

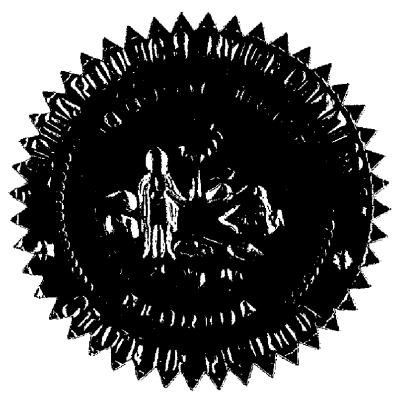
SCANNED

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041269-TP

In the Matter of:

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



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 13

BEFORE: CHAIRMAN LISA POLAK EDGAR
COMMISSIONER J. TERRY DEASON
COMMISSIONER ISILIO ARRIAGA

DATE: Tuesday, February 7, 2006

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

REPORTED BY: JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732

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FLORIDA PUBLIC SERVICE COMMISSION

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1 PARTICIPATING:

2 ADAM TEITZMAN, ESQUIRE, KIRA SCOTT, ESQUIRE, MICHAEL
3 BARRETT, KIT KENNEDY, PAT LEE, ANN MARSH, DAVID DOWDS,
4 representing the Florida Public Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN EDGAR: Okay. We are back, and we are on
3 Item 13.

4 MR. BARRETT: Good afternoon, Commissioners.

5 CHAIRMAN EDGAR: Hello.

6 MR. BARRETT: Michael Barrett of staff.

7 Item 13 is staff's post-hearing recommendation for
8 Docket Number 041269-TP. This recommendation addresses an
9 array of considerations that result from various court
10 decisions and two prominent FCC orders, the TRO and the TRRO.
11 This case is unique, however, in that for the first time the
12 parties to this proceeding are asking you to approve contract
13 language to implement many of the policy recommendations in
14 this document.

15 The proposed language is attached to this
16 recommendation as Appendix A. An errata memo was issued
17 February 3rd, 2006, that provides revisions of a clarifying
18 nature to Issues 2 and 22. With the Chairman's permission,
19 staff would like to make the specific revisions at the time you
20 are considering those issues.

21 Also with the Chairman's consent, I would suggest
22 that we begin with Issue 7A, which is the threshold issue.

23 CHAIRMAN EDGAR: Thank you.

24 Commissioners, if it is all right with you, I agree
25 with staff that 7A is probably the best place to start. And

1 then after that, realizing that it is late in the day, my
2 suggestion is that we take up items in blocks with the
3 understanding that any item that we have a question or would
4 like some discussion on, I will certainly be glad to afford
5 that time.

6 Commissioner Arriaga.

7 COMMISSIONER ARRIAGA: Madam Chairman, I'm going to
8 really ask you to indulge me today because I have a lot of
9 concerns. As we go on they will come out. It may delay this
10 process a little bit more than you wish, so please bear with
11 me, because I will be participating, okay.

12 CHAIRMAN EDGAR: Commissioner Arriaga, I'm a little
13 tired, but I'm glad to be here as long as we need to be. And I
14 mean that completely.

15 COMMISSIONER ARRIAGA: Thank you so much. I also am
16 very tired, but let's go ahead and do it.

17 I have a prior proposal to make, and I'm going to
18 read from staff's analysis, Page 76, the first paragraph of the
19 analysis. Staff acknowledges, and I just heard it two minutes
20 ago, that this is a complex issue, the resolution of which is
21 burdened by the lack of a clear declaration by the FCC and the
22 existence of a significant, yet inconsistent body of law.

23 In addition to that, from research done in my office,
24 it is my understanding that all the Commissions, specifically
25 the Georgia Commission, the Maine Commission, and the Minnesota

1 and Tennessee Commissions, with upheld decisions by district
2 courts, have indicated a disagreement with what staff is
3 proposing throughout this process.

4 What I want to say is that I think this is of the
5 utmost importance, that what we are addressing here is our
6 statutory authority. And where there is doubt, as staff is
7 already saying in the first paragraph of its analysis, and then
8 we have other commissions and other district courts that are
9 also disagreeing with staff, my first proposal will be to bring
10 this whole subject, or the subject matter that is contentious,
11 to a full hearing panel. I don't know if this is procedurally
12 possible. But what I'm trying to say is threshold issues like
13 7A, and those that are affected by the threshold issue, I think
14 we owe the courtesy to the full Commission to discuss it. We
15 should divest ourselves of authority when there is so much
16 doubt in place. And then take in this hearing, in this agenda,
17 take those items that are not affected by Issue Number 7.

18 That would be my first consideration that I would
19 like to discuss with the Commissioners. Again, I want to say
20 something very important before I finish, Madam Chairman. I'm
21 going to be expressing myself today. And, first of all, staff,
22 you know, because we met, that I have absolute respect for all
23 of your positions, that I understand that you have done very,
24 very hard work, you have been thorough, and consequently your
25 own principles and your own interpretation of the law. But in

1 the same way, I have done the same homework.

2 And, Commissioners, we may agree or disagree today,
3 it doesn't matter. I have the utmost respect for all of your
4 positions, and I will not take this in other way. I have
5 respect for all of you. Thank you.

6 CHAIRMAN EDGAR: Commissioner Arriaga and
7 Commissioner Deason, I'm going to ask for one minute of your
8 indulgence, if you would. Just hold tight, and we will come
9 back to that, please.

10 (Off the record.)

11 CHAIRMAN EDGAR: Thank you. Just a scheduling
12 question, okay.

13 Commissioner Deason, do you have any thoughts?

14 COMMISSIONER DEASON: Well, my reaction is, I guess,
15 to legal as far as -- you heard the proposal, as far as if
16 there is a mechanism to get this fundamental threshold issue
17 before the full Commission. How does that mesh with where we
18 find ourselves in this docket, which has already gone to
19 hearing?

20 CHAIRMAN EDGAR: I'm sorry. Mr. Melson, thank you
21 for joining us. I realize that we have caught you kind of in
22 the middle of an opening discussion. So, with that,
23 Commissioner Arriaga, would you, for my benefit, as well,
24 please kind of lay out, again, what it is that you are
25 suggesting and/or asking for comment on. Thank you.

1 COMMISSIONER ARRIAGA: Mr. Melson, staff has
2 indicated in its first paragraph of the analysis that staff
3 acknowledges that this is a complex issue, the resolution of
4 which is burdened by the lack of a clear declaration by the
5 FCC, and the existence of a significant yet inconsistent body
6 of law. And I go farther into indicating that other
7 Commissions and courts, and I mentioned specifically the
8 Georgia Commission, the Maine Commission upheld by the district
9 court, the District of Maine specifically state the act did not
10 intend to preempt state regulation of 271 obligations.

11 The Minnesota Commission, upheld by the District
12 Court, and the District of Minnesota saying any agreement with
13 271 items must be filed as an interconnection agreement.

14 And the Tennessee Commission -- I mean, having all of
15 those issues in front of us, to accept so quickly in a body of
16 three Commissioners to which I just said I owe the highest
17 respect, what I'm trying to say is that these are important
18 issues. There is doubt as to the application of the law. And
19 I think the full Commission should be entitled, or may be
20 entitled to hearing this issue together, especially those that
21 are threshold, like Issue 7 and those that are affected by
22 Issue 7. And we could take on today those that are not
23 affected and get it done with as part of the business of the
24 day.

25 MR. MELSON: Commissioner, Chapter 350, which governs

1 the Commission, and if you give me a minute I will look at the
2 exact language, but basically a Commission decision has to be
3 made by the panel that heard the case. In the event that panel
4 suffers attrition as a result of, you know, Commissioners
5 leaving, there are procedures to appoint substitute
6 Commissioners. But the general rule is that a Commissioner who
7 did not sit at the hearing in a case that has gone to hearing
8 would have to read the complete record before he or she could
9 vote.

10 So, while, yes, I recognize this is an important
11 issue, I'm not sure it's one that procedurally at this stage in
12 the process there is really an appropriate vehicle for getting
13 it before the full Commission. Now, having said that, give me
14 just a minute to pull the statute and look at it and make sure
15 I'm remembering it correctly.

16 CHAIRMAN EDGAR: Mr. Melson, take two minutes.

17 Commissioners, two minutes.

18 (Off the record.)

19 CHAIRMAN EDGAR: Commissioners, thank you for that.

20 Again, I needed to check on some timing things as the day is
21 going on. And, Mr. Melson, if you have some suggestions or
22 thoughts.

23 MR. MELSON: Commissioners, since I guess it involved
24 long-term memory instead of short-term, my memory was correct.
25 Section 350.01(5) of the Florida Statutes, and I'm going to

1 read this, "Only those Commissioners assigned to a proceeding
2 requiring hearings are entitled to participate in the final
3 decision of the Commission as to that proceeding." And then it
4 goes on and says if you had two Commissioners there, and there
5 is a tie, the chair reads the record and votes.

6 But with that limited exception, once the hearing has
7 been held, you are limited to those Commissioners who heard the
8 case.

9 CHAIRMAN EDGAR: Commissioner Arriaga.

10 COMMISSIONER ARRIAGA: Thank you, Mr. Melson, for
11 clarifying. And let's move on. And I have called to your
12 attention that what we have ahead of us is extremely important.
13 I know you understand it. Thank you for the clarification.

14 MR. MELSON: Certainly.

15 CHAIRMAN EDGAR: Commissioner Arriaga, we thank you
16 for your interest. And it is always a good refresher, at least
17 it is for me, anyway, when in doubt, read the statute.

18 Okay. With that, are we ready to go into 7A?

19 Staff, if you would. Thank you.

20 MR. TEITZMAN: Adam Teitzman on behalf of Commission
21 Staff. And before I introduce the item, I would like to assure
22 Commissioner Arriaga that I would be happy to discuss with you
23 the Georgia order today.

24 Commissioners, Item 7 requires the Commission to
25 determine whether or not it has the authority to require

1 BellSouth to include in its interconnection agreements Section
2 271 elements. Staff recommends that the Commission find that
3 it does not have the authority, pursuant to the plain language
4 of Sections 251 and 252 of the Act, as well as the regulatory
5 regime set forth by the FCC in the TRO and TRRO.

6 Commissioners, I'm available for your questions.

7 CHAIRMAN EDGAR: Commissioner Arriaga.

8 COMMISSIONER ARRIAGA: Yes, ma'am. I have a battery
9 of questions for staff, ma'am.

10 CHAIRMAN EDGAR: (Indicating yes.)

11 COMMISSIONER ARRIAGA: Mr. Teitzman, would you agree
12 or not that we have authority over Section 252 agreements as
13 found in the Act?

14 MR. TEITZMAN: Yes, Commissioner.

15 COMMISSIONER ARRIAGA: Do we have control over what
16 items or what terms are in the 252 agreement?

17 MR. TEITZMAN: The answer to that question, I think
18 you find our authority in 252, which would then link us back to
19 the unbundling requirements and other additional requirements
20 of Section 251. So I wouldn't say that we have control. I
21 think the FCC and Congress set forth what is required under
22 251.

23 COMMISSIONER ARRIAGA: So what do we have under 252?

24 MR. TEITZMAN: 252 is the section of the Act that
25 grants us the authority to arbitrate interconnection

1 agreements.

2 COMMISSIONER ARRIAGA: Do we have, if you don't want
3 to use the word control, you can use any word you want. Do we
4 have something over what items or in what terms are in 252
5 agreements?

6 MR. TEITZMAN: It's within staff's recommendation
7 that we are constrained by the Congress and the FCC as to what
8 we may include in Section 252 interconnection agreements.

9 COMMISSIONER ARRIAGA: I don't think you're answering
10 my question, but fine, I appreciate your -- number three,
11 question: Do you see a difference between enforcement of 271
12 items versus ensuring that they may appear in an
13 interconnection agreement?

14 MR. TEITZMAN: Yes, I believe there is a dilemma
15 between those two. And if I may discuss it with you, I think
16 there is an inherent conflict if a state has continuing
17 jurisdiction over its interconnection agreements, as this
18 Commission does pursuant to Florida Statutes, if we were to
19 require, or if the Commission were to require the inclusion of
20 271 elements in the interconnection agreements, and later on at
21 a later date there was some dispute between a CLEC and
22 BellSouth regarding the provisioning of those 271 elements,
23 they would then possibly come back to this Commission for
24 enforcement of those requirements. And I think there would be
25 a problem between the explicit language of the Act and, as

1 restated by the FCC in the TRO, that they are the exclusive
2 body with enforcement over 271 and this Commission's
3 enforcement of its interconnection agreements and the 271
4 requirements, if the Commission were to require BellSouth to
5 include those.

6 COMMISSIONER ARRIAGA: But there is a difference
7 between enforcement and ensuring that they appear in an
8 interconnection agreement?

9 MR. TEITZMAN: By definition, yes.

10 COMMISSIONER ARRIAGA: Is that why on Page 115 of
11 your recommendation stated, and let me read, patiently, please:
12 If including the requirement to commingle 271 services -- it's
13 right in the middle of the first paragraph, Page 115 -- if
14 including the requirement to include 271 services is asserting
15 the state's jurisdiction over 271 services, then including the
16 requirement for BellSouth to commingle interstate special
17 access services would be asserting the state's jurisdiction
18 over interstate special access services.

19 Certainly this is not the case. By requiring
20 commingling with 271 checklist, the Commission is not
21 specifying how or even when those checklist items would be
22 available. The Commission would only be ensuring that when
23 they are available, the CLEC may connect UNEs to them.

24 So in answer to my Question 3, you will say yes,
25 there is a difference, correct, according to what you state in

1 115?

2 MR. TEITZMAN: I think there is a difference between
3 including commingling of 271 elements with other items and the
4 inclusion of 271 elements and their rates in the
5 interconnection agreement. I do think that there is a
6 distinction there.

7 COMMISSIONER ARRIAGA: Another question, Mr.
8 Teitzman. As you state in your recommendation that 271 alludes
9 to, speaks to 251 and 252, what is the purpose, what would be
10 the purpose, then, of including 251 and 252 in 271?

11 MR. TEITZMAN: I think staff's position is that what
12 the FCC and what the Congress have done there is basically
13 restate the requirement that BellSouth -- not BellSouth, but a
14 BOC is required to interconnect pursuant to 252 and 251. I
15 don't think that it's a statement that conveys jurisdiction on
16 a state commission.

17 COMMISSIONER ARRIAGA: Commissioners, what I'm trying
18 to do here, if you continue to bear with me, is put on the
19 table that there is sufficient doubt as to the very assertive
20 assertion, I'm sorry for the duality here, remember my
21 language, from the assertion from staff that this is an issue
22 that can be discarded by stripping the Commission of its
23 authority. There is sufficient doubt.

24 But I'm going to go one step further, and I'm going
25 to go to Page 77. As you can see, Madam Chairman, I did my

1 homework. At the end of Page 77, we have a statement that
2 staff makes, the last paragraph, the middle of the paragraph,
3 "Although such a finding by this Commission may arguably have a
4 negative impact on CLEC business plans in the short-term, staff
5 firmly believes that in the long-term the Commission finding
6 that BellSouth is not required to include 271 elements in 252
7 agreements will bolster the FCC stated policy of encouraging
8 strong facility-based competition."

9 Well, Mr. Teitzman, will you kindly explain to me
10 what economic data, what projections, what statistical modeling
11 did you use to come to that conclusion?

12 MR. TEITZMAN: That statement was based on the
13 regulatory regime set forth by the FCC in the TRO and the TRRO.

14 COMMISSIONER ARRIAGA: It is a legal statement, not a
15 factual, economically supported statement, correct?

16 MR. TEITZMAN: I based it on the findings of the FCC,
17 that's correct, Commissioner.

18 COMMISSIONER ARRIAGA: Okay. Now, do you believe
19 that this Commission has the statutory responsibility to foster
20 economic development in the State of Florida? Do you believe
21 that this Commission has the statutory responsibility to foster
22 public interest? Is that the Commission's role?

23 MR. TEITZMAN: I believe so, yes.

24 COMMISSIONER ARRIAGA: Okay. So don't you think that
25 that is what the Legislature had in mind when they drafted our

1 statutes indicating that to be a Commissioner one had to have
2 one of five different areas of expertise, and the law mentions
3 clearly economics, finance, engineering, accounting, and law?

4 If I'm not stretching this too far, wouldn't you say
5 that the legislature had in mind, it was the spirit of the law,
6 for us to consider issues above and beyond the law, but that
7 effect all the different areas, including the economic
8 assertion of a statement like the one you just made?

9 MR. TEITZMAN: I think when making those
10 considerations one must always have an eye to what the law
11 requires.

12 COMMISSIONER ARRIAGA: Yes, you're absolutely
13 correct. The law and, according to the Legislature, the
14 economics, the accounting, the legal, the engineering, all the
15 consequences. And it is my understanding from some information
16 that the executive director of this agency gave me that the
17 statute also mentions specifically, and I didn't bring it with
18 me, specific areas where we have a mandate to promote economic
19 development.

20 So when you are actually saying that this is going to
21 have a negative impact on the CLEC's business plan, but at the
22 end of the day we are going to have a more competitive, strong
23 competitive market, I have my doubts. And I have my doubts
24 because what we have here in Florida, and this is important,
25 and I say this very respectfully, what we have here in Florida

1 are geographical monopolies. And the higher market, the bigger
2 companies will always subsist because if they don't agree, they
3 compete; and if they don't compete, they merge. But the small
4 companies, and remember in the state of Florida 65 percent of
5 our economy is based on small businesses, we have to be very
6 careful. And in South Florida where I'm from it is even
7 higher, it is about 80-something percent.

8 So, I'm very worried that we are jumping into a
9 situation where we are, because of a doubtful legal
10 interpretation, not stated by you, you are very clear, and I
11 respect that, but by many other people around us, we are
12 overseeing our other responsibilities. That is my issue. And
13 I think you and I spoke about this when we had the briefing, so
14 this should be no surprise to you. And, again, this is a very
15 respectful but heartfelt situation on the different positions
16 that we take.

17 So I'm trying to call to your attention that it is
18 not as black and white at you put it over here. I'm not even
19 going into the argument of who is right, the ILECs or the
20 CLECs, I don't even think about it, just our responsibility is
21 what worries me the most.

22 Thank you. Madam Chairman, I'm finished.

23 COMMISSIONER DEASON: Madam Chairman, I'm prepared to
24 make a motion.

25 CHAIRMAN EDGAR: Commissioner Deason.

1 COMMISSIONER DEASON: I'm going to move staff's
2 recommendation. And let me say that in going through this
3 entire recommendation and the entire hearing process, as far as
4 that goes, I have been frustrated to some extent, not with
5 staff, staff has done an outstanding job here, just the nature
6 of the issue that is in front of us. I think what is in front
7 of us is 99 percent trying to interpret law and ambiguous FCC
8 decisions and rulemaking.

9 And, really, what is in front of us is not
10 policymaking. We really don't have a lot of options. We are
11 here trying to interpret what the FCC meant, and that's
12 frustrating to me. To some extent, I feel like telling the
13 parties, just go to the FCC and ask them. Why are you asking
14 us as a third party to read the mind of the FCC and try to
15 interpret that. That's what this whole hearing is about. It's
16 very frustrating.

17 So on this particular issue, it's not a question to
18 me as to whether requiring 271 items, elements to be included
19 in the agreements, that is not put forth to me as a policy
20 issue. It is put forth to me simply as can you read the mind
21 of the FCC, because we can't. You tell us what the FCC meant.
22 Well, to me, the best person to ask is the FCC. But I guess
23 the way the law is structured, we are here in front of us.

24 And the way I read the law, I think staff has
25 interpreted it correctly. And for that reason I move staff's

1 recommendation.

2 CHAIRMAN EDGAR: Commissioner Arriaga, comments or a
3 second.

4 COMMISSIONER ARRIAGA: No comments. No second.

5 CHAIRMAN EDGAR: Well, Commissioner Arriaga, this is
6 one of those times where, for some of the reasons that you
7 expressed, for some that you didn't express, I wish that we did
8 have a full Commission. (Laughter.)

9 But, with that, realizing where we are, and the fact
10 that if it's possible, I agree with all of the comments that
11 each of my colleagues have made. But because we are where we
12 are, I think what I need to do procedurally, and, Mr. Melson,
13 help me through this, since it is a first for me, but,
14 Commissioner Deason, ask you to take the chair for a few
15 moments. Would you like the gavel?

16 COMMISSIONER DEASON: Do I get the gavel since I made
17 motion, or does Commissioner Arriaga get the gavel?

18 MR. MELSON: I actually think you get it.

19 COMMISSIONER DEASON: All right. A motion has been
20 made.

21 CHAIRMAN EDGAR: And we did check that before, just
22 in case this sort of scenario would present itself. And I will
23 second the motion that is on the table.

24 COMMISSIONER DEASON: There is a motion and a second.
25 All in favor of the motion say aye.

1 CHAIRMAN EDGAR: Aye.

2 COMMISSIONER DEASON: Aye.

3 All opposed?

4 COMMISSIONER ARRIAGA: Opposed.

5 COMMISSIONER DEASON: Very well. Show that the
6 motion carries by a two-to-one vote.

7 COMMISSIONER ARRIAGA: Yes. And if you would allow
8 me --

9 CHAIRMAN EDGAR: Commissioner Arriaga.

10 COMMISSIONER ARRIAGA: -- and after this it is going
11 to move quicker. But I knew this was going to happen, anyway,
12 so I have a little statement of my own as to the reasons why I
13 dissented.

14 I want to read it. It says: After reviewing staff's
15 recommendation and hearing the discussion along with the
16 record, it is evident, at least to me, that 271 refers to
17 Sections 251 and 252. Specifically, checklist Items 1 and 2 in
18 271 refers to compliance with 251 and 252. Hence,
19 interconnection agreements are ways to prove to the FCC
20 compliance with 271. Does it follow that 252 agreements are
21 compelled to have 271 obligations?

22 As to the FCC's authority, I agree that the FCC has
23 enforcement authority over 271. I do not understand that
24 allowing for terms or setting rate as broaching the enforcement
25 issue. To say that our action in this matter will be

1 preempting the FCC, or beyond our purview, would be an
2 exaggeration of what my position is and the action the
3 Commission will take with regards to this issue.

4 The FCC will still have enforcement jurisdiction, and
5 BellSouth will still have to prove compliance to the FCC.
6 Stating our authority in this issue does not cause us to act as
7 an enforcement body, nor does it have us judging compliance
8 with 271. Further, the FCC has not made any indication that
9 they intended to remove 271 items from state arbitrations or
10 interconnection agreements. Placing 271 elements and setting
11 rates would simply be using our 252 authority over
12 disagreements that we are called, that we are obliged to
13 approve, arbitrate, and mediate.

14 And as a final comment, just so that we move on,
15 based on my vote dissent, I want it stated for the record that
16 any other issue on which I may approve staff's recommendation
17 that broaches the subject of our authority over 271 is not an
18 acquiescence to the portion dealing with our jurisdiction or
19 authority.

20 Having said that, I thank staff for their
21 thoroughness and hard work with this recommendation. Now let's
22 continue moving along, and working on this complex issue.

23 Thank you very much.

24 CHAIRMAN EDGAR: Commissioner Arriaga, thank you for
25 your comments, and thank you for the work that you have put

1 into this issue, and to this item in particular. Before we
2 move on, I am going to make an executive decision and formally
3 announce that we are going to defer Internal Affairs until
4 February 27th, and I do that after consulting with staff, that
5 there are no immediate deadlines that we will not meet by
6 taking that action. And I would ask, if there is anybody who
7 can, to please let my colleagues who are not joining us on this
8 panel know that we have made that decision.

9 And also, Commissioner Arriaga, as I said at the
10 beginning, I am glad to afford as much time as any of us would
11 like to discuss this, and any other items at any other agenda
12 conference. So that brings us, I think, then to Items 1, and
13 give me a moment here to get my papers in order.

14 MR. TEITZMAN: Chairman.

15 CHAIRMAN EDGAR: Oh, that's right, we did have B and
16 C.

17 MR. TEITZMAN: B and C are fallout issues. They are
18 moot based on the Commission's decision on A. You can vote on
19 them, because the recommendation is that they are moot, or you
20 can decide not to vote on them.

21 CHAIRMAN EDGAR: Thank you for that clarification
22 procedurally. It's my understanding that those items are moot
23 and do not require a vote.

24 COMMISSIONER DEASON: That was my understanding, as
25 well, Madam Chair.

1 CHAIRMAN EDGAR: Thank you.

2 And, Mr. Teitzman, okay then?

3 MR. TEITZMAN: That was it. You can go on to
4 Issue 1.

5 CHAIRMAN EDGAR: Thank you. As I was saying, give me
6 a moment to get my paperwork in order here in front of me.

7 Commissioner Arriaga, I initially was thinking that
8 we could take some of these issues up in blocks. If you have a
9 preference to go individually, we can do that, or if we take
10 them up in blocks and you want to make sure that we -- whatever
11 is your pleasure.

12 COMMISSIONER ARRIAGA: And I thank you, but you can
13 go ahead as you have planned. I have already made my statement
14 that I'm going to work with you, and there is no need to go
15 separating every issue. The statement that was needed to be
16 made was made.

17 CHAIRMAN EDGAR: All right. Thank you.

18 Then, staff, I'm looking at Items 1 through 5.

19 COMMISSIONER DEASON: Madam Chair, I had a question
20 on Issue 1 and Issue 13. Other than that, we can go as rapidly
21 as you wish.

22 CHAIRMAN EDGAR: Okay. Then, I'm going to say that
23 we take up Issues 1 through 5. And, Commissioner Deason,
24 you're recognized for a question on Issue 1.

25 COMMISSIONER DEASON: The question I have pertains to

1 BellSouth's proposed switch-as-is conversion rates. And I know
2 it was staff's position that there was not competent evidence
3 to base a decision on those rates and that we are not
4 implementing those. What options does a CLEC have to
5 switch-as-is, or is that not an option anymore, since there are
6 no rates that would be in effect to allow that?

7 MS. LEE: The switch-as-is rate would be,
8 essentially, zero, because there is no Commission-approved
9 switch-as-is rate for BellSouth.

10 COMMISSIONER DEASON: So the switch-as-is is still an
11 option as far as a mechanism to convert?

12 MS. LEE: Under the staff recommendation, correct.

13 COMMISSIONER DEASON: And you also mentioned that
14 BellSouth would be free to petition the Commission, or make a
15 filing to justify a switch-as-is rate, correct?

16 MS. LEE: Correct.

17 COMMISSIONER DEASON: What is the timing of that, and
18 how would that be implemented, given that we are working under
19 a tight time frame?

20 MS. LEE: Conceivably, BellSouth could initiate a
21 proceeding and ask for anything that was decided in that cost
22 proceeding to be retroactive back to, perhaps, the date of this
23 order, or the date of the signing of the interconnection
24 agreement. That is one possibility. I suppose you could do it
25 on your own motion.

1 The staff recommendation truly did not address that.
2 The fact was that come March 10th, if there have been no orders
3 submitted by the CLEC, on March 11th, BellSouth will begin
4 charging the CLEC the wholesale tariff rate or the resale rate
5 and full UNE disconnect charges and nonrecurring rates to
6 switch those delisted UNES.

7 COMMISSIONER DEASON: I guess my question is after
8 March 10th, why would BellSouth even file a switch-as-is rate?
9 Aren't we already past to where it would have, really, any
10 meaningful effect?

11 MS. LEE: And that is possible, too. I was just
12 giving them the option to initiate a cost proceeding.

13 COMMISSIONER DEASON: Madam Chairman, I can move
14 staff on Issues 1 through 5.

15 CHAIRMAN EDGAR: Commissioner Arriaga.

16 COMMISSIONER ARRIAGA: Yes, ma'am. Just brief
17 questions on Issue 3 before we go to 5. Could you please give
18 me the definition, from your point of view, or from the FCC's
19 point of view, the definition of a basis line. Does that
20 definition, by default, include residential lines?

21 MS. MARSH: Ann Marsh with the Commission staff. In
22 most circumstance it does not. However, the FCC did not make a
23 distinction on UNE loops that are just sold as loops. But, for
24 the most part, they are business lines.

25 COMMISSIONER ARRIAGA: Will this artificially

1 saturate the number of business lines creating a windfall for
2 either the ILEC or the CLEC? Will there be a saturation?

3 MS. MARSH: I'm sorry, I'm --

4 COMMISSIONER ARRIAGA: I'm asking for the definition
5 of a business line.

6 MS. MARSH: Yes.

7 COMMISSIONER ARRIAGA: And you just gave it to me.
8 So I asked does it, by default, include residential lines?

9 MS. MARSH: And the answer to that is no.

10 COMMISSIONER ARRIAGA: The answer is no. So there
11 would be no saturation when it does not include them?

12 MS. MARSH: It does not include them, so I guess the
13 answer would be no.

14 COMMISSIONER ARRIAGA: Is that the only definition of
15 a business line that you have? Is that the FCC-appropriate
16 definition of a business line, or is this the staff definition
17 of it?

18 MS. MARSH: The FCC defined it. If you will look on
19 Page 44, toward the bottom of the page under the subheading of
20 business line, that is the rule there, 47 CFR 51.5, and it
21 defines a business line there.

22 COMMISSIONER ARRIAGA: Okay. And nowhere is it
23 stated that includes residential, nowhere as far as you are
24 concerned? Not here, but anywhere in the FCC's rulings and
25 orders, there is no -- so much doubt is in trying to interpret.

1 And I agree with Commissioner Deason, it gets frustrating
2 trying to read what the FCC says. Have they, by any chance,
3 somewhere included residential lines as part of a business
4 line?

5 MS. MARSH: It's possible under the UNE loops that
6 those are being used as residential. But that is a loop that
7 is simply sold to the CLEC for them to use. And the FCC has
8 specifically stated in the rule and in the body of the TRO that
9 all UNEs loops are to be included, and they don't
10 differentiate. So it's possible they are being used as
11 residential, and it is simply not known one way or the other.
12 But there is nothing specific that includes residential as part
13 of business lines.

14 COMMISSIONER ARRIAGA: But my point was the word you
15 just said, that there is a possibility.

16 MS. MARSH: There is a possibility that there are
17 some.

18 COMMISSIONER ARRIAGA: Which adds to my frustration
19 trying to interpret these issues.

20 MS. MARSH: I'm sorry, I didn't understand your
21 question earlier.

22 COMMISSIONER ARRIAGA: I appreciate it so much.
23 Thank you.

24 CHAIRMAN EDGAR: Commissioner Arriaga, we have a
25 motion for Item 1 through 5, and I am needing a second.

1 COMMISSIONER ARRIAGA: Yes, you have a second.

2 CHAIRMAN EDGAR: Thank you. Then all in favor of
3 staff recommendation on Issues 1 through 5 say aye.

4 (Unanimous affirmative vote.)

5 CHAIRMAN EDGAR: Show 1 through 5 adopted. We have
6 already done 7, and that brings us to Issue 8. My suggestion
7 is that we look at, in block, Issues 8, 9, 10, and 12. There
8 is no 11, is that correct?

9 MR. TEITZMAN: That's correct.

10 CHAIRMAN EDGAR: Thank you. Issues 8, 9, 10, and 12.
11 Commissioners, any questions on any of those?

12 Commissioner Arriaga, any questions?

13 COMMISSIONER ARRIAGA: No questions.

14 CHAIRMAN EDGAR: Do I have a motion?

15 COMMISSIONER DEASON: Move staff on Issues 8, 9, 10,
16 and 12.

17 COMMISSIONER ARRIAGA: And I second.

18 CHAIRMAN EDGAR: A motion and a second. And I
19 concur, so please show Issues 8, 9, 10 and 12 approved as
20 before us.

21 And that brings us to Issue 13.

22 Commissioner Deason, I think you indicated that you
23 had a question.

24 COMMISSIONER DEASON: Yes, I do, Madam Chairman.

25 I guess this issue probably more so than any other

1 really crystallizes the frustration with what is intended, what
2 is required, and I think we find ourselves trying to interpret
3 that, and it is a frustrating difficult process.

4 I guess let me ask this question. First, let me make
5 this statement. It appears to me that really what all of this
6 boils down to is how do you define a wholesale service as when
7 it comes to what you do or do not commingle. And I guess under
8 staff's recommendation you define wholesale service to include
9 271 elements, is that correct?

10 MS. KENNEDY: This is Kit Kennedy with the Commission
11 staff. And, yes, I believe wholesale services include 271
12 services.

13 COMMISSIONER DEASON: And what do you base that upon?
14 Because I can't make that -- I don't find that anywhere, and I
15 have difficulty making that leap absent specific definition
16 that wholesale includes that.

17 MS. KENNEDY: I believe the definition of wholesale
18 services is certainly not included in the rules or the TRO, so
19 it's certainly clear that -- well, it's certainly unclear. I
20 would say the main reason is the FCC's statement in Paragraph
21 579 of the TRO, they state three times the wholesale services
22 that don't include, but not including Section 251(c)(3). In
23 other words, in my mind that's saying everything that is not
24 251(c)(3). It is anything -- to me, from a very vernacular
25 standpoint, from a very, you know, layman's point of view, a

1 wholesale service is something that a wholesaler sells to a
2 retailer that then sells that to the customer. And for that
3 reason, I can see how the term wholesale services was meant to
4 mean -- was meant by the FCC to mean those services that the
5 ILEC sells to a CLEC who then sells to a customer, which to me
6 would include 271 services. It would include resale. It would
7 include interstate special access. It would include any type
8 of element, network element that would be sold by the ILEC to
9 the CLEC who then resells it, not using that term for its true
10 definition being resale, but who then sells it to the customer.

11 COMMISSIONER DEASON: I have labored under the
12 assumption, and it may be incorrect, that generally when the
13 FCC refers to wholesale that you're just talking about some
14 type of a tariffed item. Is that an incorrect assumption on my
15 part?

16 MS. KENNEDY: That's certainly what they used in
17 their discussion in the supplemental order of clarification.
18 And that is when the term commingling began, it got its start.
19 They used the term commingling, and they used, i.e., meaning
20 that is a special access, an interstate special access tariff.

21 Then in the TRO, they used the term wholesale
22 services and said e.g., interstate special access services. In
23 other words, for example. In my mind that's including other
24 things. And in my mind that includes anything that they see as
25 being a wholesale service.

1 COMMISSIONER DEASON: Let me ask you this. If the
2 FCC had intended for 271 checklist items to be included, why
3 didn't they just say that? Why didn't they just write it down
4 in plain English and say, folks, this is the law of the land?

5 MS. KENNEDY: And I guess my answer is they did and
6 then they didn't. As I explained in my recommendation on Page
7 111, they do say it includes 271 and then they struck it in the
8 errata. And then they say it doesn't include 271, and they
9 struck that in the errata. And now the TRO says neither. It
10 doesn't say anything about -- it doesn't put commingling with
11 271, but it doesn't exclude it, either.

12 COMMISSIONER DEASON: Well, let me ask you this. If
13 we were to allow commingling of 271 items with UNEs, would
14 that, in essence, allow the recreation of UNE-P?

15 MS. KENNEDY: I believe it does not, and the reason
16 is because of the pricing. We agree, staff agrees that it does
17 look like UNE-P. But since the pricing standard for 271 is
18 just an reasonable under 201 and 202, a market-based price
19 instead of the cost-based TELRIC standard, the price for the
20 UNE-P replacement would be significantly different.

21 COMMISSIONER DEASON: If we disagree with your
22 recommendation and say that commingling is not required for 271
23 items, is BellSouth still free to negotiate, parties still free
24 to negotiate and come to an arrangement as to enable that, in
25 essence, to happen, but it is not something that is mandated by

1 the Commission?

2 MS. KENNEDY: Certainly. And, in fact, BellSouth has
3 agreed, however, it is not required, to allow CLECs to come
4 into a commercial agreement with them and put together 271
5 switching with 271 loops. And that would allow, essentially, a
6 UNE-P like replacement, but both of those being at the 271, the
7 market-based price, would allow the CLEC to have access, but
8 still at a much higher price.

9 COMMISSIONER DEASON: Thank you.

10 MS. KENNEDY: Uh-huh.

11 CHAIRMAN EDGAR: Commissioner Arriaga, questions or a
12 discussion.

13 COMMISSIONER ARRIAGA: A brief question. I
14 understand that when we considered this the first time it was a
15 Commission order that was not included in the analysis. I'm
16 not very clear with that. We spoke about this during our
17 briefing. Can we go over that again?

18 MR. TEITZMAN: I believe -- are you referring to the
19 bottom of Page --

20 COMMISSIONER ARRIAGA: 040130, Commission decision I
21 think is the --

22 MS. KENNEDY: I believe that's discussed on Page 113
23 of my recommendation.

24 COMMISSIONER ARRIAGA: Yes, and I see it here. I
25 have it underlined. But just for the record, could we -- let

1 me have your expression of voice regarding this issue. Explain
2 it to me, please.

3 MS. KENNEDY: I would defer to Mr. Dowds on this.

4 COMMISSIONER ARRIAGA: Whichever.

5 CHAIRMAN EDGAR: Mr. Dowds.

6 MR. DOWDS: Commissioner, in Docket 040130, which is
7 an arbitration involving BellSouth and I believe it was Nuvox
8 and another CLEC, the issue arose and the Commission panel
9 voted in that proceeding to deny staff's recommendation to
10 allow commingling of 251(c)(3) UNEs with 271 checklist
11 elements. And my recollection is there were two primary
12 reasons. One was in the record there was an assertion to the
13 effect that to do so would allow the recreation of UNE-P,
14 albeit a different price, and the other pertained to the extent
15 to which to do so would undermine the incentives towards
16 facilities-based competition.

17 COMMISSIONER ARRIAGA: And I just want to make sure
18 that what you are saying here now is in no way contradictory to
19 your Issue 7 position.

20 MS. KENNEDY: Staff believes that it is not in
21 conflict.

22 COMMISSIONER ARRIAGA: So then does that -- you're
23 not taking into consideration what happened to make your
24 recommendation now?

25 MS. KENNEDY: I believe the two issues are considered

1 separately. That Issue 7 was about whether the 271 elements,
2 rates, and conditions should be included in the agreement.
3 This issue simply is whether 271 and 251 elements should be
4 connected, should be put together.

5 COMMISSIONER ARRIAGA: I guess what I'm trying to
6 pinpoint here is what has changed since the Commission made the
7 decision in Docket 040130?

8 MS. KENNEDY: I'm sorry?

9 COMMISSIONER ARRIAGA: What's the difference?

10 MS. KENNEDY: Okay. I believe the main difference is
11 a new argument that the CLECs brought forth in this docket that
12 was not presented in the previous docket. The most significant
13 argument being the commingled EELs argument, and that is that
14 staff believes the FCC never intended to eliminate commingled
15 EELs. As noted in Footnote 48, the FCC clearly lays out every
16 possible permutation of EELs and commingled EELs. They then go
17 on to explain the eligibility criteria that these EELs must
18 satisfy.

19 Staff notes that without the requirement to commingle
20 251 UNEs with 271 checklist items, the fate of commingled EELs
21 lies essentially within the hands of BellSouth. And BellSouth
22 is not obligated to offer the loops and transport on its
23 special access tariffs, it has chosen to do so. However, if
24 BellSouth's chooses to withdraw those tariffs and instead
25 fulfill its 271 obligations only by commercial agreements, then

1 the FCC's rules regarding commingled EELs is essentially
2 eviscerated. And I believe we discussed this before. And I
3 think the point here is that BellSouth may choose to withdraw
4 those tariffs and then whether they are to allow the commingled
5 EELs or not is essentially within their commercial agreements,
6 it's within their grasp and not within ours.

7 MR. DOWDS: Perhaps I can add a little clarity and
8 hopefully not confusion.

9 CHAIRMAN EDGAR: Mr. Dowds, for clarity.

10 MR. DOWDS: In the 040130 docket, the counter
11 arguments against commingling of 251 UNEs and 271 focused on
12 recreating UNE-P, namely, in the context of commingling, would
13 be commingling of a 251(c)(3) UNE loop with, I think it is
14 Checklist Item 4, but it is the 271 unbundled local switching.
15 There was little, if any, discussion whatsoever of commingling
16 involving checklist items for loops or transport.

17 An EEL is a loop transport combination. In the
18 instant docket, a major area of concern for the CLECs is
19 because of the TRRO findings that in certain wire centers the
20 ILEC would no longer have an obligation to unbundle, in
21 particular, high capacity loops and high capacity transport,
22 depending on the conditions satisfied. That if they were not
23 able to get a commingled EEL, which as an example would be,
24 perhaps, a UNE loop pursuant to 251(c)(3), but 271 transport,
25 that they would be at a competitive disadvantage.

1 And the tension, which is noted in Ms. Kennedy's
2 Footnote 48, which paraphrases the rule, is the FCC explicitly
3 established new eligibility criteria for not just EELs, which
4 are loop transport combinations where both are 251(c)(3), but
5 commingled EELs. And they enumerate the different permutations
6 and combinations.

7 And so the tension is, in this record, if they did
8 that, wouldn't it be odd that they would enumerate commingled
9 EELs which, if certain conditions are satisfied, the ILEC had
10 to provide and at the same time eviscerate the commingling
11 requirement elsewhere. And that's the tension. And as my
12 colleague characterized earlier, it is an issue of extreme
13 unclarity.

14 CHAIRMAN EDGAR: Commissioners, further questions?
15 We are on Issue 13.

16 COMMISSIONER DEASON: I have no further questions.
17 Madam Chairman, I would move to deny staff on Issue 13.

18 CHAIRMAN EDGAR: We have a motion. Do I have a
19 second?

20 Okay. Recognizing, once again, as our staff has so
21 ably shared with us, this is not an issue that is perfectly
22 clear. Clarity does not exist, although we strive for it, or
23 at least I do.

24 And so, realizing where we are, Commissioner Deason,
25 I'm going to hand you the gavel again.

1 COMMISSIONER DEASON: Do we have a motion or further
2 discussion on Issue 13?

3 CHAIRMAN EDGAR: I'll second the motion.

4 COMMISSIONER DEASON: Okay. The motion has been made
5 and seconded. All in favor say aye. Aye.

6 CHAIRMAN EDGAR: Aye.

7 COMMISSIONER DEASON: Aye.

8 All opposed?

9 COMMISSIONER ARRIAGA: Nay.

10 COMMISSIONER DEASON: Show that the motion carries on
11 a two-to-one vote.

12 CHAIRMAN EDGAR: Thank you. Okay. With that, I'm
13 going to suggest that we take up Issues 14, 15, and 16 in
14 block.

15 Commissioners, I'll let you get to those here for a
16 moment and then ask if there are any questions or discussion on
17 Issues 14, 15, and 16.

18 COMMISSIONER DEASON: Madam Chairman, I can move
19 staff on Issues 14, 15, and 16.

20 COMMISSIONER ARRIAGA: Second.

21 CHAIRMAN EDGAR: We have a motion and a second. So
22 please show Items 14, 15, and 16 approved.

23 With that, then, I'm going to suggest that we take up
24 Issues 17, 18, and 21, recognizing that there is not before us
25 an Issue 19 or an Issue 20. So, do we have questions or

1 discussion on Issues 17, 18, and 21?

2 COMMISSIONER DEASON: Madam Chairman, I can move
3 staff on Issues 17, 18, and 21.

4 COMMISSIONER ARRIAGA: Second.

5 CHAIRMAN EDGAR: We have a motion and a second. I
6 concur. Please show 17, 18, and 21 approved per the staff
7 recommendation before us.

8 Okay. Issue 22A. Questions or discussion? Do I
9 have a motion on Issue 22A?

10 COMMISSIONER DEASON: I move staff on 22A.

11 COMMISSIONER ARRIAGA: Second.

12 CHAIRMAN EDGAR: A motion and a second. And I
13 concur. Please show 22A approved.

14 22B. Do we have discussion or comment or a motion?

15 COMMISSIONER DEASON: I move staff on 22B.

16 COMMISSIONER ARRIAGA: Second.

17 CHAIRMAN EDGAR: And I concur. Please show 22B
18 approved.

19 Then, Commissioners, I'm going to suggest that we
20 look at 23. There is no 24, 25, 26, and 27. So Issues 23, 25,
21 26, and 27, questions, comments, or a motion.

22 COMMISSIONER DEASON: Madam Chairman, I can move
23 Issues 23, 25, 26, and 27.

24 COMMISSIONER ARRIAGA: Second.

25 CHAIRMAN EDGAR: A motion and a second. And I agree.

1 Show 23, 25, 26, and 27 approved as recommended before us.

2 And then I'm going to look as a block at Issues 28,
3 30 and 31. Commissioners, questions, comments, or a motion.

4 COMMISSIONER DEASON: I move staff on 28, 30, and 31.

5 COMMISSIONER ARRIAGA: Second.

6 CHAIRMAN EDGAR: A motion and a second and I concur.

7 Show 28, 30, and 31 approved.

8 And that brings us to Issue 32. Do I have a motion?

9 COMMISSIONER DEASON: Well, let me first ask this
10 question.

11 CHAIRMAN EDGAR: Commissioner Deason.

12 COMMISSIONER DEASON: The Commission has rejected
13 staff on one issue. Does that affect any specific language
14 that needs to be incorporated or not?

15 MS. KENNEDY: There's only one small paragraph in
16 Issue 13, with respect to Issue 13, where the language can
17 easily be deleted. I don't see that as being a concern.

18 COMMISSIONER DEASON: I would move staff on Issue 32
19 concerning closing the docket.

20 COMMISSIONER ARRIAGA: Second.

21 CHAIRMAN EDGAR: Motion and a second. Show Issue 32
22 approved. And that brings us to the end.

23 Staff, any further business? Seeing none, I want to
24 thank the staff for hanging in with us even though it has been
25 a long day, and we have concluded our business just after 5:00

1 o'clock. Thank you. We are adjourned.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

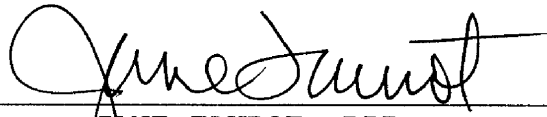
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5 I, JANE FAUROT, RPR, Chief, Office of Hearing
6 Reporter Services, FPSC Division of Commission Clerk and
7 Administrative Services, do hereby certify that the foregoing
8 proceeding was heard at the time and place herein stated.

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

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

19 DATED THIS 15th day of February, 2006.

20 

21 _____
22 JANE FAUROT, RPR
23 Official FPSC Hearings Reporter
24 FPSC Division of Commission Clerk and
25 Administrative Services
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