered into these contracts is because we were made to  
22 do so. These are really not even private contracts. These  
23 contracts are the tools through which the federal policy is  
24 implemented. We either entered into them under the terms the  
25 rules required or we brought them to you and arbitrated them

1 and you told us what to do, and that was done under a set of  
2 rules that have been reversed on three separate occasions over  
3 the last eight years and which the FCC has finally recognized  
4 were simply wrong. So even if you don't get to Mobile-Sierra,  
5 the FCC had the right to correct these contracts because of  
6 their prior mistakes.

7           Now, what's everybody else doing about this? I am  
8 embarrassed to say that BellSouth manages to hold 80 percent of  
9 the losing cases on this issue. States from California to  
10 Maine have found that no new adds were required after April --  
11 March 11th, 2005. California, New York, Texas, Maine, Ohio,  
12 Indiana, we have copies of the decisions in the package I gave  
13 you. The only one outside of the BellSouth region is Illinois,  
14 and, based on last night, they don't seem to be able to get  
15 much right, and even that decision is demonstrably wrong.

16           Now, in our region, it's funny, in our region the  
17 CLECs didn't come to you all first and they didn't go to South  
18 Carolina and they didn't go to North -- they went to Georgia.  
19 And I, I didn't argue the case, so I'm not going to claim the  
20 loss. I didn't argue -- I'm not going to claim the subsequent  
21 win either. I was there and the commissioners said, why do you  
22 keep coming back to us? We feel like an island. Why are you  
23 here instead of somewhere else? And one of the CLECs in a fit  
24 of something said, well, you know, you've bailed us out before  
25 and we need you to bail us out again. And the Georgia

1 ommission did it, and they entered an order that didn't really  
2 eason through this, but they entered an order prohibiting us  
3 rom implementing this no new add policy.

4 Last Friday the United States District Court for the  
5 orthern District of Georgia granted our request for a  
6 reliminary injunction enjoining the enforcement of that order.

7 don't have the order to give you here. It was going to be  
8 submitted today. I tried to get the transcript so that I would  
9 ave that here, but it's promised to me this morning but I  
10 still don't have it. All I can tell you is the court, and I  
11 don't believe anybody'll dispute this, the court granted our  
12 motion for a preliminary injunction, which without seeing the  
13 order I can tell you still means that the judge found that  
14 there's a likelihood of success on the merits, that BellSouth  
15 has a likelihood of success on the merits, and the harm to  
16 BellSouth is irreparable and it outweighs whatever harm there  
17 might be to the CLECs. So even though we lost in Georgia, the  
18 court has now enjoined that.

19 Mississippi, three-page order, no discussion of the  
20 FRRO. Kentucky, a four-page order, no real discussion of the  
21 analysis. We haven't seen the order in Louisiana. They simply  
22 had to vote. I don't know what they're going to say.

23 As I said, I'm embarrassed. We seem to hold most of  
24 the losses around the country, and I don't understand it  
25 because we're right. And I believe that.

1           The staff recommendation. As I understand the staff  
2 recommendation, I think what the staff said was that there were  
3 good arguments on both sides. If the FCC doesn't straighten  
4 this out, you ought to go ahead and, and grant the petition in  
5 essence and require BellSouth to keep doing it.

6           COMMISSIONER DAVIDSON: A question, Chairman, for  
7 Mr. Lackey.

8           CHAIRMAN BAEZ: Go ahead, Commissioner.

9           COMMISSIONER DAVIDSON: And I don't -- I'm not at all  
10 trying to ask about any sort of terms of negotiation or for you  
11 to disclose any sort of terms and conditions you reached. But  
12 my question is has BellSouth reached any commercial agreements  
13 with any CLECs either in Florida or in the BellSouth territory?

14           MR. LACKEY: Yes, sir, we have. As a matter of fact,  
15 I told you a moment ago that I think we've got somewhere  
16 between 2.5 and 2.8 million UNE-Ps. I don't know precisely  
17 because they won't tell me. But it's my understanding that at  
18 this point we have more than 100 commercial agreements with  
19 CLECs, and we have more than a million of those UNE-P lines now  
20 under commercial contract. Which raises, if you'll indulge me,  
21 a very good point, and that is last August the FCC in the  
22 interim order said to the CLECs, it's over. They said, it's  
23 over. There's going to be a transition period, six months,  
24 we'll get to it the first quarter of next year. These folks  
25 have known since last August that something bad was going to

1 happen to them. And a number of carriers have come to us and  
2 negotiated commercial agreements. And I'll tell you, I have  
3 not read those commercial agreements, I'm not privy to them,  
4 but I have every confidence that the price they're paying is  
5 higher than TELRIC. And those carriers have come to us -- made  
6 that deal, are paying those rates that are higher than TELRIC  
7 prices, and now the rest of the CLECs are here asking you to  
8 let them keep buying at that lower price. It's sort of like  
9 the kid in college who shows up at the professor's office and  
10 says, I know my term paper was due today. I really didn't get  
11 it finished. Let me have another week or two. It's not fair  
12 to the people who did what they were supposed to do, which is  
13 to start finding alternatives, to start negotiating on a  
14 commercial basis with us to come up with rates that are  
15 actually compensatory and that both parties are satisfied with.  
16 That's another consideration, and I appreciate the opportunity  
17 to, to bring it up.

18           Anyway, with regard to the staff, the staff's  
19 position, I understand where they say they don't know, it's not  
20 clear. But the problem is adopting staff here and enjoining us  
21 from doing this really is taking sides. I mean, if, if they  
22 really felt like it was a tossup and who knows, the thing to do  
23 would probably be do nothing. I mean, the real answer is the  
24 one that the staff hit on, and that is the FCC should have  
25 explained this. And, you know, the CLECs tried to get the FCC

1 to do it. On February 23rd, Alt (phonetic) sent a letter to  
2 the Commission saying you need to do something or the CLEC --  
3 the ILEC -- the RBOCs, BellSouth, are going to quit  
4 provisioning these UNEs. And we sent a letter back saying,  
5 that's right, we are. And you know what's come out of it?  
6 Nothing.

7 COMMISSIONER DEASON: Mr. Lackey, do we have the  
8 option of doing nothing? And if we do, what is the result of  
9 that?

10 MR. LACKEY: If you, if you do nothing, on April 17th  
11 we're going to quit provisioning switching orders, and we'll do  
12 with the high-cap loops and the transport what I said, we'll do  
13 the certify.

14 COMMISSIONER DEASON: So you're going to go forward  
15 as planned.

16 MR. LACKEY: Absolutely.

17 COMMISSIONER DEASON: And then what recourse do the  
18 CLECs have? Can they go to the FCC and get them to clarify  
19 their own order?

20 MR. LACKEY: They can go to the FCC or they can start  
21 using any one of the other alternatives. Most of them in their  
22 interconnection agreements have resale provisions. They can  
23 start ordering the same thing -- you know, we've always taken  
24 the position that the UNE-P is nothing but a discounted resale.  
25 They can do resale, they can start buying services from other

1 CLECs who have switches. Indeed, that's the very reason the  
2 FCC said there would no longer be a national switching UNE  
3 because there are alternatives that are available. And these  
4 folks have known or should have known at least since last  
5 August that they needed to start looking for those options, and  
6 a number of them have. As I said, we have a million lines  
7 under commercial agreement. We're perfectly willing to enter  
8 into more. And we suspect, given the district court's ruling  
9 in Georgia last Friday, that there will be a number of people  
10 at our door probably today wanting to do exactly that.

11 CHAIRMAN BAEZ: I have a question for, I think it was  
12 staff that mentioned it briefly. Can you tell us what the,  
13 what the filings were and by whom on the 28th, those filings  
14 that you mentioned?

15 MR. TEITZMAN: Chairman, with regard to clarification  
16 or reconsideration at the FCC, is that --

17 CHAIRMAN BAEZ: Uh-huh.

18 MR. TEITZMAN: Oh, uh-huh. There was, I believe  
19 there was a total of seven petitions filed, two of which  
20 addressed specifically this issue regarding new adds. The  
21 first one would have been filed by CTC, Gillette, GlobalCom,  
22 Lightwave, Cloud USA, Empower, Pac-West, TDS Metrocom and US  
23 LEC. And the other one that seemed to address this issue would  
24 be, have been filed by the PACE Coalition. The others  
25 addressed separate issues that really would not be pertinent to

1 the issue at hand here today.

2 CHAIRMAN BAEZ: The PACE Coalition, is that -- can  
3 anybody enlighten me on what that is, who that is?

4 Do you -- a question to, to Ms. McNulty or Mr. Horton  
5 or any, any of the other petitioners or the movants. Why, why  
6 wouldn't you seek clarification with the FCC as well? Any one  
7 of you can -- I'm curious.

8 MS. McNULTY: Chairman Baez, MCI did not seek  
9 clarification of the FCC's order because MCI believes that the  
10 order is clear and doesn't need clarification with respect to  
11 this issue. It is our position that Paragraph 233 that sets  
12 forth the implementation of unbundling determinations is clear.

13 And I would just like to read one more sentence that  
14 wasn't read to this Commission. The first two sentences were  
15 read to you. The fourth sentence is, "Thus, the incumbent LEC  
16 and competitive LEC must negotiate in good faith regarding any  
17 rates, terms and conditions necessary to implement our rule  
18 changes."

19 CHAIRMAN BAEZ: But how do you -- and, and I think  
20 Mr. Lackey alluded to some language in the, in the remand order  
21 that specifically limited their decision to embedded customer  
22 base. Is that, is that the proper term? You know, existing  
23 customers, I'm assuming they meant.

24 MS. McNULTY: Yes. That is actually discussing under  
25 the section regarding the transition, and that's basically a



1 default mechanism that's set up.

2 CHAIRMAN BAEZ: Explain to me the concept of a  
3 default mechanism. Because -- and I'll --

4 MS. McNULTY: Basically for the embedded base the FCC  
5 takes the position that there should be an adder, you know,  
6 MELRIC plus a dollar for the embedded base as it exists from  
7 March 10th, 2005, to the end of that 12-month period.

8 CHAIRMAN BAEZ: And do the, do the good-faith  
9 negotiations contemplate negotiation over, over the transition  
10 of that embedded customer base or the existing customers?

11 MS. McNULTY: MCI's position is that to implement  
12 this entire order, you have to go through negotiations, and  
13 that would be one aspect.

14 CHAIRMAN BAEZ: No, I know. But if what -- if you're  
15 telling me that a default, that a default -- here's, here's the  
16 problem that I'm having. I'm having trouble, if you, if you  
17 read the order on some level at least as establishing  
18 transition, as establishing, essentially establishing a  
19 baseline of sorts, what the new regime is going to be, what the  
20 new universe is going to look like, and then it says, but you  
21 all go out and negotiate in good faith some alternative  
22 universe, the fact is that baseline has still been established.  
23 And then, you know, in terms of negotiation, when, when the  
24 baseline has been established and, personally, if I knew what  
25 it would look like absent something else and it was okay with

1 e, why should I negotiate? What incentive do I have to  
2 negotiate?

3 MS. McNULTY: That's actually a good question. And  
4 here are many aspects that go into the negotiations, and this  
5 is just one aspect that goes to the 12-month period. But I  
6 would imagine the negotiations would contemplate a longer  
7 period of time.

8 CHAIRMAN BAEZ: In exchange --

9 MS. McNULTY: Because there's a lot of going back and  
10 forth between the parties when they negotiate.

11 CHAIRMAN BAEZ: If -- and, again, that's -- I  
12 still -- do you -- it's your position that the interconnection,  
13 the existing interconnection agreements, and, and by that, the  
14 change of law provisions and the process involved with that,  
15 extends to new additions that at least theoretically haven't  
16 become the subject of an agreement yet; correct?

17 MS. McNULTY: Correct. Because a new add is just one  
18 aspect of this order. And there was no carve-out in Paragraph  
19 233 to discuss, well, what do you do with new adds?

20 CHAIRMAN BAEZ: Well, and go back to, go back to  
21 contracts generally. Is, is, is it, is it such a foreign  
22 notion that some, that a change in law prospectively could  
23 change the character or the, or the duration or the application  
24 of a contract in certain circumstances?

25 MS. McNULTY: Well, I think that's why they have the

1 change of law process in a provision in a contract to begin  
2 with, especially in this field. Gosh, as we have seen since  
3 1995 really, every time we've had a big case before this  
4 Commission, as many of you are aware, right in the middle of  
5 the case the law changes. I mean, it's -- we're in a current  
6 state of flux, and that's why this change of law provision --

7 COMMISSIONER DEASON: Oh, you've noticed that too,  
8 huh?

9 MS. McNULTY: Correct.

10 COMMISSIONER DEASON: You've noticed that too, huh?

11 CHAIRMAN BAEZ: I thought it was just Commissioner  
12 Deason.

13 (Laughter.)

14 But more to the, more to the point, is it your belief  
15 or is it your argument that the, that the regulatory body or  
16 the FCC in this case doesn't -- cannot in any way drive a stake  
17 in the ground and say, you know what, from here on out, from  
18 here on out things are going to be, things are going to be  
19 different? And I realize that that impacts your ability to add  
20 customers the way that, the way that you would prefer. But  
21 that a regulatory body such as the FCC couldn't drive a stake  
22 in the ground and say from here on out things are a certain  
23 way. And as for, and as for the relationships that have  
24 already been cemented, the relationships that already exist  
25 that are subject to the interconnection agreement, that you all

1 are going to talk about. Because out of respect for an  
2 existing contract, we can't, we can't change what exists within  
3 that contract or subject to that contract. You don't believe  
4 that they could ever do that?

5 MS. McNULTY: Not necessarily. I think that if the  
6 FCC were to do that or any agency were to do that, they have a  
7 very high standard to meet to do that, and that's basically to  
8 abrogate our interconnection agreement or any contract is a  
9 really high -- I mean, basically what they're saying is your  
10 change of law processes that you've agreed to in this contract  
11 means nothing.

12 CHAIRMAN BAEZ: Well, but then -- and let's, let's  
13 touch on abrogation for a second. And I'll confess here, I'm  
14 not familiar precisely with what the standard is for  
15 abrogation. You say it's very high and I have no doubt but  
16 that it is.

17 How can you, how can you abrogate, how can you  
18 abrogate something that doesn't exist? If I don't have a  
19 relationship, if I don't have a relationship with you as a  
20 customer, all right, how can, how can something that would  
21 otherwise impact you be subject to that contract? How can it  
22 be abrogated?

23 MS. McNULTY: Would be abrogated is -- MCI's position  
24 is what the, what BellSouth is arguing is that our change of  
25 law process that both parties agreed to means nothing.

1           CHAIRMAN BAEZ: Well, it, it means -- would you agree  
2 that at least it means something? There, there is a part,  
3 there is a part of the applicability of those change of law  
4 provisions that, that does mean something because it is what is  
5 governing, to some extent, the transition period. Can we at  
6 least agree on that?

7           MS. McNULTY: I'm sorry. Do you mind repeating the  
8 question?

9           CHAIRMAN BAEZ: All right. If you, if you -- the  
10 discussion here as far as I've been able to discern is between  
11 new adds and the existing customers, the existing customer  
12 base; correct? I mean, there is some distinction being drawn  
13 there.

14          MS. McNULTY: You're correct. You're correct. The  
15 key focus of this debate is what do we do about the new adds?

16          CHAIRMAN BAEZ: I agree. Fine. But, but so then you  
17 do agree that there's at least a distinction between the new  
18 adds and the existing customer base.

19          MS. McNULTY: Yes.

20          CHAIRMAN BAEZ: Whatever that distinction may be.

21          MS. McNULTY: Yes.

22          CHAIRMAN BAEZ: But there is some distinction. So  
23 then do you agree that the change of law provision, and I don't  
24 think that -- I haven't heard any dispute as to, as to what I'm  
25 going to say now -- that the change in law provisions do have

1 application undisputedly at least as to the existing customer  
2 base? And I don't know if Mr. Lackey agrees with that or not,  
3 but I'm just telling you what I'm hearing.

4 MS. McNULTY: Yes.

5 MR. LACKEY: I do agree.

6 MS. McNULTY: Yes.

7 CHAIRMAN BAEZ: Because the -- and, again, I don't  
8 know if you gave me an answer that I can, that I can agree with  
9 you with or at least understand your point of view. I'm trying  
10 to reconcile what the, what the FCC sees as existing change of  
11 law provisions because they do want to respect existing  
12 interconnection agreements and their language that says that  
13 these, that these transitions apply only to existing customer  
14 base and, and no more. And I guess I'm having trouble  
15 reconciling the, the two notions that they could drive a stake  
16 in the ground and say, you know, because the rules are  
17 changing, well, the rules are changing as of this date and,  
18 therefore, the new additions are, are of a different character  
19 than what's already existing. And I'm having trouble not  
20 reading it, not giving meaning to, to the FCC language that  
21 actually states that with, with saying change of law provisions  
22 apply to everything.

23 MS. McNULTY: Chairman Baez, I would have -- in  
24 responding to that, I would ask you a question, if that's okay.

25 CHAIRMAN BAEZ: Ask away. You may -- I don't know

1 that answer I'm going to give you, but.

2 MS. McNULTY: Well, how would -- what kind of meaning  
3 would you give to the clear provisions in 233 that tells  
4 everybody how to implement this entire order? And specifically  
5 it tells us, it tells the ILECs and the CLECs to negotiate in  
6 good faith regarding any rate, terms and conditions necessary  
7 to implement our rule changes. It doesn't say except for the  
8 new adds.

9 CHAIRMAN BAEZ: Well, I'll agree with you that it  
10 doesn't refer specifically to new adds in Paragraph 233. But  
11 there, there seems to be conditional language in terms of the  
12 conclusions of this order. Is the new add language, would you  
13 term it a conclusion, excuse me, a conclusion of this order?

14 MS. McNULTY: Yes. I mean, that is in there, and  
15 that would be something that --

16 CHAIRMAN BAEZ: So the language that says, the  
17 language that says these transition terms are, are for embedded  
18 customer base only and, and not applicable, and I'm  
19 paraphrasing here, but not applicable to new additions, is that  
20 a conclusion in your mind of this order?

21 MS. McNULTY: Yes. And it's, it is something that  
22 would be implemented as part of Paragraph 233 and be the  
23 subject of the negotiations to implement -- everything that is  
24 embodied in this order, it is MCI's position, has to go through  
25 the change of law process in our interconnection agreement.

1 CHAIRMAN BAEZ: Okay.

2 MS. McNULTY: And that would be one of them. And I  
3 would just also like to add, it's not -- you know, MCI doesn't  
4 concede the lawfulness of that dollar adder that's, you know,  
5 associated with the embedded base, but MCI has been willing to  
6 fold the UNE-P arrangements added after March 10th, what we  
7 call the new adds, into that same transition period, subject to  
8 the same FCC transition rates as applied to the embedded UNE-P  
9 arrangements prior to that March 10th.

10 CHAIRMAN BAEZ: A question, Mr. Lackey. I want to  
11 try and understand what the, what the abeyance agreement, what  
12 kind of effect it is. And Mr. Chaiken also referred to a  
13 letter that sounded pretty broad yet definitive as an attitude  
14 on the part of BellSouth. And I want to understand what kind  
15 of meaning you are now giving to it or what kind of an effect  
16 you are now giving to it.

17 COMMISSIONER DEASON: Mr. Chairman, before we get to  
18 the abeyance agreement, can I follow up?

19 CHAIRMAN BAEZ: Yes. Absolutely. I'm sorry.

20 COMMISSIONER DEASON: Okay. Ms. McNulty, I'm trying  
21 to understand the practicality of your argument, and maybe you  
22 can help me with that. You agree that there is a transition  
23 period defined by the FCC as it pertains to what I'll refer to  
24 as the embedded base. Do you agree with that?

25 MS. McNULTY: Yes.



1           COMMISSIONER DEASON: And is that -- that's a  
2 .2-month transition period; is that correct?

3           MS. McNULTY: Yes.

4           COMMISSIONER DEASON: And during that transition  
5 period there is an opportunity for there to be negotiations for  
6 change of law provisions; correct?

7           MS. McNULTY: Yes.

8           COMMISSIONER DEASON: To implement this change of  
9 law.

10          MS. McNULTY: Yes.

11          COMMISSIONER DEASON: Okay. Now -- but it's your  
12 position that you should be able to continue to add new adds  
13 and add to the embedded base while you do away with the entire  
14 embedded base within 12 months; is that correct?

15          MS. McNULTY: Until we go through the change of law  
16 process, yes. And that would be consistent with any change of  
17 law that happens.

18          COMMISSIONER DEASON: Do you see the, the difficulty  
19 from a practical effect if the FCC says we want you to do away  
20 with this -- and doing something like this in 12 months with  
21 the FCC involved is very quick. So what they're saying is we  
22 want you to do away with this embedded base and we want you to  
23 do it quickly, but, oh, by the way, continue to add to the  
24 embedded base while you do away with it. Do you -- you don't  
25 see any disparity there in that logic?

1 MS. McNULTY: I understand what you're trying to get  
2 at. But MCI still believes that it has rights and obligations  
3 under the change of law process because what it really said is  
4 they're not obligated to do this under Section 251. MCI wants  
5 the opportunity to negotiate because MCI believes there are  
6 other provisions under federal law or state law in which they'd  
7 be able to provision UNE-P.

8 CHAIRMAN BAEZ: Can I jump in real quick, because  
9 that's the, that's the second time that, that you've mentioned  
10 it. And I guess I'm trying to understand the relationship  
11 between 251 and 252.

12 In my mind, 252 is merely an implementation of, a  
13 form of implementation of whatever obligations exist under 251.  
14 And you seem, at least it sounds to me that you're implying  
15 that there are two, that the two exist independently. Is  
16 that -- am I hearing you wrong?

17 MS. McNULTY: I think what I'm trying to say is the  
18 FCC has said under -- it's clear what the FCC has said under  
19 Section 251, an impairment with respect to switching under 251.  
20 But it has only made this statement with respect to 251. It  
21 has not made the same statement with respect to other portions  
22 of federal law. It has not come out and said, Florida, you  
23 can't require switching under 364.161 or 162.

24 CHAIRMAN BAEZ: But that's not, that's not before us  
25 today, is it?

1 MS. McNULTY: That is not before you today.

2 CHAIRMAN BAEZ: Okay. So then --

3 MS. McNULTY: But the importance of having the  
4 change, an opportunity to negotiate with BellSouth would be to  
5 have an avenue to debate this and work things out with the  
6 ILEC.

7 COMMISSIONER DAVIDSON: Basically you just want us to  
8 keep something out there that appears to be a threat so the  
9 ILECs will come to the table. I mean, that's what I'm hearing.

10 MS. McNULTY: No. What you really are hearing is I  
11 think that we have an interconnection agreement with BellSouth,  
12 that BellSouth agreed to this provision to go through the  
13 change of law process. And I ask this Commission to require  
14 Bell to follow that process.

15 COMMISSIONER DAVIDSON: We've got a number of  
16 commercial agreements on the table. A substantial portion of  
17 sort of the UNE-P lines have, are now subject to commercial  
18 agreements. I mean, I think the reality is some are going to  
19 negotiate well, others may not. But commercial negotiation is  
20 clearly what the FCC has stated is the, is the policy that  
21 needs to be followed.

22 CHAIRMAN BAEZ: Commissioner Deason, you had a  
23 question.

24 COMMISSIONER DEASON: Ms. McNulty, how do you give  
25 meaning to the terminology in the FCC order that says "no new

1 .adds" if it is your position that during this 12-month  
2 .ransition period you should be able to include, continue to  
3 have new adds up until the very point, which may be day 364, to  
4 continue to have the new adds up until there is a final change  
5 in law negotiation in the agreement? I can see under your  
6 scenario there will be, probably won't be any period of time  
7 where's no new adds. There will probably be, if we agree with  
8 your argument, new adds up until the very day that you all  
9 reach an agreement.

10 What period of time does the FCC under their order  
11 think that we're going to implement no new adds? What meaning  
12 do you give to that phrase under your reading of the, of the  
13 order?

14 MS. McNULTY: We have to do it within the time limit  
15 set forth by the FCC.

16 COMMISSIONER DEASON: Within the 12 months.

17 MS. McNULTY: Yes. And that also requires a change  
18 of law process be done in that time.

19 CHAIRMAN BAEZ: A potentially meaningless question  
20 jumped into my head, but of the existing interconnection, are  
21 there -- to anybody's knowledge are there interconnection  
22 agreements existing today that, that are in anyone's opinion  
23 cut short in terms of duration, cut short and made ineffectual  
24 earlier than they would have by, by the remand order? Assuming  
25 the worst, assuming the worst case.

1 MR. LACKEY: I don't think I can answer that  
2 question, Mr. Chairman.

3 CHAIRMAN BAEZ: Do you under -- am I -- is it that  
4 I'm not -- am I mixing things that, you know --

5 MR. LACKEY: Don't make me say that.

6 CHAIRMAN BAEZ: No. No.

7 MR. LACKEY: I didn't understand the question.

8 CHAIRMAN BAEZ: You didn't understand the question.  
9 All right.

10 ICAs are for a thee-year term.

11 MR. LACKEY: Correct.

12 CHAIRMAN BAEZ: At least the last I saw. All right.  
13 Is there anything, is there anything in the implementation of  
14 the remand order, Mr. Lackey, under your interpretation, all  
15 right, what we're arguing about, what we're discussing today,  
16 is there anything in your interpretation of implementing this  
17 remand order that cuts short an existing interconnection  
18 agreement?

19 MR. LACKEY: I believe the answer to that is no. All  
20 of the interconnection agreements continue in effect. It's  
21 simply that the provision regarding the delisted UNEs --

22 CHAIRMAN BAEZ: Is not available for new business.

23 MR. LACKEY: -- is not available, is not available  
24 anymore. But the interconnection agreements are still there.  
25 That's what I had said that, you know, they can still buy UNE

1 loops from us, they can still buy facilities for resale from  
2 us. That's all still there.

3 CHAIRMAN BAEZ: And they would, and they would  
4 govern -- and I guess they would govern existing customer base  
5 until the end of that interconnection agreement, despite,  
6 despite any transition, or is that not the case?

7 MR. LACKEY: I need to be careful here because I  
8 don't think we have a dispute on the embedded base. I mean, I  
9 think that --

10 CHAIRMAN BAEZ: Well, and that's -- my question is,  
11 my question is pretty simple. I mean, to the extent that  
12 there's an interconnection agreement in place and in force as  
13 to that existing customer base that extends beyond that  
14 12-month transition, that existing customer base is already  
15 spoken for beyond that, beyond that 12 months. Is that a  
16 fair --

17 MR. LACKEY: I think so. But can I restate it and  
18 make sure I've got it right?

19 CHAIRMAN BAEZ: Okay.

20 MR. LACKEY: Let's assume, let's assume that you're a  
21 CLEC customer at your home and that you're buying service from  
22 the CLEC and that they are providing that CLEC, that service to  
23 you via UNE-P.

24 CHAIRMAN BAEZ: Uh-huh.

25 MR. LACKEY: So you're an embedded customer, you had

1 the service before March 10th and so forth. Now over the next  
2 12 months the CLEC that serves you is going to have to move  
3 your service off of UNE-P and onto something else. They could  
4 simply by -- if we were serving you, they could buy resale from  
5 us and continue to serve you exactly as you're, you know, being  
6 served. They could buy the unbundled loop from us and have us  
7 roll it into a collocation space of someone who owned a switch  
8 and they could provide you the service that way. You'd still  
9 be their customer, they could still buy services from us other  
10 than the delisted UNES. And that could go on for as long as  
11 you were their customer.

12 CHAIRMAN BAEZ: Did they get -- say that last part.  
13 They could still buy services from you including delisted UNES?

14 MR. LACKEY: No. If you, if you, for instance --

15 CHAIRMAN BAEZ: You're making -- I don't think that  
16 my question or at least my need to understand what my, the  
17 answer to my question, has anything to do with the residential  
18 customer. They're -- they exist oblivious to the wholesale  
19 relationship.

20 MR. LACKEY: Okay. Then I'm clearly not  
21 understanding your question, sir.

22 CHAIRMAN BAEZ: Okay. If, if there is a, if there's  
23 an interconnection agreement in existence today that extends  
24 beyond, that extends beyond the 12-month transition, is that a  
25 possibility? Is that --

1 MR. LACKEY: Yes, sir, it is.

2 CHAIRMAN BAEZ: Okay.

3 MR. LACKEY: But now they will not be able beyond the  
4 12 months to buy UNE-P under that interconnection agreement.  
5 The interconnection agreement --

6 CHAIRMAN BAEZ: Even for an embedded, even for an  
7 embedded customer?

8 MR. LACKEY: For the embedded --

9 CHAIRMAN BAEZ: Even if for whatever --

10 MR. LACKEY: If that were the question, the embedded  
11 base, the existing base of customers as of March 10th has to be  
12 transitioned off of the delisted UNES by March 10th, 2006.

13 CHAIRMAN BAEZ: No matter, no matter the duration, no  
14 matter the duration of the ICA beyond that?

15 MR. LACKEY: No matter the duration of the ICA. I'm  
16 sorry. I didn't understand you.

17 COMMISSIONER DEASON: Well, isn't that an abrogation  
18 of the ICA then under some reading of the law?

19 MR. LACKEY: Yes. But I would say that that is a  
20 change in law. And in this case the FCC specifically  
21 acknowledged that it was a change in law and that the change in  
22 law process was to be used to transition this base -- I mean,  
23 they specifically said for the embedded base, use the change of  
24 law.

25 And you were really on the point a moment ago, and



1 that is they didn't say that with regard to their no new adds.  
2 They didn't say no new adds and implement this using change of  
3 law.

4 CHAIRMAN BAEZ: But, but, see, in my, in my mind I  
5 think, I think I hear where Commissioner Deason's concern may  
6 be or where his question lies. You know, that, that really  
7 does -- okay. If you listen to the questions that I was asking  
8 before, if the, if the new adds at least philosophically  
9 haven't fallen within the purview of an existing  
10 interconnection agreement, but now you're saying, maybe  
11 arguably, that's, that's a, that's a philosophical distinction  
12 that's reasonable to make, to try and reconcile everything in  
13 the remand order, but now what you're saying is that even, even  
14 the customer base, even the embedded customer base, which is  
15 something that's been clearly set, set aside, so to speak, by  
16 the FCC, that too is subject to the ineffectiveness of change  
17 in law provisions. Did I hear you say that?

18 MR. LACKEY: No. It's subject to the change in law.

19 CHAIRMAN BAEZ: What, what -- but what, what possible  
20 change in law provisions could, could have effect on something  
21 that as the, that as the ILEC you are holding steady to a  
22 12-month transition period? I mean, what possible -- and,  
23 again, I'm trying to understanding because, you know, if I were  
24 in that position, I'd say, you know what, you've got 12 months,  
25 take it or leave it. I don't have to lift a finger.

1           COMMISSIONER DAVIDSON: Yeah. And, Chairman, I think  
2 you're right on that. There's a footnote in the TRO that  
3 provides, while competitive LECs cannot add new UNE-P  
4 arrangements using unbundled access to local circuit switching,  
5 while they cannot add new, the requesting carrier shall  
6 continue to have access to shared transport signaling  
7 call-related databases for arrangements that haven't yet been  
8 converted. I mean, I think you're absolutely right. It's 12  
9 months, that's it. And at the end, if nothing's worked out,  
10 well, we're in a different situation. But as to the embedded  
11 customer base, it's, I think there is a different issue, as you  
12 point out.

13           CHAIRMAN BAEZ: Well, but I guess that I'm trying to,  
14 and I'm trying to understand why the distinction if everything  
15 is subject to that 12-month transition? I mean, some, some  
16 embedded customer base, it seems to me, and, again, I may be  
17 reading it completely wrong, but it seems that there's some,  
18 there's some nod to this existing customer base that says,  
19 okay, this, this group or this distinctive group merits the  
20 protection or the normal operation of an, of an existing  
21 interconnection agreement.

22           This future prospective customer base, no. I think  
23 the FCC seems to be making a distinction that says, you know,  
24 it's okay with us because practicality demands that we do this  
25 in this manner. Fine.

1           But how do you respect change in law provisions, how  
2 do you respect processes contained within an interconnection  
3 agreement if, if, in fact, they're saying, you know, it's 12  
4 months and out no matter who you are?

5           MR. LACKEY: Actually, I really, I think I see where  
6 you are now, and, and I'm not sure I know how to answer it. I  
7 mean, basically I think what the FCC said was, we'll let you  
8 use the change of law for the embedded base because you all  
9 have to decide where you're going to move these customers.  
10 You've got to decide that you're going to move them off of  
11 JNE-P to something else, and we'll let you go through the  
12 change of law process over the next 12 months to do that. But  
13 if March 11th, 2006, comes along and you've not done anything,  
14 you've just sat on your hands for the entire period, then come  
15 March 11th, 2006, those are going to go away too. The embedded  
16 base is going to go away.

17           CHAIRMAN BAEZ: So then who, who -- and please  
18 forgive the tone because I don't mean anything, but who has the  
19 incentive in a situation like that? I mean, who's holding  
20 cards here?

21           MR. LACKEY: Well, I hope that the answer to that is  
22 this whole thing is an incentive for the CLECs and BellSouth to  
23 get their entire relationship on a commercial footing. I hope  
24 that's what the incentive is.

25           CHAIRMAN BAEZ: And I would hope that that's the,

1 that that's the end result in a manner that benefits and is  
2 comfortable and uncomfortable for everyone involved.

3 MR. LACKEY: And we have, and we have a financial  
4 interest in doing this sooner rather than later because you  
5 know we have complained bitterly for years about TELRIC  
6 pricing. And the sooner we can effectuate this transition, the  
7 better off we're going to be with regard to that embedded base.  
8 It's actually -- if -- I don't mean to sound pejorative either,  
9 but it's the CLECs who have the incentive to wait until the  
10 364th day and drop a million orders on us, if they could, and  
11 then claim that we didn't do the conversion so they'd get to  
12 keep UNE-P and this sort of thing further. I think that's  
13 where the incentives lie. Our incentive is to get this done  
14 for financial reasons, if no other.

15 COMMISSIONER DEASON: Mr. Chairman?

16 CHAIRMAN BAEZ: Yes, Commissioner Deason.

17 COMMISSIONER DEASON: I've got a question for  
18 Mr. Lackey, and then I'll ask the same question to Ms. McNulty.

19 Scenario, if we accept the CLEC argument that new  
20 adds are permissible until you go through some type of change  
21 of law provision; scenario, let's say that come January 1 a new  
22 customer is added with, and it's a new add and that customer is  
23 served via UNE-P, does that customer then become part of the  
24 embedded base or is that customer some new unique customer that  
25 has rights separate from this 12-month transition period that

1 the FCC spoke about?

2 MR. LACKEY: Well, without trying, without being  
3 obsequious, let me say to you that that is a very good  
4 question.

5 The embedded base clearly is defined, and Ms. McNulty  
6 said this a moment ago, that it's the customers that were in  
7 existence when the Commission's order became effective on  
8 March 10th, 2005.

9 The question is, is if you allow new adds to continue  
10 from March 11th, 2005, forward until the agreements change,  
11 what category do they fall in?

12 CHAIRMAN BAEZ: And that's, and that's a fair  
13 question. But I'm looking at it from -- I mean, exactly what  
14 status does, does that, that customer base as of March 11th,  
15 2005, what status does it have?

16 MR. LACKEY: Let me see if I can answer that one  
17 while I'm finishing.

18 CHAIRMAN BAEZ: I'm sorry. I didn't mean to  
19 interrupt your answers.

20 MR. LACKEY: No. That's fine. I can, I can  
21 multitask even at my advanced age.

22 CHAIRMAN BAEZ: You know, there's a definite date  
23 where the line gets drawn, and that's 3/11/2005, or am I --

24 COMMISSIONER DAVIDSON: For the no new adds.

25 CHAIRMAN BAEZ: Right. So that, so that you say

1 you've defined the customer, the embedded customer base. That  
2 is a magic number, you know.

3 COMMISSIONER DEASON: Yeah. And the question is,  
4 just simplify the question, a new add, if it is permitted and  
5 that new add takes place, does it become part of the embedded  
6 base or is it a new set of customers that have to be treated  
7 somehow differently?

8 MR. LACKEY: It's a new set of customers, which is  
9 even more of an anomaly. Because for the customers who are in  
10 place on March 10th, 2005, for the UNE-P, for instance, we get  
11 to do an adder of \$1 to the rate. My recollection is that your  
12 unbundled port is \$1.17. So adding a dollar to the rate is  
13 almost an 100 percent increase in the rate that the FCC has  
14 allowed.

15 So for the embedded base, instead of \$1.17 for the  
16 ports, we're going to get \$2.17. For the new add on  
17 March 12th, if you allow it to go into effect, since it's not a  
18 part of the embedded base, apparently we only get the \$1.17.  
19 So what you've ended up doing is you've allowed the CLEC to add  
20 new customers at a cheaper rate than the embedded base would  
21 get added under that scenario, which is another reason to  
22 demonstrate that the FCC surely could not have intended that  
23 result. I really -- you know, I don't see the, I don't see how  
24 logically you can reach a different conclusion.

25 COMMISSIONER DEASON: Mr. Chairman, as I indicated,

1 I'd ask the same question to Ms. McNulty or Mr. Horton.

2 MR. HORTON: Well, Ms. McNulty has been having too  
3 much fun, so I guess -- that would -- the treatment -- it's our  
4 position that we indeed can, should be able to continue to add  
5 customers. You've got your embedded base. The new customers,  
6 now that's treated is subject to the negotiation process,  
7 excuse me, that the FCC has made clear is supposed to continue.  
8 This, this transition plan, the transition mechanism is a  
9 default mechanism. They, they clearly point out in several  
10 paragraphs within, within the remand order that this is a  
11 default mechanism, the parties need to negotiate the resolution  
12 of how this is, how this is treated.

13 CHAIRMAN BAEZ: Mr. Horton, let me stop you right  
14 there because I think you -- so then do you, do you agree, do  
15 you agree with Mr. Lackey's interpretation or answers to my  
16 questions that, that the 12 months is, is, come hell or high  
17 water, whether you negotiate or not on your embedded customer  
18 base, no matter how long your interconnection agreement is,  
19 that that is a drop-dead date for that embedded customer base?

20 MR. HORTON: I think that is spelled out, these time  
21 periods are spelled out.

22 Now there are a couple of, I believe there are a  
23 couple of them that are 18 months. But --

24 CHAIRMAN BAEZ: Yeah. The different -- a couple of  
25 other elements.

1           MR. HORTON: But Commissioner Deason earlier  
2 expressed some concern about what, about the process. And  
3 going back to 233, Paragraph 233, the incumbent, you know,  
4 thus, the incumbent LEC and competitive LEC must negotiate in  
5 good faith regarding the rates, terms and conditions necessary  
6 to implement our rule changes. We expect the parties to the  
7 negotiating -- we expect that parties to the negotiating  
8 process will not unreasonably delay implementation of the  
9 conclusions adopted in this order. We encourage the state  
10 commissions, sorry, to monitor this area closely to ensure that  
11 parties do not engage in unnecessary delays. So it's got to  
12 move forward. If it doesn't move forward, this default  
13 mechanism kicks in.

14           Under Bell's scenario, under Bell's approach we are  
15 not allowed, under our existing interconnection agreements  
16 would not be allowed to add any customers. That's going to  
17 cause irreparable harm to us. Nothing in the order says that,  
18 that we cannot add under existing interconnection orders,  
19 agreements. Excuse me.

20           CHAIRMAN BAEZ: Commissioners, any other questions?

21           COMMISSIONER DEASON: What about Mr. Chapkis?

22           CHAIRMAN BAEZ: Mr. Chapkis, I'm sorry. See, you  
23 should have taken, you should have taken the opportunity when I  
24 gave it to you. Go ahead, sir.

25           MR. CHAPKIS: I wanted to defer to Mr. Lackey to give



1 him an opportunity to present BellSouth's case. I'll try to be  
2 brief. I know you've asked a lot of questions and you've heard  
3 a lot of information.

4           The one thing I wanted to do was pass out some  
5 provisions from our interconnection agreement. As you are  
6 probably aware, American Dial Tone is the only party that's  
7 filed with respect to Verizon, and American Dial Tone, at least  
8 as far as I can tell, isn't represented here today.

9           With respect to Paragraph 233, from what I can  
10 understand, that's the sole paragraph that the CLECs are  
11 relying upon. And in interpreting the order to require  
12 amendments to implement the no new adds makes no sense, I think  
13 as many of your questions have indicated.

14           As a number of other states have found, it would be  
15 illogical and extreme to permit CLECs to continue to add new  
16 UNEs to the embedded base, while at the same time stating that  
17 that embedded base is going to be reduced to zero. That just  
18 doesn't make any sense.

19           And I think even staff in their recommendation at  
20 Page 14 reached that same conclusion. And I'm going to read  
21 you a quote from staff's recommendation.

22           It said, "Arguably it would not fit the framework of  
23 the FCC's transition plan if petitioners were able to continue  
24 ordering new arrangements during the transition period where  
25 they were to be converting their current embedded base of UNE

1 arrangements."

2 Another reason that the CLECs' interpretation of  
3 Paragraph 233 is wrong is that it would really render the no  
4 new adds directive a nullity. In other words, the FCC's  
5 explicit direction that the new, no new adds take place, not  
6 take effect after March 11th would be meaningless if Verizon  
7 had to go through negotiations, arbitration and amendment to  
8 implement that directive. It would make no sense for the FCC  
9 to say we should have no new adds as of March 11th, 2005, and  
10 then give carriers until March 11th, 2006, the end of the  
11 transition period, to implement that directive. That's  
12 nonsensical.

13 As Mr. Lackey pointed out, there have been a number  
14 of commissions, the vast majority of the commissions that have  
15 expressly agreed with that result. When the Indiana Commission  
16 was presented with the same argument that the CLECs are  
17 erroneously making here, they stated, and I'd like to read a  
18 quote from that decision as well, "We cannot reasonably  
19 conclude that the specific provision of the TRRO to eliminate  
20 UNE-P, which includes a specific date after which CLECs will  
21 not be allowed to add new customers using UNE-P, was also meant  
22 to have no applicability unless and until such time as carriers  
23 had completed the change of law processes in their  
24 interconnection agreements. To reach the conclusion proposed  
25 by the joint CLECs would confound the FCC's clear direction

1 provided in the TRRO with no obvious return to the transition  
2 timetable established in the TRRO."

3 Now not only has the Indiana Commission reached this  
4 conclusion, but every other state in which Verizon has  
5 addressed this issue has reached that same conclusion. The  
6 FCC's no new adds directive is effective and self-implementing  
7 as of March 11th, 2005, as it's expressly stated in the order,  
8 not March 11th, 2006, as the CLECs are requesting here today.

9 For example, you've got New York, Massachusetts,  
10 Pennsylvania, Rhode Island, they've all approved Verizon's  
11 tariffs implementing the TRRO and rejecting the notion that the  
12 new no new adds directives had to be implemented through the  
13 parties' interconnection agreements.

14 Similarly, New Jersey, Maine, Delaware, Virginia also  
15 denied the CLEC petitions to require Verizon to continue  
16 accepting new UNE orders. In other states where the so-called  
17 emergency motions are pending, the Commissions have not blocked  
18 the implementation of the TRRO and Verizon's tariffs have  
19 become effective. Even in California, Ohio, Texas, Kansas,  
20 they've likewise declined to require incumbent LECs to accept  
21 new UNE-P orders for existing customers.

22 In support of its decision, the California Commission  
23 reasoned that, and I'm going to read another quote, "Common  
24 sense indicates that it would be more disruptive to provide a  
25 service to a new customer that would only be withdrawn in 12

1 months than to refrain from providing such a service that will  
2 be discontinued." And that's the end of the quote.

3 COMMISSIONER DAVIDSON: I take it this is the new and  
4 improved California Commission.

5 MR. CHAPKIS: Yes, indeed, Commissioner Davidson.

6 CHAIRMAN BAEZ: They've been called that before  
7 though.

8 (Laughter.)

9 MR. CHAPKIS: And as Mr. Lackey stated earlier, one  
10 of the -- the lead commission in the BellSouth jurisdiction  
11 that went the other way, the Georgia Commission, the court just  
12 issued an injunction preventing that decision from going into  
13 effect. The CLECs, unlike the commissions in Verizon's  
14 jurisdiction that I've just mentioned and unlike the majority  
15 of commissions across the nation, have overlooked the FCC's  
16 distinction between new orders and the embedded base. The  
17 correct way to interpret the TRRO is to find that the no new  
18 adds directive went into effect on March 11th, 2005, and that  
19 the 12-month transition period applies only to the embedded  
20 base. This is what the FCC has repeatedly stated in the TRRO,  
21 that the transition period only applies to the embedded base.

22 And I don't know if you have the TRRO before you, but  
23 Paragraph 199 of that order states -- and it's the sentence  
24 that begins, "Finally." It says, "Finally, we adopt a  
25 transition plan that requires competitive LECs to submit orders

1 to convert their UNE-P customers to alternative arrangements  
2 within 12 months of the effective date of this order. This  
3 transition period shall apply only to the embedded base and  
4 does not permit competitive LECs to add new customers using  
5 unbundled access to local circuit switching." I think that  
6 puts an end to the dispute.

7           Now even, in Verizon's case even if there were a  
8 plausible argument that the parties' interconnection agreements  
9 could trump binding federal law and basically remove the no new  
10 adds directive of its meaning and no such plausible argument  
11 exists, Verizon's interconnection agreement at issue here  
12 requires the parties to comply with the FCC's directives, not  
13 to ignore them. And that's part of the reason that I handed  
14 out the handout that I did at the beginning is our  
15 interconnection agreement with American Dial Tone in this  
16 particular case is instructive.

17           I refer you to Section 1, Section 1 -- pardon me,  
18 Amendment 1, Section 1.5 of that agreement, which provides that  
19 Verizon may terminate delisted UNE combinations as soon as  
20 they're delisted by the FCC. And specifically this section  
21 provides -- well, it says, quote, in part, if Verizon provides  
22 a combination to Ganoco and the Commission, the FCC, a court or  
23 other governmental body of appropriate jurisdiction determines  
24 or has determined that Verizon is not required by applicable  
25 law to provide such combination, Verizon may terminate its

1 :rovision of such combination to Ganoco, end quote.

2           CHAIRMAN BAEZ: Mr. Chapkis, one of the things, one  
3 f the things, and I think there's been several allusions to  
4 t, is the notion that this is not over, that the argument on  
5 his isn't over. And, and I guess reading, reading your  
6 anguage, I guess you can take it one, one way or the other.  
7 ny initial decision by this Commission, whether or not subject  
8 o appeal, would trigger your affirmative action on this  
9 anguage. And, and part of, part of the underlying discussion  
10 ere is things are still up in the air. I mean, there are  
11 larifications, there are other filings for, for  
12 econsideration, I think, with, with the FCC, you know, on this  
13 nd other subjects. You know, what kind of accommodation is  
14 vailable under your language for, for things like that, for,  
15 o, to reach -- to not change something until it does reach  
16 finality?

17           MR. CHAPKIS: One problem, I guess one problem for me  
18 inherent in your question is that the state of law in this area  
19 seems to be constantly in flux.

20           CHAIRMAN BAEZ: Yes. I agree.

21           MR. CHAPKIS: And, therefore, you can't -- you're not  
22 going to be able to wait ever for finality; otherwise, you are  
23 going to be constantly involved in this process where you say  
24 to Verizon, you are not allowed to terminate UNE-Ps --

25           CHAIRMAN BAEZ: Unless and until, right.

1 MR. CHAPKIS: -- which the FCC has been found to be  
2 not in the public interest until this is final.

3 CHAIRMAN BAEZ: I think it's a valid point. I don't  
4 disagree with you, just --

5 MR. CHAPKIS: And so I guess what I would say is  
6 right now you have a binding federal FCC order that says there  
7 shall be no new adds as of March 11th, 2005. That means that  
8 there are no new adds as of March 11th, 2005.

9 Now as Mr. Lackey has alluded to, there are  
10 commercial agreements available, these parties can do resale.  
11 It's not as if they're not going to be able to provide service.  
12 This is really about price, and CLECs want to continue  
13 receiving these at TELRIC, even though the FCC says that  
14 they're not impaired without, without access to unbundled local  
15 circuit switching.

16 CHAIRMAN BAEZ: Thank you. Are you -- go ahead and  
17 finish your comments.

18 MR. CHAPKIS: I'm not, I'm not done with my  
19 presentation, but I hope I addressed your question. I was --

20 CHAIRMAN BAEZ: No. No. You -- thanks.

21 MR. CHAPKIS: If you'll look at the other section of  
22 our agreement that I presented, it's Amendment 1, Section 2,  
23 and that provides, quote, Verizon shall be obligated to provide  
24 a combination of network elements, a combination, only to the  
25 extent that the provision of such combination is required by

1 applicable law.

2           So, I mean, I do think that that language that I've  
3 just read made clear that the agreement does not tie the  
4 parties' compliance with federal law to the completion of, you  
5 know, negotiation, arbitration and amendment.

6           In Verizon's case, in this specific instance it says  
7 that Verizon can stop providing UNE combos as soon as there's  
8 an FCC declaration to that effect.

9           Another thing that we've been talking about here, and  
10 I think one of the things that staff relies on for its  
11 recommendation, is the Mobile-Sierra doctrine. And, first, one  
12 thing that I want to make clear is whether the FCC was bound by  
13 the Mobile-Sierra doctrine or not is outside of what's before  
14 the Commission and what the Commission can decide. The only  
15 decision here for the Commission is whether the Commission  
16 can -- is barred from requiring Verizon to accept new adds and  
17 allowing CLECs to make new adds.

18           And it's clear on the face of the order that the FCC  
19 said, you know, no new adds as of March 11th, 2005. If the  
20 CLECs want to challenge the FCC's authority to adopt this rule,  
21 the only place they can do that is in, is on review before the  
22 D.C. Circuit. This isn't the appropriate venue to make that  
23 type of determination.

24           Second, it's clear from the authorities we've cited  
25 in our briefs that the FCC plainly has the authority to adopt



1 the no new adds rule. It has the authority to remedy the  
2 effects of eight years of unlawful unbundling. It's a basic  
3 administrative law principle that an agency can, can remedy the  
4 effects of its prior unlawful orders.

5           And, third, the Sierra-Mobile doctrine we don't think  
6 applies here. That doctrine deals with the modification of  
7 private contracts when one carrier seeks to avoid the terms of  
8 a voluntary agreement, and interconnection agreements don't fit  
9 that model. They're not voluntary agreements, but mandatory  
10 regulatory instruments that implement the terms of the  
11 incumbents' regulatory obligations under the 1996 Act. And, in  
12 fact, federal courts have actually stated that an  
13 interconnection agreement is not an ordinary private contract.  
14 It's not to be construed as a traditional contract but as an  
15 instrument arising within the context of ongoing federal and  
16 state regulation.

17           So the FCC has an obligation for adopting regulations  
18 to implement all of the provisions of the '96 Act.  
19 Accordingly, it also has the ability to adopt regulations to  
20 govern the circumstances that are present here. It can adopt  
21 rules under 251 and 252 barring the continued provision of  
22 delisted network elements.

23           And finally, as Mr. Lackey stated, even if you  
24 decided that the Sierra-Mobile doctrine applied and even if you  
25 decided that it was proper for this Commission to determine

1 whether that, whether the FCC followed that doctrine in this  
2 case, the FCC has made plainly clear in the context of its  
3 order that the continued existence of delisted UNEs is not  
4 within the public interest. They've made clear that it's a  
5 detriment to competition and it hampers facilities-based  
6 competition.

7 Just one more error that I'd like to point out in the  
8 Commission's recommendation, and I'll, I'll try to be brief.

9 COMMISSIONER DAVIDSON: Staff's recommendation.

10 MR. CHAPKIS: You're correct, Commissioner Davidson.  
11 I apologize for that error.

12 It's the notion that this Commission should maintain  
13 the, quote, status quo because applying the no new adds  
14 directives as of March 11th, 2005, would run afoul of the FCC's  
15 admonitions regarding subdelegation.

16 First, I think that misperceives the status quo.  
17 This went into effect as of March 11th, 2005, and with respect  
18 to Verizon we are currently saying no new adds. So the status  
19 quo with respect to Verizon is that new adds are not being  
20 allowed.

21 Second, as I pointed out earlier with respect to  
22 Verizon's agreement, the recommendation erroneously assumes  
23 that all of, that all of Verizon's Contracts require amendment  
24 to implement delistings. This isn't the case, as I said, as  
25 evidenced by this particular contract here.

1           Third, this case has nothing to do with the FCC's  
2 delegating impairment authority to the states. It's the  
3 Commission's duty to interpret the FCC's rules. States can't  
4 avoid this obligation by saying they don't want to get involved  
5 in an unlawful subdelegation of authority.

6           And fourth, even if there were an unlawful  
7 subdelegation --

8           COMMISSIONER DEASON: Mr. Chapkis, let me interrupt  
9 you just there for a -- you mentioned an obligation for the  
10 Commission to interpret the FCC rules. Earlier, Mr. Lackey  
11 said we really don't have to do anything. If we want to  
12 maintain the status quo, the status quo is what you all are  
13 doing and that there's not an obligation on this Commission's  
14 part to try to read the mind of the FCC and interpret a vague  
15 order. Do you agree or disagree with that? I'm probably  
16 putting words in Mr. Lackey's mouth.

17           MR. CHAPKIS: No. But I think you essentially  
18 characterized what Mr. Lackey said. He said you can make a  
19 decision here to deny what the CLECs are asking for. In either  
20 case -- and I think he also said this: You're making a  
21 decision, and that's exactly what you need to do. You can't  
22 essentially throw up your hands and say we'll leave it to the  
23 parties to file a motion for reconsideration or motion for  
24 clarification before the FCC.

25           CHAIRMAN BAEZ: Well, wait a second on that and stop

1 right there, because I think I'm having -- one of the questions  
2 that I had, and I was actually going to ask General Counsel,  
3 doesn't -- I mean, if there's been an effort on the staff's  
4 part to, to, to steer clear of the subdelegation issue, I guess  
5 that raises in my mind questions, do you do anything? And  
6 maybe, maybe Mr. Lackey was trying to make the point or maybe  
7 not, but I know Commissioner Deason asked the question in one  
8 way or another, by doing anything, are we undermining what has  
9 previously been said about us sticking our nose into things we  
10 shouldn't be doing?

11 MR. MELSON: Commissioner, by taking any action other  
12 than simply punting, and I'll, and I'll say that's what in  
13 essence the staff recommendation does, by taking any action  
14 beyond that, you would be interpreting in effect the FCC order.  
15 That may not be a strict violation of the subdelegation that  
16 the court said the FCC couldn't do, but it would run afoul of a  
17 similar sort of principle.

18 I think you're free today, if you believe the FCC  
19 order is clear, to apply it as you read it. If you believe  
20 it's unclear, I think you are free to resolve that lack of  
21 clarity one way or the other, or to say, as the Virginia  
22 Commission apparently did, we're not going to resolve the  
23 unclarity, and then speak to whether you believe the status quo  
24 ought to be maintained in the interim. I think you've got the  
25 whole range of options available to you.

1           Staff's recommendation was staff's view of what an  
2 appropriate action would be in light of what staff sees as some  
3 real ambiguities and tensions in the order. But it's clearly  
4 not the only, only possible solution.

5           CHAIRMAN BAEZ: And, and I see staff's recommendation  
6 in two parts. And really the one that troubles me or at least  
7 that I have, that my question was on was the part that says  
8 require, require new adds to be permitted. And I question  
9 whether we can require anything and, and still hold, and still  
10 hold to some detachment that's been kind of, you know, pointed  
11 out to us.

12           MR. MELSON: I think probably a better way to say it  
13 would be require that the parties continue to operate under  
14 their existing interconnection agreements until there's an  
15 amendment pursuant to the change in law provisions.

16           CHAIRMAN BAEZ: Does that have -- would that have the  
17 effect of, of allowing the, allowing the conflict to continue  
18 under the independent interpretation to the parties? I mean,  
19 you know, there seems to be some difference as to what the,  
20 what the interconnection agreement allows on the one hand and  
21 what it, what it allows on the other.

22           MR. MELSON: I think the Verizon interconnection  
23 agreement, the particular interconnection agreement they're  
24 pointing to is not something that I had focused on in reviewing  
25 the recommendation. I don't know if that was pointed out in

1 Verizon's pleadings or if that's those particular provisions or  
2 something they're pointing out to us for the first time today.

3 COMMISSIONER BRADLEY: I have a question.

4 MR. CHAPKIS: Just to speak to that, they were  
5 pointed out in our pleadings. This is not the first time that  
6 those have been mentioned.

7 CHAIRMAN BAEZ: Very well. Commissioner Bradley, you  
8 had a question?

9 COMMISSIONER BRADLEY: Right. I'm, I'm reading  
10 staff's recommendation, and it seems to me that staff has, has  
11 not been able to determine what the FCC's intent is as it  
12 relates to new additions or new adds. Let's talk a little bit  
13 about the true-up.

14 How would a true-up be enforced and how would that --  
15 I mean, what -- who, who would make a determination as to how a  
16 true-up would occur and what the amount would be?

17 MR. CHAPKIS: I think, and I'll let Mr. Melson speak  
18 for staff, but I think as staff envisioned it, if the FCC were  
19 to come down, for example, and say that indeed Verizon and  
20 BellSouth were correct in the interpretation of our order,  
21 then, you know, we would be charging the rates in our  
22 interconnection agreements today. We would get the rates that  
23 would have been under -- I guess that would be -- I guess we'd  
24 get commercial rates at that point. But it would be tough for  
25 those parties that we didn't have commercial agreements with.

1 It doesn't, frankly, it doesn't make a lot of sense. I think  
2 all things that we've argued about point to the fact that the  
3 negotiation through interconnection agreements applies to just  
4 the embedded base. That does not apply to, and it's fairly  
5 clear from the terms of the FCC's order, new adds.

6 MR. TEITZMAN: Commissioner, I would not completely  
7 disagree with Mr. Chapkis's understanding of what staff had  
8 recommended in the order. There would be a true-up. It would  
9 be set to the commercial rates with regard to enforcement. I  
10 think that would be governed by, once again, the parties'  
11 interconnection agreements and their billing dispute language  
12 within those interconnection agreements.

13 MR. LACKEY: May I be heard on that,  
14 Mr. Commissioner?

15 COMMISSIONER DAVIDSON: We actually prefer that  
16 others speak for you, Mr. Lackey.

17 (Laughter.)

18 CHAIRMAN BAEZ: Go ahead, Mr. Lackey.

19 MR. LACKEY: I knew I should have retired.

20 CHAIRMAN BAEZ: You keep saying that, but you keep  
21 coming back.

22 (Laughter.)

23 MR. LACKEY: I know. In all seriousness though, part  
24 of the problem that the true-up issue doesn't address is the  
25 customers that we lose while this goes on. I don't have the

1 figures for Florida, but I believe MCI in their pleading at the  
2 United States District Court or before the court last week said  
3 that they were gaining 100 -- 1,500 UNE-P customers in Georgia  
4 each week. Now the problem with going forward with the new  
5 adds is those customers are gone. It's not a matter of money  
6 making us whole, the difference between the, the TELRIC rate  
7 and the commercial rate. If they had been charging the right  
8 rate to begin with, those customers might not have left us.  
9 And that's the irreparable harm we argued to the federal court  
10 last week. And, again, I don't have the order or the  
11 transcript, but I believe that's what his decision turned on.  
12 I don't think a true-up will make us whole if you allow the new  
13 adds to continue.

14 MR. TEITZMAN: Chairman, may I make a --

15 CHAIRMAN BAEZ: Mr. Teitzman.

16 MR. TEITZMAN: Yes. Although we do not have that  
17 order, I just wanted to read to the Commission, this is an  
18 order by the District Court, Northern District of Illinois  
19 where it addressed that same issue. And just, just so you're  
20 aware, the court did find in that case, I'll read it to you.  
21 "The court further finds that while denial of preliminary  
22 relief threatens some harm to SPC," this is a case that was  
23 dealing with SPC, "the threat of irreparable injury to the  
24 competing carriers if an injunction is granted is incomparably  
25 greater." And that was found by the court in the Northern



1 District of Illinois.

2           There are -- I guess the point would be that there  
3 are conflicting decisions on that as well within the courts.

4           MR. LACKEY: Mr. Chairman, may I comment on that?

5           CHAIRMAN BAEZ: You can go ahead, Mr. Lackey.

6           MR. LACKEY: The Illinois decision has come up. Let  
7 me just say this again, and the staff has that decision, I  
8 believe they can tell you what the court found with regard to  
9 the likelihood of success on the merits. I believe they will  
10 confirm that the court found that SPC was going to suffer  
11 irreparable harm as well, and then they did the balancing and  
12 concluded that the CLECs came out on the better end of the  
13 balancing.

14           But what the court missed in the Illinois case is  
15 that the harm claimed by the CLEC was an entitlement to  
16 something that the FCC has said they're not entitled to on a  
17 national basis. They were asking for delisted UNEs, and that  
18 was their harm, not being able to get the delisted UNEs. And  
19 the federal court up there bought that argument. But the case  
20 law is clear that when balancing the harm, you cannot weigh as  
21 harm something that is in conflict with federal, national  
22 federal policy, which is what this is. I think the Illinois  
23 decision was simply wrong on the balancing.

24           MR. CHAPKIS: I would also just add that that's a  
25 decision that's in the distinct minority.

1 MR. CHAIKEN: Commissioners, this is Brian Chaiken.  
2 Can I address the point?

3 CHAIRMAN BAEZ: Sure, Mr. Chaiken. Go ahead.

4 MR. CHAIKEN: Thank you. I would just like to raise  
5 another United States District Court opinion, that of the  
6 Eastern District of Michigan in a case involving MCI in  
7 Michigan in which the Michigan court came down in favor of MCI  
8 on the point. I don't have the written opinion here. I'm sure  
9 we can get it for the Commission. But I would like to add --  
10 excuse me?

11 CHAIRMAN BAEZ: Go ahead, Mr. Chaiken.

12 MR. CHAIKEN: I'm sorry. I would just like to add  
13 that the change of law provisions in the parties' contract can  
14 address this issue of new adds. The parties can freely  
15 negotiate when to state the new adds should cease, if there  
16 should be retroactive treatment to those new adds, what rate  
17 should be applied to those new adds. And if the parties are  
18 unable to reach an agreement pursuant to those change of law  
19 provisions, then we come back to you and you make a decision as  
20 to how those should be treated consistent with the language in  
21 the TRRO. To do otherwise is to make those change of law  
22 provisions ineffectual and moot.

23 It's entirely consistent to apply both the embedded  
24 base as well as the provisions regarding no new adds within the  
25 concept of the change of law provisions. The parties'

1 contractual amendments can say whatever they want to say and  
2 they come to you for approval. You can approve them, you can  
3 modify them, you can make them consistent with the law. But  
4 there's no reason why those change of law provisions cannot  
5 apply to this situation with respect to new adds.

6 CHAIRMAN BAEZ: Mr. Chaiken, a question to you.  
7 Exactly what part, if any, of the, of the remand order is,  
8 quote, self-effectuating?

9 MR. CHAIKEN: We don't believe any part is  
10 self-effectuating.

11 CHAIRMAN BAEZ: Then why, why, why are the words in  
12 the order though? Why does it somewhere say in the order  
13 that -- and I'm, and I'm fumbling for the language here.

14 COMMISSIONER DAVIDSON: It's in Paragraph 3 of the  
15 ERRO that the FCC states --

16 CHAIRMAN BAEZ: Paragraph 3.

17 COMMISSIONER DAVIDSON: Right. "We believe that the  
18 impairment framework we adopt is self-effectuating,  
19 forward-looking and consistent with the technology trends that  
20 are reshaping the industry."

21 CHAIRMAN BAEZ: What, what does that mean?

22 COMMISSIONER BRADLEY: Let me --

23 MR. CHAIKEN: I think that means with respect to  
24 Section 251, which is all that we're talking about here, that  
25 it's very clear that they're saying there's no more UNEs under

1 251. And that when you effectuate your change of law  
2 provisions, that that is how the state commissions, if there's  
3 a dispute, have to rule, have to come down. Contract  
4 amendments have to state that under 251 you no longer have  
5 unbundled switching.

6 But the reason why we need to follow the change of  
7 law provisions is because we still have obligations under 271,  
8 as the main Public Utility Commission has already found. I  
9 would hope that the Commission would address the issue of  
10 271 with both BellSouth and Verizon because I don't think that  
11 issue has been addressed.

12 MR. CHAPKIS: May I respond? First, Verizon is not  
13 --

14 CHAIRMAN BAEZ: Go ahead, Mr. Chapkis, but I don't  
15 want to --

16 MR. CHAPKIS: I was just going to say, first, Verizon  
17 is not a 271 company, and so it doesn't apply to Verizon in  
18 this state.

19 And, two, I think there's a very simple answer to  
20 your question which even a nonlawyer could understand, which is  
21 it's self-effectuating with respect to new adds and it's, and  
22 it's to be implemented through interconnection agreements with  
23 respect to the embedded base.

24 CHAIRMAN BAEZ: Commissioner Bradley, you had a  
25 question?

1           COMMISSIONER BRADLEY: What -- in this instance can  
2 someone define what self-effectuating means?

3           MR. CHAPKIS: That means that the provision that says  
4 no new adds as of March 11th, 2005, doesn't need to be  
5 implemented through the change of law provisions in the  
6 interconnection agreements. The FCC said it to, to remedy past  
7 wrongs, and that, that goes into effect then. The, the  
8 statements with respect to the embedded base are to be  
9 implemented through the interconnection agreements.

10           CHAIRMAN BAEZ: But, Mr. Chapkis, I feel compelled to  
11 give equal time to Ms. McNulty and her cohorts. So if you all,  
12 if you all want to add what you think.

13           MR. HORTON: Chairman, the language does not say it  
14 is self-effectuating as to new adds. It says, "The impairment  
15 framework we adopt is self-effectuating, forward-looking and  
16 consistent with technology trends that are reshaping the  
17 industry." That's the only place self-effectuating appears.  
18 Self-effectuating, the entire framework will go into place. It  
19 does not need to go to state commissions for any proceedings,  
20 it doesn't need to go anywhere else. It doesn't say --

21           COMMISSIONER BRADLEY: But what does it mean?

22           CHAIRMAN BAEZ: What does that mean, Mr. Horton?  
23 What does, what does it mean when the FCC says, "This framework  
24 is self-effectuating? What is the framework that they're, that  
25 they're referring to? The framework that says there's no

1 impairment as to, as to certain UNEs and that they will be  
2 elisted and that they would, therefore, not be applicable  
3 o -- I mean, and all the other language that we've gone, what  
4 exactly do you mean, self-effectuating?

5 MR. HORTON: Well, I would even go and say that  
6 self-effectuating means that we don't have to tell everybody to  
7 go and implement the change of law, negotiate change of law.  
8 but they have done that on a number of occasions in here that  
9 they've said we expect carriers to negotiate new agreements.  
10 It's the entire framework. It's not just, not just the new  
11 adds that -- it does not say new adds are self-effectuating.

12 CHAIRMAN BAEZ: Ms. McNulty, and then I'm going to  
13 see if Commissioner Bradley has any other questions. Go ahead,  
14 Ms. McNulty.

15 MS. McNULTY: I just want to add to that a little  
16 bit, and it's basically MCI's position that that language is  
17 simply making the point that the FCC is not subdelegating to  
18 the state commissions decisions that are contained in, in this  
19 FCC remand order, that it's basically responding to those  
20 concerns raised in USTA II.

21 CHAIRMAN BAEZ: Commissioner Bradley, do you have any  
22 other questions?

23 COMMISSIONER BRADLEY: Staff, an interpretation of  
24 what you just heard.

25 MR. TEITZMAN: Actually, my interpretation, I would

1 agree with Ms. McNulty. I think that that is in response to  
2 the USTA II decision and the court's ruling that the  
3 subdelegation was unlawful. And basically this is saying that  
4 the FCC is now making those impairment findings and they need  
5 to be applied as opposed to the process we went through after  
6 the TRO was issued, the Triennial Review Order was issued where  
7 this Commission began a case to make impairment findings.

8           CHAIRMAN BAEZ: And, and, and yet even though they  
9 say self-effectuating ostensibly to get out of this USTA II  
10 bind that they're in, they, on the other hand, drop it on our  
11 laps yet again? Is that --

12           MR. TEITZMAN: Well --

13           CHAIRMAN BAEZ: Is that essentially what, what's  
14 happened, what you think has happened?

15           MR. TEITZMAN: I'm not sure if that was -- I want to  
16 say I'm not sure if that's their intent. But I think staff's  
17 concern here is that because of the ambiguities, I know there  
18 was a lot of discussion regarding interpretation of this order.  
19 I think our concerns also go to the fact that this might go  
20 beyond what would simply be considered an interpretation to --  
21 because of the ambiguities, it would almost extend to the point  
22 of making policy saying whether or not new adds or change of  
23 law provisions are still applicable, and that was the concern.

24           Certainly, the Commission can interpret these orders.  
25 But with regard to the unlawful subdelegation, I think what we

1 were trying to say there is it was a concern that we were  
2 actually going beyond just interpreting the order, like I said.  
3 but as a result of the ambiguity, as a result of Paragraph 233,  
4 that just doesn't seem to match up. And the fact that it's,  
5 it's just not clear in this order. I mean, how easy would it  
6 have been for them to put a sentence in there that says, you  
7 know, change of law clauses are not applicable or they've been  
8 abrogated? No. No. I understand.

9 CHAIRMAN BAEZ: If I had a dime for every time we  
10 could say that about an FCC or any other order, for that  
11 matter, you know, we, I certainly wouldn't be sitting here.  
12 but --

13 MR. TEITZMAN: It's just not there. And, in  
14 addition, I just wanted to also point out something that we  
15 haven't discussed is staff has contacted the FCC as well on  
16 this. We asked, you know, what, what did you mean? And I  
17 don't know exactly how to take it, but --

18 CHAIRMAN BAEZ: Please don't say they said, we don't  
19 know.

20 MR. TEITZMAN: Pat, would you like to address your  
21 discussions with the FCC? It would be very close to something  
22 like that, Chairman.

23 CHAIRMAN BAEZ: Commissioner Bradley.

24 COMMISSIONER BRADLEY: No, Lisa.

25 CHAIRMAN BAEZ: Commissioner Edgar, I'm sorry.



1           COMMISSIONER EDGAR: Could I ask staff to speak again  
2 to the question that Commissioner Bradley asked a few minutes  
3 ago about how, if indeed a true-up were to be adopted in some  
4 way, how would that be enforced at the end of the year period?

5           MR. TEITZMAN: Well, I think certainly you would have  
6 to take a look at the billing dispute language in the parties'  
7 interconnection agreements, and that language could vary from  
8 agreement to agreement. I'd imagine at some point in their  
9 billing dispute language it probably would come back to the  
10 Commission if there was a dispute. Certainly with the  
11 Commission ordering the true-up, it would be interesting to see  
12 where a CLEC would argue that they do not, or that, you know,  
13 that they, that they do not have to make that true-up of rates.  
14 But I do think it would go back to the billing dispute language  
15 in the interconnection agreement.

16           COMMISSIONER BRADLEY: And that goes to the crux of  
17 my question. How is a true-up going to be enforceable if a  
18 CLEC decides that they just want to bail or if they decide that  
19 it's, in their interpretation the true-up is, is, is something  
20 different from what they think it should be versus what Verizon  
21 or BellSouth thinks it should be? Wouldn't we then be back  
22 into a situation where we have a dispute about who is owed what  
23 and how much?

24           COMMISSIONER DAVIDSON: I think BellSouth would have  
25 to either sue Qwest or Verizon at some point.

1           MR. TEITZMAN: Well, Commissioner, just as we would  
2 it here and discuss the applicability of the change of law  
3 clause, I think it would go back to the billing dispute  
4 language. And I'm certain that there are remedies in that  
5 language that would be enforceable. I hope that answers your  
6 question or your concern.

7           COMMISSIONER BRADLEY: Enforceable.

8           MR. TEITZMAN: I'm not -- I guess what I'm saying is  
9 if, take it outside of this arena, if there was another billing  
10 dispute between the parties, there would certainly be, there  
11 certainly is an enforcement mechanism, and I think you'd have  
12 the same result here.

13          CHAIRMAN BAEZ: Commissioners, any other questions?  
14 Commissioner Edgar.

15          COMMISSIONER EDGAR: As the new person, let me just  
16 show this out as a question. We've been told that there are,  
17 believe, seven requests for reconsideration pending before  
18 the FCC, two that appear to be on point to the issue that we've  
19 been discussing here today.

20                 When could we reasonably expect the FCC to respond to  
21 those requests that are before them?

22          CHAIRMAN BAEZ: Commissioner Deason, do you want to  
23 answer that?

24                 (Laughter.)

25          COMMISSIONER DEASON: I'd be surprised if it's during

1 he 12 -- before the end of the 12-month transition period just  
2 from personal experience.

3 CHAIRMAN BAEZ: And I was being facetious, but I  
4 don't think that the hopes would be too high. I would tend to  
5 agree with Commissioner Deason that those things take a long,  
6 long time. I mean, if you just look back a little bit, that  
7 seems to be the case. But --

8 COMMISSIONER DAVIDSON: Mr. Chairman, I'm prepared to  
9 make a motion at this point, if --

10 CHAIRMAN BAEZ: Commissioner Davidson.

11 COMMISSIONER DAVIDSON: I'll throw this out with just  
12 a few preliminary thoughts. Although there have been some  
13 motions to the FCC that address whether this TRRO is  
14 self-effectuating, the FCC, to begin with, is not even under an  
15 obligation to address the motions before it for reconsideration  
16 or clarification. And if they choose to, it may certainly be  
17 well outside the 12-month time frame.

18 The staff recommendation would cut off new adds at  
19 one year from March 11, 2005, thus prolonging UNE-P and, I  
20 think, promoting a policy that would defer investment in  
21 facilities by CLECs.

22 Typically when there is doubt between provisions in  
23 an order, the more specific prevails over the more general, and  
24 I believe the order of the, the FCC in the TRRO is quite  
25 specific. Indeed, in the changes to the Code of Federal

1 Regulations, the rules themselves, the rule now states that  
2 requesting carriers may not obtain new local switchings as an  
3 unbundled network element. The rule is clear; there's  
4 additional language that I quoted to earlier and that the  
5 parties have discussed that enhance that clarity. And the FCC  
6 provides very clearly for a date certain. In Paragraph 235,  
7 the FCC states that, "Given the need for prompt action, the  
8 requirement set forth here shall take effect on March 11, 2005,  
9 rather than 30 days after publication in the federal register."  
10 So the FCC was making clear its intent that the rules take  
11 effect immediately, and they modified the Code of Federal  
12 Regulations, the governing rules, to provide that requesting  
13 carriers may not obtain new local switching.

14           Again, if there's some conflict between the specific  
15 and the general, as a basic principle of law the specific  
16 should govern. Although staff pitches their rec as a status  
17 quo rec, it's not, in my view, any status quo as determined by  
18 the TRRO's intent that no new adds occur after March 11th. A  
19 decision based on the staff rec, in my view, would be a policy  
20 decision to allow UNE-P to grow for up to another year contrary  
21 to the intent of the TRRO, contrary to the teachings of the  
22 D.C. Circuit decision vacating the TRO, contrary to the  
23 expressed intentions of, of numerous parties.

24           I think adding UNE-P customers at the very time when  
25 CLECs are transitioning its embedded base off of UNE-P is both

1 unwise and I think it's unlawful under the Act. The FCC  
2 clearly wanted prompt action, prompt, clear action, and I think  
3 we have an opportunity to do that now.

4 Sort of in dealing with the issues, I think we do  
5 have to distinguish between loops, transport and switching.  
6 Those are the three essential elements of the UNE platform.  
7 The FCC was crystal clear on switching. It wasn't as clear and  
8 provided for certain processes on loops and transport.

9 So my motion would be to deny staff on Issue 2 as  
10 follows: With regard to high-capacity loops and transport, the  
11 motion would be, pending the outcome of BellSouth's appeals to  
12 the FCC and if, if Verizon has appeals, those appeals,  
13 BellSouth would follow the procedure outlined by Mr. Lackey  
14 that, one, the requesting CLEC will certify its order for loops  
15 and/or transport, and, two, that BellSouth will either  
16 provision the high-capacity loops and/or transport pursuant to  
17 that certification, or BellSouth will dispute such provisioning  
18 pursuant to the parties' existing dispute resolution  
19 provisions.

20 On switching, the motion would be as follows: As of  
21 March 11th, 2005, there shall be no new adds. In other words,  
22 and using the exact words of the TRRO, requesting carriers may  
23 not obtain new local switching as an unbundled network element  
24 after March 11th, 2005. As the FCC stated in the TRRO at  
25 Paragraph 204, the disincentives to investment posed by the

1 availability of unbundled switching in combination with  
2 unbundled loops and shared transport justify a nationwide bar  
3 on such unbundling.

4           Commissioners, in my view the rules are crystal clear  
5 on switching. Of course, nothing in this motion prevents the  
6 parties from negotiating commercial agreements to address the  
7 various issues on the table. BellSouth and CLECs within its  
8 territory have already reached agreements regarding a very  
9 substantial percentage of the switching UNEs that are on the  
10 table. I note that all parties have a good-faith obligation to  
11 negotiate, and if a party can establish that the other is not  
12 negotiating in good faith, I believe that that is actionable.

13           Expectations of continuing to receive switching as a  
14 UNE is patently unreasonable in view of the FCC's remand order,  
15 the D.C. Circuit decision, the TRO. I think on switching the  
16 law is clear, and that is my motion, Mr. Chairman.

17           COMMISSIONER EDGAR: A question.

18           CHAIRMAN BAEZ: Go ahead, Commissioner Edgar.

19           COMMISSIONER EDGAR: Commissioner Davidson, would you  
20 repeat for me just the portion of the motion itself dealing  
21 with switching?

22           COMMISSIONER DAVIDSON: Yes. The motion on switching  
23 would be as follows: As of March 11th, 2005, there shall be no  
24 new adds of local switching as an unbundled network element.  
25 And, in other words, in using the exact words of the TRO,

1 specifically the, the existing rules and the federal, Code of  
2 Federal Regulations, requesting carriers may not obtain new  
3 local switching as an unbundled network element. And that's in  
4 the amendment to Part 1 -- Part 51 of Title 47.

5 And on high-capacity loops and transport, the other  
6 two elements of the UNE platform, it would follow the, the  
7 concession of BellSouth that they would accept certification by  
8 the CLECs and either provide the UNE or file a dispute  
9 resolution that exists in the parties' agreements.

10 CHAIRMAN BAEZ: That would be pending appeal, I  
11 guess?

12 COMMISSIONER DAVIDSON: Yes, Chairman, pending  
13 appeal.

14 CHAIRMAN BAEZ: Is that, is that -- was it  
15 represented accurately, Mr. Lackey?

16 MR. LACKEY: (Microphone not on.)

17 CHAIRMAN BAEZ: Well, how did he characterize your --  
18 he put your name on the proposal, so I think you --

19 MR. LACKEY: Well, I, I don't -- I think the truth of  
20 the matter is if they certify, if that's what you're asking me  
21 about, if they certify, we have to provision and then dispute.

22 CHAIRMAN BAEZ: Correct.

23 COMMISSIONER DAVIDSON: And that's fine. Perfect.  
24 My motion would so reflect that.

25 CHAIRMAN BAEZ: Okay.

1           COMMISSIONER DAVIDSON: Provisioning and then  
2 dispute.

3           CHAIRMAN BAEZ: Commissioners, comments or, or a  
4 second.

5           COMMISSIONER DEASON: Mr. Chairman, I'm going to  
6 second the motion, but before, before I do, I'd like to, I  
7 guess, editorialize a little bit.

8           We're here once again as a state commission being  
9 asked to read the minds of the FCC, which is a constantly  
10 moving target, and to try to -- in this case they have issued  
11 an order, which is a remand order, which one would think would  
12 be crystal clear.

13           CHAIRMAN BAEZ: Settle the question once and for all.

14           COMMISSIONER DEASON: And we're here once again  
15 trying to read the minds of the FCC. And I think this is a  
16 further erosion of this Commission's, what historically was an  
17 important substantive role for this Commission when it came to  
18 implementing telecommunications policy, and we're being  
19 relegated to trying to read an order which should be clear on  
20 its face and trying to make an interpretation consistent with  
21 that.

22           Given that, it is very appealing, no pun intended,  
23 appealing to follow the lead of the Virginia Commission and  
24 say, we're not going to do it. FCC, you should write your  
25 orders clearly, and don't put us in the situation of trying to



1 read your minds and interpret your orders when they should be  
2 clear on their face. If this Commission has jurisdiction in  
3 areas, it should be clearly stated. If the FCC wants us to  
4 implement part of their guidance, they should delineate what  
5 the jurisdiction is and the criteria we should apply, let us  
6 listen to the evidence and let us make a decision. That's not  
7 what we're doing here today. We're here because these parties  
8 can't agree between themselves what is the policy of the FCC  
9 because the FCC order is not clear. So they come to us, and  
10 they have also gone to the FCC.

11 As you can, you know, plainly see, once again I am  
12 frustrated by this process we're having to follow. But I do  
13 agree with the motion. I believe that a reading of the order  
14 that the most -- for us to give meaning to it and for it to be  
15 as internally consistent as it can be, that the motion is the  
16 proper interpretation. And I also in this, as I indicated  
17 earlier, I think that our role as policymakers is getting  
18 smaller and smaller when it comes to telecommunications. But  
19 to the extent we have any role remaining, I think it's the  
20 correct policy as well. So for those reasons, I second the  
21 motion.

22 CHAIRMAN BAEZ: Yeah. Briefly, this, this -- I would  
23 agree with all of, most, if not all, of what you said,  
24 Commissioner Deason.

25 The, the key point for me is to, you know, we have

1 the FCC order. If I had my druthers, this wouldn't be before  
2 us. But here it is. And I think walking away from it is on  
3 some level irresponsible, no, no matter the fact that it is  
4 frustrating trying to divine what the FCC meant to say.

5           Having said that, you do have what are arguably  
6 conflicting, conflicting terms. And part of our  
7 responsibility, if we choose to accept it, is to try and make  
8 sense and try and reconcile all of, all of those terms as best  
9 we can. We are only doing the best that we can with what we're  
10 given. But having said that, there's a motion, unless,  
11 Commissioner, if you have comments quickly before we --

12           COMMISSIONER BRADLEY: Just, just a comment. I think  
13 that the FCC, the order that the FCC, the FCC sent down was  
14 intended to create just what, just what has happened here  
15 within this Commission. And I think that the motion itself is,  
16 is an excellent compromise between all, all positions, and it  
17 moves the transition from, from UNE-P in the right direction.  
18 I think that the FCC has made it very clear that it is  
19 interested in competition that's facilities-based, and I think  
20 that this motion keeps the ball moving in that direction. So I  
21 think it's an excellent motion.

22           CHAIRMAN BAEZ: All right. Motion and a second. All  
23 those in favor, say aye.

24           (Unanimous affirmative vote.)

25           CHAIRMAN BAEZ: Thank you all, parties, for the

1 :omments, and thank you, staff.

2 MR. TEITZMAN: Chairman, the close docket issue. I  
3 must want to -- this is a close docket issue.

4 CHAIRMAN BAEZ: Do you want to, do you want to move  
5 --

6 COMMISSIONER DAVIDSON: Move staff to close the  
7 docket.

8 MR. TEITZMAN: Thank you.

9 CHAIRMAN BAEZ: Move staff.

10 COMMISSIONER DEASON: Second.

11 CHAIRMAN BAEZ: Motion and a second. Without  
12 objection, show Issue 3 approved.

13 COMMISSIONER DEASON: Wait, now, you were being  
14 facetious about closing the docket.

15 SPEAKER: The dockets were consolidated. Are we  
16 closing the consolidated dockets?

17 CHAIRMAN BAEZ: I'm sorry. Let's back up.

18 COMMISSIONER DEASON: It's set for -- it's currently  
19 set for hearing.

20 COMMISSIONER DAVIDSON: No, well, all right. Let's  
21 strike that. What will we do on this, Mr. Melson, because  
22 we've, I guess we've resolved, I thought, the issues that were  
23 the subject of this particular docket.

24 MR. MELSON: You resolved the issues in 050171 and  
25 172. The 041269 is set for hearing and it has others.

1           COMMISSIONER DAVIDSON: So would we move staff --  
2 would we move, would we move to close the two dockets you  
3 referenced?

4           MR. MELSON: Yes, sir.

5           COMMISSIONER DAVIDSON: And move forward on the  
6 consolidated dockets.

7           MR. MELSON: Well, they're -- at that point there  
8 really would no longer be a consolidated docket.

9           COMMISSIONER DAVIDSON: Okay.

10          MR. MELSON: The two closed ones would have dropped  
11 out.

12          COMMISSIONER DAVIDSON: All right.

13          CHAIRMAN BAEZ: Okay. So we --

14          COMMISSIONER DAVIDSON: Move staff to close the  
15 dockets referenced by Mr. Melson.

16          CHAIRMAN BAEZ: We have with one fell swoop rendered  
17 our decisions moot within the same item. This is, this is  
18 Borgean almost in its --

19          UNIDENTIFIED SPEAKER: Not the first time it's  
20 happened.

21          CHAIRMAN BAEZ: Exactly.

22          COMMISSIONER DAVIDSON: And it certainly won't be the  
23 last.

24          CHAIRMAN BAEZ: All right. So can we let our vote  
25 reflect whatever is consistent with, with our vote on Issue 2

1 actually. I mean, if it's rendered --

2 MR. MELSON: I think actually the cleanest thing,  
3 frankly, would be to reconsider the Issue 2 and not consolidate  
4 the dockets, and then you can close the two much more easily.

5 CHAIRMAN BAEZ: All right. Do we have a motion for  
6 reconsideration on Issue 1?

7 COMMISSIONER DAVIDSON: Motion to reconsider Issue 1

8 CHAIRMAN BAEZ: All right.

9 COMMISSIONER BRADLEY: Second.

10 CHAIRMAN BAEZ: All right. And a second. All those  
11 in favor, say aye.

12 (Unanimous affirmative vote.)

13 CHAIRMAN BAEZ: And now do we have a motion on  
14 Issue 1, which I think you can --

15 COMMISSIONER DAVIDSON: Motion to move staff.

16 COMMISSIONER DEASON: Second.

17 CHAIRMAN BAEZ: And a second. All those in favor,  
18 say aye.

19 (Unanimous affirmative vote.)

20 CHAIRMAN BAEZ: Okay. Now we got that straight. I  
21 have one request. I don't know -- there will be an order  
22 issued on this. I, I, I can only speak for myself, but I'll  
23 extend the same opportunity to the other Commissioners, if you  
24 can circulate the order around and let us look at it.

25 MR. MELSON: Absolutely.

1           CHAIRMAN BAEZ: Thank you. Ladies and gentlemen, we  
2 are at high noon, and so if it's all right with you, we're  
3 going to break for an hour and come back at 1:00 where we'll  
4 make up the remaining items.

5           (Agenda Item 4 concluded.)  
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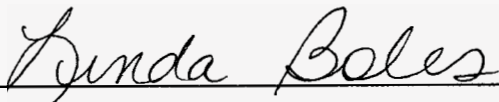
STATE OF FLORIDA )  
:  
COUNTY OF LEON )

CERTIFICATE OF REPORTER

I, LINDA BOLES, RPR, Office of Hearing Reporter Services,  
FPSC Division of Commission Clerk and Administrative Services,  
do hereby certify that the foregoing proceedings, Pages 1  
through 102, were transcribed from cassette tape.

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' attorneys or counsel  
connected with the action, nor am I financially interested in  
the action.

DATED THIS 13TH DAY OF APRIL, 2005.

  
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