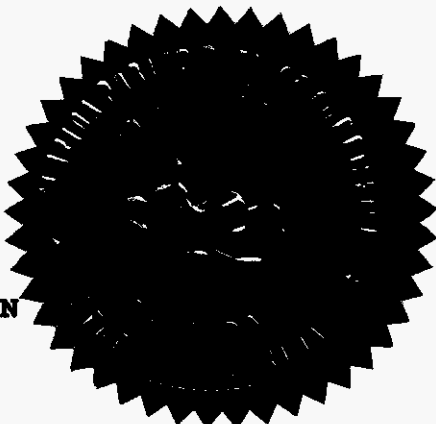


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :
Resolution of petition(s) :
to establish nondiscrimi- :
natory rates, terms, and :
conditions for intercon- :
nection involving local :
exchange companies and :
alternative local exchange :
companies pursuant to :
Section 364.162, F.S. :

DOCKET NO. 950985-TP



FIRST DAY - MORNING SESSION

VOLUME 1

Pages 1 through 169

PROCEEDINGS: HEARING
BEFORE: CHAIRMAN SUSAN F. CLARK
COMMISSIONER J. TERRY DEASON
COMMISSIONER JULIA L. JOHNSON
COMMISSIONER DIANE K. KIESLING
DATE: Monday, March 11, 1996
TIME: Commenced at 9:30 a.m.
PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida
REPORTED BY: JOY KELLY, CSR, RPR
Chief, Bureau of Reporting
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9 behalf of **Time Warner Communications.**

10 **J. JEFFRY WAHLEN**, MacFarlane Ausley Ferguson &
11 McMullen, 227 South Calhoun Street, Tallahassee, Florida
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13 **Central Telephone Company of Florida and United Telephone**
14 **Company of Florida.**

15 **DONNA CANZANO, SCOTT EDMONDS and TRACY**
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19 413-6199, appearing on behalf of the **Commission Staff.**

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P R O C E E D I N G S

(Hearing convened at 9:35 a.m.)

CHAIRMAN CLARK: Call the hearing to order.

Will you please read the notice?

MR. EDMONDS: Pursuant to notice, this time and place has been designated for a hearing in Docket No. 950985-TP.

CHAIRMAN CLARK: We'll take appearances.
Ms. Wilson.

MS. WILSON: Laura Wilson representing the Florida Cable Telecommunications Association, 310 North Monroe Street, Tallahassee, Florida 32301.

MR. CROSBY: Don Crosby. I'm the Southeast Regional Regulatory Counsel for Continental Cablevision, 7800 Belfort Parkway, Suite 270, Jacksonville, Florida 32256.

MR. GILLMAN: Commissioners, my name is Tony Gillman, One Tampa City Center, Post Office Box 110 Tampa, Florida. I'm here representing GTE Florida Incorporated.

And on my right is another attorney that's going to help try this case, Eric Edgington, from the same address.

MR. WAHLEN: Good morning, I'm Jeff Wahlen of the MacFarlane Ausley Law Firm, P. O. Box 391,

1 Tallahassee, Florida 32302. I'm appearing on behalf
2 of Central Telephone Company of Florida and United
3 Telephone Company of Florida. Also appearing with me
4 will be John P. Fons and Lee L. Willis of the same law
5 firm and same address.

6 MR. MELSON: Richard Melson of the law firm
7 Hopping Green Sams & Smith, P. O. Box 6526,
8 Tallahassee, appearing on behalf of MCI Metro Access
9 Transmission Services, Inc.

10 MS. DUNSON: Robin Dunson appearing on
11 behalf of AT&T Communications of the Southern States,
12 Inc., 1200 Peachtree Street, Room 4038, Atlanta,
13 Georgia 30309.

14 I'd also like to enter an appearance for
15 Michael W. Tye and Mark Logan from the law firm of
16 Bryant, Miller, and Olive, 201 South Monroe Street,
17 Suite 500, Tallahassee, Florida 32301.

18 MR. HORTON: Norman H. Horton, Jr. and Floyd
19 R. Self of the Messer, Caparello Law Firm, Post Office
20 Box 1876, Tallahassee, on behalf of McCaw
21 Communications of Florida, Inc. and its Florida
22 regional affiliates.

23 MR. RINDLER: Richard Rindler with the law
24 firm of Swidler & Berlin, 3000 K Street, N.W.,
25 Washington, D.C. 20008, appearing on behalf of

1 Metropolitan Fiber Systems of Florida, Inc.

2 MR. COHEN: Bob Cohen from the Pennington
3 Law Firm, P. O. Box 10095, Tallahassee 32302, here on
4 behalf of Time Warner AxS of Florida and Digital Media
5 Partners.

6 I'd also like to enter an appearance on
7 behalf of Sue Weiske, Senior Counsel for Time Warner
8 Communications, 160 Inverness Drive West, Englewood,
9 Colorado 80112.

10 MR. WIGGINS: Patrick K. Wiggins, law firm
11 of Wiggins & Villacorta, P. O. Box 1657, Tallahassee
12 32302 on behalf of Intermedia Communications of
13 Florida, Inc.

14 MR. EDMONDS: Donna Canzano, Scott Edmonds
15 and Tracy Hatch on behalf of the Commission Staff,
16 2540 Shumard Oak Boulevard, Tallahassee, Florida
17 32399.

18 CHAIRMAN CLARK: Thank you very much. I
19 understand we have some preliminary matters we need to
20 take up.

21 MS. CANZANO: That's correct. We've got
22 about five that I know of. First, Staff has a request
23 for official recognition which we've distributed to
24 the parties, the court reporters and the
25 Commissioners.

1 I believe some other parties have also
2 handed out a list.

3 MR. CROSBY: Yes, Madam Chairman.
4 Continental Cablevision has also handed out a list,
5 and I don't believe -- you don't have the list.

6 CHAIRMAN CLARK: Sure don't, Mr. Crosby.

7 MR. RINDLER: Madam Chairman, Metropolitan
8 Fiber Systems --

9 CHAIRMAN CLARK: I have that.

10 MR. CROSBY: We also ask that you take
11 official recognition of these decisions.

12 CHAIRMAN CLARK: Mr. Rindler, let me ask you
13 something. Are these all orders that you have listed
14 here?

15 MR. RINDLER: Yes, except for the last two
16 with respect to Florida, and also the statute at the
17 end, the Telecommunications Act of '96.

18 CHAIRMAN CLARK: Is it clear to the parties
19 what exactly -- what you are asking for with respect
20 to the PCB in the amendment?

21 MR. RINDLER: Madam Chairman, these are the
22 same documents that were recognized in connection with
23 the universal service proceeding.

24 CHAIRMAN CLARK: I'm sorry, you said these
25 were the same documents in the last proceeding --

1 MR. RINDLER: In the universal service
2 proceeding.

3 CHAIRMAN CLARK: Okay. What I would like to
4 do is label the Staff's list as Exhibit 1, label
5 Continental's list as Exhibit 2 and MFS' list as
6 Exhibit 3 so we will have some index of those
7 documents that we have taken official notice of. And
8 we will take official notice of all the documents
9 listed on each of those three exhibits.

10 (Exhibit Nos. 1 and 2 marked for
11 identification.)

12 MS. CANZANO: Thank you. Another
13 preliminary matter is that FCTA has filed a letter
14 notifying that they withdraw the testimony of their
15 witness, Mr. Cresse.

16 CHAIRMAN CLARK: It's not been entered, so
17 we'll acknowledge the fact that that prefiled
18 testimony has been withdrawn.

19 MS. CANZANO: The next preliminary matter is
20 that GTE and MFS have proposed stipulations
21 specifically regarding Issues 4 through 12 and 14.
22 Perhaps this might be better to do this after the oral
23 argument?

24 CHAIRMAN CLARK: All right.

25 And the issue of the subpoena between FCTA

1 and United/Centel has been resolved.

2 MR. WAHLEN: Yes, that's correct. We don't
3 think it's necessary to rule on our motion to quash.
4 Mr. Poag will be available to answer the questions
5 listed in the subpoena during his examination
6 tomorrow.

7 CHAIRMAN CLARK: Okay.

8 MS. WILSON: Chairman Clark, and I would
9 just add that FCTA has agreed to this on the
10 understanding that Mr. Poag has knowledge and
11 capability to testify as to these matters.

12 CHAIRMAN CLARK: Okay.

13 The Prehearing Officer set for oral argument
14 the matters that were set forth in Issue 15 -- is it
15 Issue 15?

16 MS. CANZANO: Yes.

17 CHAIRMAN CLARK: Okay.

18 MS. CANZANO: Also, I have one question on
19 that. The issue as it's phrased says: To what extent
20 are the nonpetitioning parties that actively
21 participate in this proceeding bound by the
22 Commission's decision in this docket as it relates to
23 United/Centel?

24 I just want to make it clear, is what the
25 Commission decides also the same as it affects GTE

1 Florida, and I would --

2 CHAIRMAN CLARK: Which is Issue 5 in the
3 GTE?

4 MS. CANZANO: Which is also -- it's the
5 same, Issue 15. I just think it should be broadened
6 to also include the petition as it affects GTE.

7 CHAIRMAN CLARK: Yes. But is it Issue 5 in
8 the GTE docket?

9 MS. CANZANO: I mean, it's the
10 interconnection and resale that are the two different
11 dockets. There are two different -- all the petitions
12 for the interconnection are with the different LECs,
13 United/Centel, and GTE.

14 COMMISSIONER DEASON: Did the issue numbers
15 in the Prehearing Order apply to both GTE and United,
16 unless they are broken out within the Prehearing
17 Order; is that correct?

18 MS. CANZANO: Well, I would assume so, but
19 the way the issue is phrased in the Prehearing Order
20 itself just says United/Centel. And I just --

21 COMMISSIONER DEASON: Yes, I agree that we
22 need to get that clarified.

23 MS. CANZANO: Okay.

24 COMMISSIONER DEASON: It's not a separate
25 issue for GTE and a separate issue for United within

1 the Prehearing Order.

2 MS. CANZANO: Correct. It only says
3 United/Centel in the Prehearing Order.

4 COMMISSIONER DEASON: Madam Chairman,
5 there's no other issue addressing this, other than 15.
6 And what Staff counsel is saying is that the exact
7 wording of 15 --

8 MS. CANZANO: I'm sorry, I cannot hear you.

9 COMMISSIONER DEASON: There's no issue in
10 the Prehearing Order, like 15, which addresses GTE.
11 The only issue is Issue 15. It needs to be orally
12 argued. And the way it's apparently worded,
13 technically it only applies to United. And the
14 question is should we also make it apply equally as
15 well to GTE?

16 MS. CANZANO: Exactly.

17 CHAIRMAN CLARK: The reason I guess I was
18 confused is the March 5th memo refers to the
19 Prehearing Officer ruled that the decision on the new
20 issue would be applicable to both Issue 15 in one
21 docket and Issue 5 in the other docket.

22 MS. CANZANO: And that's correct. And
23 Issue 5 in the other docket is the unbundling resale
24 docket.

25 CHAIRMAN CLARK: I've got you. All right,

1 thank you.

2 I understand that five minutes a side was
3 allotted. And who is going to be presenting argument,
4 and who is going to be going first?

5 MR. WAHLEN: Commissioner, my understanding
6 was that it was five minutes a party.

7 CHAIRMAN CLARK: A party?

8 COMMISSIONER DEASON: Madam Chairman, we had
9 difficulty determining who was on whose side. And so
10 we determined that it be five minutes per party. But
11 for those parties who did not necessarily need to take
12 up their five minutes, they were strongly encouraged
13 to acquiesce to someone else's argument if they could.

14 MR. GILLMAN: Commissioner Deason, GTE will
15 not take its entire five minutes, but would like to
16 make some comments.

17 CHAIRMAN CLARK: Mr. Wahlen -- just a
18 moment. (Pause)

19 Excuse me. If I heard correctly, you don't
20 need all of your five minutes; is that correct,
21 Mr. Gillman?

22 MR. GILLMAN: That is correct.

23 CHAIRMAN CLARK: But, Mr. Wahlen, you would
24 go first since it is your motion?

25 MR. WAHLEN: Yes, ma'am.

1 CHAIRMAN CLARK: All right. Who else is
2 presenting argument?

3 MS. WILSON: FCTA would concur in the
4 argument to be presented by MCI.

5 MR. CROSBY: Continental does not intend to
6 argue. We'll stand by our position as stated in the
7 Prehearing Order.

8 MR. MELSON: MCI intends to argue.

9 MS. DUNSON: AT&T will be presenting
10 arguments, but I don't anticipate it will take the
11 entire five minutes.

12 MR. HORTON: McCaw will not be making any
13 argument, but for the record let me -- since this
14 argument will be applicable in the 984 docket, McCaw
15 is not a party in 984, but LDDS World Com is, so those
16 arguments will be applicable there.

17 CHAIRMAN CLARK: Mr. Rindler.

18 MR. RINDLER: We don't intend to take any.

19 CHAIRMAN CLARK: You are not going to argue
20 this point?

21 MR. RINDLER: No.

22 CHAIRMAN CLARK: Mr. Cohen.

23 MR. COHEN: Time Warner will be joining in
24 the argument of MCI.

25 COMMISSIONER KIESLING: Push your button

1 again.

2 MR. COHEN: Excuse me. Time Warner will be
3 joining or concurring with the argument made by MCI
4 and will only argue to the extent certain points are
5 not covered by MCI, but would not expect to take the
6 full five minutes.

7 CHAIRMAN CLARK: Then it would be my
8 proposal that Mr. Wahlen you go first, and
9 Mr. Gillman, then MCI, AT&T, and Time Warner if you
10 need time.

11 Commissioner Deason, I have forgotten a
12 watch. Can you -- (laughter)

13 COMMISSIONER DEASON: I'll let you borrow
14 mine.

15 CHAIRMAN CLARK: Okay. Go ahead,
16 Mr. Wahlen.

17 MR. WAHLEN: Thank you, Chairman Clark. I
18 would like to reserve two of my minutes for rebuttal.

19 Our position is simple here, Commissioners.
20 The nonpetitioning parties who are participating in
21 this docket need to be obligated to pay the rates,
22 terms and conditions that this Commission sets for
23 interconnection for United and Centel. While Section
24 364.162 may contemplate negotiation and then
25 litigation, it does not contemplate litigation then

1 negotiation then litigation. One bite at the apple,
2 not two.

3 MCI Metro is an interesting case study. It
4 participated in the BellSouth portion of this docket
5 as a petitioner. It filed testimony, conducted
6 discovery, participated in the hearing, filed a brief,
7 did everything. In this phase of the proceeding, it
8 did not file a petition; it has filed testimony; it
9 has conducted discovery; it's going to present
10 witnesses; it's going to take a position on the
11 issues; we expect that it will file a brief. The only
12 difference between the two is that in the BellSouth
13 proceeding, it filed a petition.

14 Now, the failure or absence of a petition by
15 MCI Metro does not and should not allow MCI Metro
16 another bite at the apple. They are fully litigating
17 the issues in this case. They should be bound by the
18 decision that comes out of this case.

19 In fact, it's interesting that MCI Metro in
20 this case has two witnesses and two of the three
21 petitioning parties only have one. MCI Metro is fully
22 taking advantage of its opportunity to litigate these
23 issues, and it should be bound by the decision.

24 As noted in AT&T's response, the doctrine of
25 res judicata does apply in administrative proceedings.

1 However, contrary to their position, there's nothing
2 unfair or unjust about applying that doctrine in this
3 case. The application of that doctrine is simple. If
4 they litigate the issues in this case, if they present
5 testimony, if they take positions, they should be
6 bound by the decision.

7 Our position is simple, one bite of the
8 apple, not two. Negotiation and litigation maybe, but
9 not negotiation -- I'm sorry, not litigation,
10 negotiation, and then litigation. There needs to be
11 an end to litigation. And for the parties that are
12 participating in this part of the proceeding, that end
13 should come when the final order is issued. Thank
14 you.

15 CHAIRMAN CLARK: Thank you. You still have
16 three minutes, Mr. Wahlen. Mr. Gillman.

17 MR. GILLMAN: Thank you, Chairman Clark.
18 I'll be very brief because generally GTE concurs with
19 what Mr. Wahlen from Sprint-United has just stated. I
20 mean, we have struggled some with this particular
21 issue because it raises, I think, a new arrangement
22 for regulatory proceedings with the new legislation
23 providing the parties to negotiate individual
24 agreements and then bring their individual disputes to
25 the Commission. And from that point of view, I am not

1 here purporting, like, issues that are not being
2 litigated, such as the MFS agreement that has been
3 reached with GTE, that that would be binding on every
4 party to this agreement.

5 I feel under the statute that MCI could come
6 to us, and indeed has a duty to come to us, to attempt
7 to negotiate the appropriate interconnection
8 arrangements with GTE. Those may not be exactly like
9 the interconnection agreements that have been reached
10 with MFS. And, in fact, that is, I think, the beauty
11 of the statute that it does provide the parties some
12 flexibility as long as they are not acting in a
13 discriminatory fashion.

14 However, as Mr. Wahlen has stated, once a
15 party comes in as an intervenor and fully litigates an
16 issue, as MCI has done in this particular case, and
17 they are not successful in that issue, then they come
18 back and attempt to negotiate with GTE and then don't
19 agree on the issue that was decided in this case, they
20 shouldn't be allowed then to file a petition and
21 relitigate that specific issue, again against GTE.
22 Mr. Wahlen has stated the correct law, I believe,
23 under res judicata and collateral estoppel which is
24 applicable in administrative decisions.

25 If MCI Metro -- and I'm just picking on

1 them, but it really applies to any nonpetitioning
2 party -- if they had a full opportunity to litigate
3 the issue in this particular case against
4 Sprint-United and GTE, and they lose on that issue or
5 we lose on that issue, neither one of us should be
6 able to come back before this Commission again and
7 essentially -- and raise the same issue against the
8 same party before the same Commission at a later date.
9 From that standpoint they are bound by issues that
10 they litigate in this case. Thank you.

11 CHAIRMAN CLARK: Thank you, Mr. Gillman.
12 Mr. Melson.

13 MR. MELSON: Commissioners, MCI's position
14 is that we are not independently bound by the
15 decisions that the Commission renders in this docket
16 on the petitions of MFS, Continental and Time Warner.

17 As an introductory note, I don't believe the
18 issue of the binding effect of the decision is evenly
19 properly before you today. Res judicata and
20 collateral estoppel, which is essentially what Sprint
21 and GTE have argued, are affirmative defenses that
22 would typically be raised if and when MCI Metro came
23 back in with a petition of its own and the parties
24 attempted to determine at that point the extent to
25 which we were bound by the earlier decision.

1 Nevertheless, I'm going to deal today with the merits
2 of the argument.

3 We are dealing here with a very unique
4 statutory framework. It's a framework that gives each
5 party an obligation to negotiate. It gives each party
6 a right to come in once negotiations have failed and
7 seek redress from the Commission, and gives the
8 Commission an obligation in that proceeding to set
9 nondiscriminatory terms and conditions.

10 At this point, MCI has negotiated with GTE
11 and Sprint-United and Sprint-Centel but has not yet
12 reached an impasse and, therefore, does not feel it's
13 appropriate to bring a petition on our own at this
14 time.

15 On the other hand, we recognize it as a
16 practical matter, the Commission's decision in this
17 docket, just like the decision you made last week in
18 the Southern Bell docket, is going to set a framework
19 against which all subsequent negotiations may be
20 judged. For that reason, we feel that to protect our
21 interests, we need to be here in the first petition
22 even though our rights are not directly being
23 adjudicated.

24 I would point out to you that Chapter 120
25 recognizes two different types of parties. It

1 recognizes parties under 120.52, I believe it's A,
2 people whose substantial interests are being
3 determined by the proceeding. It also recognizes as
4 parties those whose substantial interests are
5 affected.

6 I submit to you that even though our
7 interests are not absolutely determined by this
8 proceeding, they are affected because the result of
9 this proceeding will presumably be the filing of a
10 tariff which sets out rates, terms, and conditions
11 that are available not only to the petitioning
12 parties, but to any other party.

13 MCI Metro has the right to take under that
14 tariff, pending the conclusion of its negotiations, or
15 it may determine it might choose to take under that
16 tariff forever. In any event, our interests are
17 affected by the outcome of the proceeding even if we
18 are not literally bound.

19 The doctrines of res judicata and collateral
20 estoppel essentially apply when identical issues are
21 being litigated. I submit to you that given the
22 statutory framework in Chapter 364, which anticipates
23 separate petitions by separate parties, that the
24 issues being litigated here are the issues of
25 appropriate terms and conditions for MFS, Time Warner

1 and Continental, and it is not until you get a
2 separate petition from MCI Metro that that issue is
3 being litigated. Thank you.

4 COMMISSIONER DEASON: Let me ask you a
5 question. Mr. Melson, did you participate in the
6 framing of the issues in this docket, this hearing as
7 we are going to conduct it in the next two days?

8 MR. MELSON: I participated in the framing
9 of Issues 1 through 14. Issue 15 was the issue that
10 Sprint put forth in the prehearing conference. And
11 those issues, you will notice, define ALEC to include
12 simply the three petitioning parties.

13 COMMISSIONER KIESLING: I have a question,
14 also. I'm still trying to look at standing and
15 substantial interest being affected. And it seems to
16 me this is one of those kinds of cases where the
17 dispute is entirely between the petitioning party and
18 the LEC that they are dealing with, or with whom
19 negotiations have broken down. And it seems to me
20 that there is a body of cases within administrative
21 law cases that suggests that when a dispute is
22 uniquely between two entities, that it's not
23 appropriate to allow intervenors because they are not
24 going to be bound by the outcome.

25 Are you familiar with that line of cases?

1 MR. MELSON: Without a specific case name,
2 I'm not familiar with it. That sounds like cases that
3 I generally have read. It seems to me that that line
4 of cases would not apply to a situation like this
5 where there will be a tariff at the end of the
6 proceeding.

7 If no tariff were to be filed and MCI had no
8 opportunity to take under the terms and conditions
9 that are established here, I think that line of cases
10 would apply; and I would agree with you.

11 But one of the issues in this case is should
12 the decision in this proceeding be incorporated in a
13 tariff, and I believe the parties are in general
14 agreement that, yes, it should. And once you overlay
15 that tariff law on top of the cases, there will be a
16 tariff out there which will be available to us. We
17 are affected by it just as directly as any other party
18 who takes under the tariff and, therefore, our
19 interests, we believe, are affected.

20 CHAIRMAN CLARK: Mr. Melson, I guess the
21 question I have is that you have the opportunity to
22 take under that tariff, but you are not required to
23 take under that tariff.

24 MR. MELSON: That's correct.

25 CHAIRMAN CLARK: And that's where I see the

1 notion of you being affected as falling apart, because
2 it is a tariff, but you don't have to live by -- you
3 don't have to live by the terms of the tariff. Maybe
4 United or GTE does. But you have an opportunity to
5 negotiate something different; and if you don't like
6 those negotiations, you likewise have an opportunity
7 to litigate it again. Another tariff will result, and
8 you can take under that tariff or the other tariff.
9 That's where it falls apart for me.

10 MR. MELSON: Okay. It seems to me that we
11 will have the right, but not the obligation to take
12 under the first tariff that's filed. To the extent
13 that we need to go ahead and get in business, that for
14 some period of time may be the only terms and
15 conditions available to us. Unless we are able to
16 persuade you in a subsequent proceeding that we are
17 different, it may be the only terms and conditions
18 that are ever available to us.

19 CHAIRMAN CLARK: But you will have that
20 opportunity, and then you will be bound by it.

21 I guess, wouldn't it be better to find out
22 now if we are going to tell you later on, you know,
23 you've already litigated this. It seems to me it's to
24 your benefit to know in advance, rather than have to
25 litigate this point later on, as to whether or not res

1 judicata or collateral estoppel apply.

2 MR. MELSON: Commissioner, my problem is
3 that we are dealing with a statute that does not
4 contemplate a rulemaking, it does not contemplate a
5 generic proceeding. I've said before and I'll say
6 again, I didn't write the statute, but it seems to me
7 that given the statutory framework, we are forced into
8 a situation where the Commission -- or the parties
9 have the right to bring their own petitions to the
10 Commission, and the Commission has the obligation to
11 entertain each of those independently.

12 Now, as a practical matter, I think the odds
13 are 90% that whatever decision comes out of this
14 proceeding is one MCI would never come back in and
15 seek to litigate again because we recognize the
16 practicalities. However, given the specific statutory
17 framework, I do not believe that we are bound as a
18 matter of law.

19 CHAIRMAN CLARK: I agree that you are not
20 bound in the sense that you can't negotiate. But I
21 would think if your negotiations fail, then it should
22 be the tariff that you've litigated that you would be
23 bound by. Because I see it as not just two bites of
24 the apple, but three. You get to litigate it here,
25 you get to negotiate it, and then you get to litigate

1 it again.

2 MR. MELSON: It sounds like you've adopted
3 Mr. Wahlen's argument.

4 CHAIRMAN CLARK: I've been persuaded by it.
5 Ms. Dunson.

6 MR. DUNBAR: Well, I'd have to agree with
7 what Mr. Melson said as an initial matter. But I'd
8 also like to add a different twist on it as far as
9 AT&T is concerned. When AT&T intervened in this
10 docket, we were an interexchange carrier. And to the
11 extent that AT&T needs to deliver traffic to its
12 customers through local exchange carriers, we will, in
13 effect, be bound by the decisions that this Commission
14 has reached.

15 So that is the principle reason why AT&T
16 intervened in this docket, and to the extent that we
17 need to enter into arrangements with local exchange
18 companies to deliver our traffic, we will be bound in
19 essence, so we intervened in order to protect our
20 interests in that respect. But other than that, I
21 would also like to, like I said, adopt what Mr. Melson
22 has said.

23 COMMISSIONER DEASON: Ms. Dunson, it's true
24 that AT&T has applied for and been granted an ALEC
25 certificate?

1 MS. DUNSON: Yes. AT&T has subsequently
2 filed for an ALEC certificate. This was after the
3 issues were framed in this case. This was after the
4 issue ID conference. We have not had an opportunity
5 under the statute to negotiate for our 60-day period,
6 so we don't feel that we should be bound by the
7 decisions in this case.

8 COMMISSIONER DEASON: And you have the
9 option of just withdrawing from this case then if you
10 do not want to be bound by it, if that's the
11 Commission's decision, correct.

12 MS. DUNSON: That is true.

13 CHAIRMAN CLARK: Mr. Horton, did you want to
14 say anything?

15 MR. HORTON: No, I have nothing to add.
16 Thank you.

17 CHAIRMAN CLARK: Mr. Cohen.

18 MR. COHEN: Thank you. I would like to
19 begin by responding a little bit to Commissioner
20 Kiesling's questions related to the line of cases on
21 standing and where there is a dispute that is uniquely
22 between the petitioning party and usually the agency,
23 or the two parties. Even in those type of cases -- an
24 example of some of those cases, and maybe a somewhat
25 different line from Commissioner Kiesling's cases

1 she's recalling, is a case involving the Department of
2 Environmental Protection where a developer wants a
3 permit to put in a dock or put in a marina or
4 something that is uniquely between that developer, who
5 controls that property, and the agency, in terms of
6 how the statutory process works.

7 However, when it comes time for the hearing
8 process and the public comment process, there is a
9 provision -- and it's a unique provision to some of
10 those statutes -- there's a provision which allows any
11 affected party to intervene in the proceedings. And
12 those are usually the parties like the Audubon
13 Society, the Sierra Club, the Florida Defenders of the
14 Environment, or other organizations that are
15 interested in issues that are certainly different from
16 just putting in the dock and the marina, but are
17 interested in issues that attack that project from all
18 sides, such as more people moving into the area, more
19 developments spreading out from the marina, which
20 isn't exactly the marina but might affect some
21 endangered or protected species. There are different
22 situations.

23 The significant point in this case is we
24 have a statute, and now a federal act, that provides
25 for this right to negotiate. We also know that this

1 Commission has always been interested in building a
2 complete and richly developed record that would
3 contemplate all issues arising now or that might arise
4 in the future so that while we know -- it is our
5 position that Time Warner and the other petitioning
6 and nonpetitioning parties should not be bound here --
7 but we know that the precedential effect of the
8 decisions made in this docket are going to carry
9 forward in a subsequent docket where we may be arguing
10 similar issues again. That's where res judicata comes
11 in to in advance of the decision being made by the
12 Commission in this docket say that we'll let you know
13 what our position is going to be so that you can
14 prepare down the road, or you can determine whether
15 you should withdraw this position, really flies in the
16 face of the whole doctrine of res judicata and
17 collateral estoppel. As Mr. Melson said, it comes
18 later. We have to petition later, and then you say,
19 well, wait a minute. You're raising the same issue
20 that has been considered by the Commission, you
21 provided testimony, you provided documentary evidence,
22 and now you are back in here arguing the same issue.
23 Sorry, we are going to be consistent in our
24 application of our interpretation of the rules and
25 statutes here, and we are going to rule for you the

1 same way as here.

2 CHAIRMAN CLARK: So I understand what you
3 are saying is that we can let the parties participate,
4 but then to the extent they come back in and cover the
5 same points, we can simply say, You participated in
6 that, and you are bound by those decisions.

7 MR. COHEN: Unless the parties have
8 different or new evidence at that time. Because this
9 is still a new and emerging area, there may be
10 something that happened over the next 6 to 12 or 18
11 months that would be brought to the Commission's
12 attention in the context of a hearing that might
13 change your mind.

14 CHAIRMAN CLARK: So what is the difference
15 between saying now you are bound by everything that
16 was litigated in this case, and acknowledging that at
17 this point. And then when they come in after the
18 negotiations have failed and they want to argue a new
19 point they can say it wasn't discussed in that,
20 therefore, we should be able to litigate that point
21 here. I don't see any difference.

22 MR. COHEN: The only difference is it's a
23 nuance more than a concrete difference --

24 CHAIRMAN CLARK: Okay.

25 MR. COHEN: -- is that when we say there may

1 be emerging and new conditions and evidence that will
2 come forth later on, we don't know that today. So
3 that is leap of faith or an anticipation on our part
4 that we are not really sure about. But because this
5 is a new area, we want to put all the issue before the
6 Commission. All the parties want to contribute to
7 this proceeding to put those issues before the
8 Commission so that an informed and complete decision
9 can be rendered by the Commission. But we want to
10 reserve the right.

11 Res judicata may apply at some point in the
12 future, and we may all be back here and have the
13 argument made, well, you are collaterally estopped
14 from raising the same argument because you put on the
15 same witnesses the last proceeding, you offered the
16 same testimony, and you haven't made any new point,
17 and you haven't convinced us to do anything
18 differently.

19 We know that in future negotiations, the
20 decision made in this proceeding will play a
21 significant role in those negotiations. Knowing how
22 the Commission has ruled previously is going to help
23 set the tenor of the negotiations and set the frame
24 work under which negotiations are conducted.

25 So it's a harsh remedy, I think, is what we

1 are presenting to. Cut us out of the proceeding or
2 make us bound by the proceeding when the law will make
3 us bound by the proceeding to the extent that we don't
4 give novel or different or better arguments at a
5 subsequent proceeding if one is ever held.

6 COMMISSIONER DEASON: Well, that's the
7 question I have. You say "better argument." Are you
8 saying that you should be able to litigate this
9 proceeding, and then when you see that there perhaps
10 is a gap in your position or your argument or your
11 testimony, then you'll know what areas you need to
12 bolster the next time you get a chance to litigate the
13 same issues.

14 MR. COHEN: When I say better or to bolster
15 the issues, I'm basing that more on as this
16 technology, as this develops, whether there are
17 different evidence or different facts that would come,
18 not a better one. We're not holding in our back
19 pocket an argument we won't use today.

20 CHAIRMAN CLARK: Changed circumstances.

21 MR. COHEN: Changed circumstances would be
22 better than my bad choice of words, "a better
23 argument."

24 COMMISSIONER DEASON: Well, if there are
25 truly changed circumstances, do you not have the right

1 under the statute to file a complaint with the
2 Commission saying what was either negotiated before or
3 else the tariff that was approved by the Commission
4 that we are bound to, circumstances have now changed,
5 we've approached the company about trying to reopen
6 this, they are not listening to us, and file a
7 complaint, are we not obligated to hear that complaint
8 if there truly are changed circumstances?

9 MR. COHEN: That would probably be an option
10 available to us. But in light of 364.162 which says
11 we get the opportunity to negotiate, and then if the
12 negotiations break down or don't result in something
13 we can live with, then we petition the Commission and
14 go forward.

15 COMMISSIONER KIESLING: And let me just say
16 that the line of cases that I'm thinking of are not
17 anything related to what you just brought up. They
18 are ones where they are uniquely between two parties,
19 such as agriculture cases where the agency is not a
20 party and is not a player but simply is -- or between
21 motor vehicle dealers where that agency is not a
22 player in the case but is simply the forum to which
23 they can go.

24 And my memory of those kinds of cases is
25 that there is no one who can intervene if they are not

1 going to be directly affected by the outcome. Not
2 just, you know, well, they may be affected at some
3 point in the future, but it has to be an effect that
4 is clearly contemplated under the controversy between
5 those two parties, to clarify that.

6 MR. COHEN: The difference, Commissioner
7 Kiesling, in, for example, the auto dealer dispute,
8 which, correct, the forum is the Department of Highway
9 Safety/Motor Vehicles. But two dealers disputing over
10 territorial rights or some other issue that is unique
11 to them and not to other, certainly not others in
12 different territories because they don't have any
13 standing to participate.

14 The difference here is we do have this
15 statute that says negotiate, then go to hearing, but
16 we still want to build this record, and build this
17 record as completely as possible on the first bite
18 here, so that we hope we don't need a second bite, if
19 that's the terminology of Mr. Wahlen and many have
20 adopted here. We are not looking to get two shots at
21 the same issue. We still know that we are going to be
22 bound by the statements we made and the evidence we
23 present in the next day or two.

24 COMMISSIONER JOHNSON: Could you explain to
25 me again how procedurally the res judicata and

1 collateral estoppel arguments would work if we were to
2 rule in your favor and you were to come back in a
3 subsequent proceeding?

4 What would the parties do, would they have
5 to look at your prefiled testimony? How would we
6 orchestrate that entire process?

7 MR. COHEN: I think the issue will be -- I
8 mean, since we don't know at what point -- I don't
9 know if I can say right now at what point we would
10 have to raise that. The petitions are generally
11 fairly skeletal or bare bones in nature, especially a
12 petition to intervene. And even though there are some
13 facts set forth in there, if the facts aren't directly
14 on point -- if we file the same petition the next time
15 around, allege the exact same facts as we did this
16 time around, then it's very easy for someone to file a
17 motion and say, "All right, your petition should be
18 dismissed, and the grounds for dismissal are res
19 judicata or collateral estoppel because that identical
20 issue you raised in the original proceeding, evidence
21 was heard in that original proceeding, and the issue
22 was determined in the original proceeding." So you
23 can't come back. And that's the real two bites of the
24 apple.

25 But if we come back the next time and say

1 we've negotiated, and because of reasons A, B, C and D
2 which were not present the first time around,
3 especially since weren't in a negotiating phase, but
4 the burden will be on the petitioning party to
5 demonstrate that the issues are different or are
6 significantly dissimilar to the issues decided today
7 so that we would not be bound by this decision.

8 COMMISSIONER JOHNSON: Now, the burden would
9 be on the petitioning party or would it be on the
10 complaint, or the other party?

11 MR. COHEN: To dismiss the petition, the
12 burden would be on the dismissing party, the moving
13 party to dismiss the petitions.

14 But then we would have to -- responding to
15 that motion to dismiss, we have to show that these
16 issues are not substantially similar to the issues
17 first argued.

18 COMMISSIONER JOHNSON: And one other
19 question, and it's kind of a follow-up on Commissioner
20 Kiesling's question, or perhaps I did not understand,
21 your argument as to why you are an affected party
22 under the law.

23 MR. COHEN: We are an affected --

24 COMMISSIONER JOHNSON: Or were you all
25 saying there are two different lines of cases and you

1 are looking at one as she's looking at the other, or
2 did she distinguish your argument?

3 MR. COHEN: Well, on the issue of standing,
4 what Commissioner Kiesling was referring to were cases
5 involving two parties whose dispute is unique to those
6 two parties. For example, if there are two automobile
7 dealers in Tallahassee who are fighting over the same
8 territory, an automobile dealer from Orlando or Tampa
9 or Jacksonville could not intervene in that proceeding
10 because they are in no way affected by that territory.
11 It's two territories that are up here in the
12 Tallahassee area, and they have no legal right to
13 intervene in those proceedings.

14 Our position is there's a big difference
15 here because we have a statute that says we are given
16 the right to negotiate our rates, terms and
17 conditions, and then if we can't reach a suitable
18 solution in that negotiation, we can then petition the
19 Commission and go forward in a subsequent proceeding.

20 COMMISSIONER JOHNSON: I still don't
21 understand how you are affected by this particular
22 decision and any tariff that we would file in this
23 particular case.

24 MR. COHEN: Well --

25 COMMISSIONER JOHNSON: And it's a similar

1 question for Mr. Melson because I thought that he kind
2 of implied that if a tariff were to be the result of
3 this proceeding that maybe although not on its face,
4 but there will be implications and that perhaps we
5 would use that as a model for the cases that follow.

6 MR. COHEN: Our problem with the specific
7 example of the tariff is we have not filed a complaint
8 against GTE on the tariff. So we can't come in today
9 and argue that that tariff is no good as it applies to
10 us. We may be bound by the evidence that's presented
11 in this hearing in terms of how that tariff may be
12 arrived at, but we haven't come through the
13 appropriate vehicle to directly challenge that tariff.
14 We are limited in terms of how we can challenge GTE.

15 COMMISSIONER JOHNSON: But you aren't bound
16 by the tariff?

17 MR. COHEN: It is our position we would not
18 be bound by the tariff.

19 COMMISSIONER JOHNSON: Well, if you are not
20 bound by the tariff, how are you impacted by the
21 decision?

22 MR. COHEN: Well, United-Sprint's argument
23 is obviously we are bound by it, whether that's the
24 argument today or whether that's going to be the
25 argument that's briefed in posthearing. But that will

1 be -- that's the essential argument here. Whether
2 it's a threshold argument prior to the hearing or an
3 argument for the briefs posthearing that, I think, is
4 the essence of what this proceeding is about.

5 COMMISSIONER JOHNSON: I was just trying to
6 get to the -- looking at the standing issue and how
7 you would be impacted by this particular decision in a
8 way that would make you an affected party. And that's
9 what I was kind of trying to tie to the tariff. And I thought
10 that perhaps Mr. Melson was making that particular
11 argument. And maybe that was his argument. So
12 perhaps you could help me on that point, Mr. Melson.

13 MR. MELSON: Commissioner Johnson, the point
14 I was trying to make is that if this proceeding
15 results in a tariff, then unless and until MCI either
16 conducts its own negotiations or comes back to the
17 Commission, that tariff will set the terms and
18 conditions under which we can take local
19 interconnection. So it will, for at least some period
20 of time, establish those terms and conditions. And it
21 may do that indefinitely if we choose not to come back
22 with a petition of our own.

23 CHAIRMAN CLARK: Mr. Melson, do you agree
24 that to the extent the issues are litigated in this
25 proceeding, that if you attempt to come in and

1 relitigate them after your negotiations fail, that you
2 will be bound by these decisions?

3 MR. MELSON: Commissioner Clark, to the
4 extent the four prongs of the res judicata test are
5 met, the answer is yes.

6 CHAIRMAN CLARK: What are those four prongs?

7 MR. MELSON: Identity of the things sued
8 for, identity of the cause of action, identity of the
9 parties, and identity of quality in the person for or
10 against whom the claim is made.

11 CHAIRMAN CLARK: Identity of what? The
12 quality --

13 MR. MELSON: The quality in the person for
14 or against whom the claim is made. That means a
15 person in representative capacity may not be bound in
16 an individual capacity.

17 CHAIRMAN CLARK: Do you think you will be
18 bound based on those prongs?

19 MR. MELSON: I think I have got a good
20 argument I will not be because the identity of the
21 things sued for is not the same. In one case it is
22 the statutory right of MFS and Time Warner to a
23 particular set of terms and conditions. And in the
24 second case it is MCI Metro's right which under the
25 statute need not be identical.

1 CHAIRMAN CLARK: But it seems to me you are
2 making inconsistent arguments then. If you are saying
3 it is between those two parties, then you are not
4 bound by it in the sense that you have to take it
5 under the tariff, and yet you are saying, we'll have
6 to take it under the tariff.

7 MR. MELSON: I'm saying the tariff will be
8 the only mechanism available to take it.

9 CHAIRMAN CLARK: Well, you could be
10 negotiating them now and get your own tariff.

11 MR. MELSON: We could be. But given the
12 time frames, if our negotiations fail, we file a
13 petition. It's scheduled for hearing. There's
14 discovery. There's everything. We are out 120 days
15 from the date we filed the petition. Whereas, this
16 proceeding will result in a tariff well within that
17 timeframe.

18 CHAIRMAN CLARK: Well, there's nothing that
19 precluded you from undertaking those negotiations some
20 time back.

21 MR. MELSON: And we have been in
22 negotiations. We simply have not got to the point of
23 impasse with these two companies.

24 Commissioner Clark, if I could take about 30
25 seconds on two other very brief points?

1 CHAIRMAN CLARK: Yes, go ahead.

2 MR. MELSON: One reason I would not like to
3 see a ruling today as to whether we are bound -- and I
4 believe that that's appropriately in the next
5 proceeding -- is that that matter would be tested on a
6 motion to dismiss our petition if MCI Metro ever comes
7 to you and files a petition. If there is a ruling in
8 this case that this decision will be res judicata, it
9 seems to me as soon as they move to dismiss my
10 complaint, that's granted and that's the end of the
11 inquiry.

12 As a second point, as a very practical
13 matter, if you rule today that I'm bound and I'm happy
14 with the decision, or I think I'm happy with the
15 decision, I may, nevertheless, have to try to appeal
16 to get an appellate court to tell me I'm not bound to
17 guard against the possibility that we get six months
18 down the road, circumstances have changed, and without
19 upsetting your res judicata decision, we might be
20 bound.

21 CHAIRMAN CLARK: So in the interest of
22 judicial economy, we can simply not decide the issue
23 now. And then this decision can go forward without
24 any appeal as to whether or not you can be bound and
25 then that gets litigated when you try to file a case.

1 MR. MELSON: It's litigated if and when we
2 try to file a case. And we assume the risk that our
3 participation in this proceeding will bind us in the
4 future.

5 CHAIRMAN CLARK: Okay.

6 COMMISSIONER KIESLING: Isn't there also a
7 third option which is to determine that intervention
8 was not improvidently granted and dismiss you since
9 you aren't really affected by this case, if we were to
10 decide that you are not?

11 MR. MELSON: First, I believe I am
12 substantially affected for the reasons just given.

13 COMMISSIONER KIESLING: I understand.

14 MR. MELSON: Second, I had understood the
15 ruling at the prehearing conference that we were
16 granted standing, and that the only question today
17 would be the issue of whether, and the extent to which
18 we were bound. And I'm not aware that anybody has
19 asked for reconsideration of that ruling. I assume
20 the Commission could reconsider on its own motion, but
21 that was not what I understood we were about here
22 today.

23 COMMISSIONER KIESLING: All right.

24 CHAIRMAN CLARK: Mr. Wahlen, you reserved
25 some time.

1 MR. WAHLEN: I'm not sure. Did Ms. Wilson
2 indicate an interest in argument?

3 CHAIRMAN CLARK: I thought she agreed with
4 MCI's argument.

5 MR. WAHLEN: I apologize. I have several
6 points I would like to make, and I'm going to ask
7 Mr. Fons to pass out a couple of things while I'm at
8 it.

9 I have a lot of analogies bubbling around in
10 my mind, and I will try to keep them to a minimum.
11 But the legal procedure that Mr. Melson and Mr. Cohen
12 are setting up is in many respects similar to a
13 schoolyard fight. You two hold him and I'll hit him
14 while he can't fight back.

15 I mean, what's going on here is that one
16 ALEC has filed a petition. The rest pile on and
17 decide they would like to participate and try and get
18 the tariff the way they like it. And then if they
19 don't like it, they can go in for a shot on their own,
20 and that is simply not appropriate.

21 CHAIRMAN CLARK: Well, Mr. Wahlen, what if
22 they take it at their own risk. And to the extent
23 that they have litigated it, you can file a motion to
24 dismiss when they do file it.

25 MR. WAHLEN: Well, I would suggest that we

1 need a little certainty here. The negotiation process
2 needs certainty. It's not clear to me that in a
3 subsequent proceeding that would properly be the
4 subject of a motion to dismiss because there would be
5 factual issues about whether or not they're raising
6 new issues whether their issues are within the
7 confines of the original issues that were litigated.

8 CHAIRMAN CLARK: That will always be the
9 debate.

10 MR. WAHLEN: That's correct. And that's why
11 we think it's important at this point to go ahead and
12 decide that they are bound by these issues. That way
13 the negotiations can proceed with the resolution of
14 this case as a given. Does that make sense?

15 CHAIRMAN CLARK: No. Because you'll always
16 have a debate as to whether or not that particular
17 issue was, in fact, litigated.

18 MR. WAHLEN: And that's our whole point on
19 the need --

20 CHAIRMAN CLARK: Even if we say you are
21 bound by it now, and they come in later. I don't see
22 you as being in a different posture if you are saying,
23 yes, it was covered, or if you raise res judicata and
24 say it was covered.

25 MR. WAHLEN: We will be in a much better

1 posture because there will be an order from the
2 Commission that says that they are bound. If there
3 isn't an order from the Commission that says they're
4 bound, that will be open for discussion again, and we
5 don't think that is consistent with efficiency.

6 What they want to do is have it both ways.
7 They want to be able to litigate the tariff, and then
8 if they don't like the tariff, not be bound by it.

9 The cases that I've passed out -- I was not
10 going to get into standing, but since Commissioner
11 Kiesling and Mr. Cohen raised the issues, are two
12 cases which clearly address the issue of standing.
13 And I think the matters discussed in them are
14 particularly relevant for AT&T and FCTA. Not only do
15 you have to allege standing, but you have to prove
16 standing. You have to come forth and show how you are
17 going to be affected by the decision in this case.

18 FCTA does not have any testimony. It has
19 withdrawn its witness, and it has not shown how it's
20 going to be bound by the decision in this case.

21 AT&T has come in here a little bit like a
22 Trojan horse. They came in, rolled in as an IXC,
23 saying, "We want to protect our interests as an IXC."
24 They filed testimony which talks generally about local
25 interconnection but doesn't discuss their

1 participation or how their interest as an IXC will be
2 affected. And then all of a sudden out pops an ALEC.
3 And they are wanting to take the position that they're
4 not bound by the result in this case. They get to
5 take the tariff or not litigate if they want or not,
6 and that's just simply inconsistent.

7 It's a pretty simple concept. If they want
8 to negotiate, they should be allowed to negotiate.
9 They should not negotiate through litigation, which is
10 what they are doing here.

11 We are not trying to deprive anyone of their
12 right to negotiate. We did not invite MCI Metro into
13 this party, nor did we invite the FCTA or AT&T or
14 McCaw. Now, they are here. They have taken positions
15 on the issues. All we are asking is the Commission
16 determine that they be bound by those issues. If they
17 are not bound by those issues, they do not need to
18 participate in this proceeding.

19 COMMISSIONER JOHNSON: Could you explain to
20 me once again why it would be proper for to us make
21 that determination at this point?

22 MR. WAHLEN: The reason we need to make that
23 determination at this point is so that the parties can
24 leave this proceeding with some certainty about how
25 things will go in the future. We need to know whether

1 or not we have to negotiate with MCI Metro on things
2 that were addressed in this proceeding.

3 CHAIRMAN CLARK: Mr. Wahlen, that's a little
4 different than I heard what you were saying. Are you
5 saying that if they participate here they may not come
6 to you and negotiate a different interconnection rate?

7 MR. WAHLEN: No, that's not true. If they
8 can come in during negotiations and show changed
9 circumstances or something along those lines --

10 CHAIRMAN CLARK: Now, wait a minute. You
11 are saying that they have lost their right to
12 negotiate with you by participating in this hearing?

13 MR. WAHLEN: I think there is a strong
14 argument that can be made to that effect.

15 CHAIRMAN CLARK: Well, I didn't understand
16 that as your position.

17 MR. WAHLEN: Well, if I've confused you, I'm
18 sorry. They are making the argument that we are
19 somehow trying to deprive them of their right to
20 negotiate. Our point is this: They haven't exercised
21 their right to negotiate, but they are instead
22 exercising their right to litigate. They are taking
23 things out of order. If they want the right to
24 negotiate, they should negotiate. And if those
25 negotiations fail, then they should litigate.

1 CHAIRMAN CLARK: I guess then that your view
2 is they should not have been granted standing in this
3 case?

4 MR. WAHLEN: That's correct.

5 CHAIRMAN CLARK: Did you make a motion that
6 they not be granted standing?

7 MR. WAHLEN: In our motion on parties and
8 issues we asked for the Commission to dismiss them if
9 they are not going to be bound by this case.

10 CHAIRMAN CLARK: Okay.

11 COMMISSIONER JOHNSON: But was it on -- was
12 it a standing issue that you raised?

13 MR. WAHLEN: Yes.

14 COMMISSIONER JOHNSON: Oh, it was.

15 MR. WAHLEN: We raised standing. We cited
16 the Agrico case; we cited all of the cases that are
17 the progeny of Agrico. They are the same cases that
18 are cited in the recommended order in the Concerned
19 Citizens of Orange Lake, the decision we handed out.
20 And I think it's pretty clear, if they are going to be
21 bound by the decision, then they have standing. If
22 they are not going to be bound by the decision, then
23 they don't have standing. They don't need to
24 participate.

25 Thank you very much.

1 COMMISSIONER DEASON: Let me say that was
2 before the Prehearing Officer. And not knowing
3 whether they were going to be bound or not, I couldn't
4 say they very well didn't have standing, kind of the
5 chicken-or-the-egg situation, which comes first.

6 MR. WAHLEN: That's correct.

7 CHAIRMAN CLARK: Now, Staff, what were we
8 supposed to do now? Were we supposed to make a ruling
9 on the issue?

10 COMMISSIONER DEASON: Let me say that I
11 expressed, I guess, my own personal belief and
12 expressed to the parties, I think it would probably be
13 in their best interest as well to know what our
14 predisposition, our ruling was going to be, so that
15 if they want to withdraw they will have that
16 opportunity. That they would not find subsequent
17 to -- after participating that then they are bound
18 when they may have wanted to make a decision to simply
19 withdraw and not have that risk hanging over their
20 head, so to speak.

21 What I hear Mr. Melson saying is he wants
22 the risk. He wants to participate and then he'll
23 litigate that at that time.

24 I hear Mr. Wahlen saying that no, there
25 needs to be some certainty in this process because it

1 could affect the negotiations, if there are going to
2 be negotiations.

3 Let me say that I don't think that we can
4 rule here today to deny the parties their statutory
5 right to negotiate. That even if we ruled that they
6 are bound, they still have the right to negotiate. It
7 may hamper their negotiations some, I don't know,
8 depending on the perspective. But I think it needs to
9 be their choice whether they are going to participate
10 or not participate, and we need to give them as much
11 guidance as we can so they'll know what their ultimate
12 position is probably going to be before this
13 Commission.

14 That's why I indicated that to the extent it
15 would be possible, it may be in everyone's best
16 interest, even the Commission as well from an
17 efficiency standpoint, to let everyone know where we
18 think they stand so everyone can judge themselves and
19 act accordingly.

20 COMMISSIONER JOHNSON: Did Staff have
21 anything?

22 MR. HATCH: Let me add a couple of things
23 before you get to a decision.

24 I think the one thing that nobody has really
25 talked about here today, and I think that complicates

1 everything, is that not only does Chapter 364 give
2 everybody the right to enter into the negotiations and
3 to seek a resolution individually and then get a
4 resolution from the Commission, but it also imposes
5 upon the Commission the obligation for
6 nondiscriminatory rates, and that is the most
7 complicating factor here.

8 Because to suggest that they be bound by
9 this decision deprives them ultimately of their right
10 to seek an individual Commission resolution, however
11 their negotiations bear out. And yet at the same time
12 to sit on the sidelines and accept your opportunity to
13 negotiate and litigate later is to watch the policy
14 formulations made, and you have no say in them, and
15 every time you make a decision in the context of
16 attempting to formulate nondiscriminatory rates, you
17 literally drive the boat as to -- and narrow the
18 parameters as to what they can ultimately negotiate.

19 And while it is not efficient and while it
20 makes it very complicated, I think ultimately in order
21 to reconcile their standing in terms of a decision
22 coming out of here that may, or will, affect their
23 substantial interests in terms of a policy
24 determination, their ability to negotiate and come to
25 an individual customized arrangement between the two,

1 in order to reconcile those I think you end up with
2 essentially two bites. I don't see how you can
3 reconcile those two without it.

4 CHAIRMAN CLARK: Well, Mr. Hatch, would you
5 agree that once they go to negotiate and if those
6 negotiations fail, does res judicata apply to the
7 extent they raise the same issues in their litigation
8 before the Commission that were raised in this
9 proceeding?

10 MR. HATCH: Res judicata in the
11 administrative context is a very difficult thing
12 simply because -- it's like the old adage "Everything
13 in regulation is etched in Jello." Nothing is ever
14 permanent because regulation, in regulating an
15 industry, is a dynamic thing. It's not like you come
16 into circuit court and you say you owe me money and
17 you win or lose, and you can't come back and sue on
18 the same debt and get another recovery. That's where
19 res judicata comes in. But in terms of a dynamic
20 industry like telecommunications, it doesn't work that
21 way.

22 CHAIRMAN CLARK: What I hear you suggesting
23 is to the extent there are changed circumstances they
24 can come back in. I would agree with that. But I
25 also think the parties who are bound by this, the ones

1 who petitioned, can come in under changed
2 circumstances.

3 MR. HATCH: I'm not sure res judicata in its
4 pure form applies. But let me also suggest to you
5 that when they come in again, they have an
6 extraordinarily tough road to hoe to convince you that
7 the policy determination you made before should be
8 different. There's an inertia to these decisions.
9 And so in a sense there's a pragmatic res judicata if
10 not a pure legal one.

11 CHAIRMAN CLARK: Any other questions,
12 Commissioners?

13 To the extent you want a suggestion as to
14 now how to proceed, I'm more persuaded by Mr. Melson's
15 view that perhaps it is not right to determine whether
16 res judicata follows and that, perhaps, should be done
17 at a later date.

18 Now, I understand the uncertainty that that
19 may create for some folks, but at this time this
20 industry is nothing but uncertainty at this point. So
21 I'm not -- incrementally it makes much different.

22 COMMISSIONER JOHNSON: Mr. Hatch, I have a
23 question for you because I was somewhat persuaded by
24 the arguments of Time Warner and Mr. Melson with
25 respect to whether or not the time is right to

1 determine the res judicata issues.

2 But then I hear you all saying res judicata
3 is not going to apply. That concerns me. Will they,
4 indeed, have the opportunity to argue the same issues,
5 put on the same witnesses?

6 MR. HATCH: The line of res judicata in an
7 administrative context really deals with -- and it
8 really does center around the fact of changed
9 circumstances. You cannot go back to identical facts,
10 identical witnesses, identical issues in a single
11 point in time and relitigate the same thing.

12 CHAIRMAN CLARK: Which is the same standard
13 that will be applied to the people who have petitioned
14 in this case.

15 MR. HATCH: I don't dispute that. And in a
16 sense, it centers around that. But between now and
17 the end of the month facts for every company in this
18 room are going to change. And so, in a sense,
19 relitigating the issue doesn't answer the question
20 because you'll have potentially new facts between now
21 and the end of the month, even though the issue is
22 exactly the same and the parties are exactly the same.

23 CHAIRMAN CLARK: Then why should we even
24 hear the case? Because if the facts are going to
25 change by the end of the month, even the parties who

1 are the real parties are going to be able to come in
2 and say "changed circumstances" and do it over again.

3 MR. HATCH: That's just true in the nature
4 of regulation. When you make any decision in
5 regulation, that's a slice in time. In a classic rate
6 case it's exactly the same notion.

7 CHAIRMAN CLARK: Commissioners, it's
8 somewhat -- I guess to some extent I'm inclined to
9 adopt the view that this is not an issue that we need
10 to decide now. But I would note by the very fact that
11 the parties who have alleged their substantial
12 interests are affected, they are, in effect, saying
13 they are going to be bound by what is litigated and
14 what is decided in this case. And that when -- when
15 they have negotiations and they can't reach a decision
16 and they come to us, to the extent it has been
17 litigated and brought up in this case, I think you're
18 going to be bound by it, but I would agree that we
19 don't have to decide it at this point.

20 COMMISSIONER DEASON: I think that raises a
21 more fundamental question is what Commissioner
22 Kiesling alluded to early on, and that is if they are
23 not willing to sit here today and accept the fact,
24 either by their own acquiescence or a ruling from this
25 Commission, that they are bound, then do they have

1 standing?

2 CHAIRMAN CLARK: That's right. I agree with
3 that. In effect they said they have standing. And to
4 that extent they are acknowledging their substantial
5 interests are affected, and to the extent if their
6 negotiations fail and they come in, then if they have
7 been litigated and they were part of this case, I
8 believe you're going to be bound by that.

9 COMMISSIONER DEASON: I'm willing to say
10 that in an order and not just say we'll defer the
11 issue.

12 CHAIRMAN CLARK: I guess I was thinking
13 about that and trying to think what does it gain you?

14 I think the point that will be argued at
15 that time will be the same thing: Whether or not it
16 was, in fact, litigated. And I don't see that we
17 gained anything by saying you're going to be bound by
18 it one way or the other. The argument is still going
19 to be whether it was part of the case.

20 COMMISSIONER DEASON: See, I think there's
21 an opportunity -- not that anyone in this room would
22 ever do -- but there's an opportunity for gaming in
23 that you put on your best case here and you say,
24 "Well, they really shot holes in this argument X so
25 I'm going to get a -- hire a new witness and I'm going

1 to present X but I'm going to call it Y and modify it
2 a little bit. I'm going to take my next shot." Is
3 that fair? I don't think it is.

4 CHAIRMAN CLARK: I think to some extent that
5 difficulty was presented to us by the legislature and
6 how they set this thing up. And it's just my view if
7 and when they come in later on they will have to
8 demonstrate that it is changed circumstances, and not
9 something they could raise before and not something
10 that should have been part of what was litigated
11 before, which is the same thing that anyone else who
12 is actually petitioning the party will have to show.

13 CHAIRMAN CLARK: To make it clear where
14 everyone is, I'm leaning more toward Commissioner
15 Deason's position, which I have some concern leaves us
16 in what may be a two-two split.

17 CHAIRMAN CLARK: So?

18 COMMISSIONER KIESLING: So what do we do?

19 COMMISSIONER JOHNSON: It is two-two.

20 CHAIRMAN CLARK: I am expecting Commissioner
21 Garcia to arrive at some point. His earlier plane was
22 cancelled. And it would be my suggestion that we can
23 go forward, because our first witnesses are not -- Mr.
24 Melson -- let me just be clear. This pertains to --
25 who are the petitioning parties in this case?

1 MR. HATCH: You have a potentially
2 complicated scenario in the absence of a decision
3 because you have parties here wearing two hats: They
4 are petitioners vis-a-vis one company and intervenors
5 as another, going forward with a common set of
6 testimony so it becomes very problematic to proceed
7 without any kind of a decision.

8 MR. CROSBY: Madam Chairman, it's a little
9 more complicated than that because some of us are
10 wearing hats not of our choosing.

11 I interpret the Prehearing Officer's ruling
12 as expressed in the Prehearing Order as making
13 nonpetitioning parties intervenors. And we requested
14 in our position on this Issue 15 that if we were
15 unintentionally granted intervenor status, we would
16 like to be excused from that with respect to GTE only.

17 CHAIRMAN CLARK: So you will not even be
18 participating in the case as it applies to GTE?

19 MR. CROSBY: Yes, ma'am.

20 COMMISSIONER DEASON: I think it's only fair
21 to the parties to put them on notice if they choose to
22 be characterized in whatever manner they want to be
23 characterized, they should have that choice.

24 MR. CROSBY: Thank you. Thank you.

25 MR. GILLMAN: Chairman Clark, just while

1 we're on this, MFS is the only party petitioning
2 against GTE. I believe everyone else, except for
3 Continental, has sought or been granted intervention
4 in our proceeding. But MFS is the only petitioning
5 party. So primarily Time Warner and FCTA have not
6 petitioned.

7 CHAIRMAN CLARK: Let me do one thing so we
8 can clarify that. We have been discussing it but we
9 have no motion. And it may be well to get a motion so
10 that we can clarify that, in fact, we can't resolve
11 this.

12 COMMISSIONER KIESLING: I'll be happy to
13 throw one out, see if I can pick up a second. I move
14 that we make a determination that intervenors who
15 fully litigate in this proceeding are bound by the
16 results and will be subject to a motion to dismiss on
17 res judicata grounds if they file a petition -- this
18 is getting too long -- if they file a future petition
19 and do not show changed circumstances. Does that make
20 any sense?

21 COMMISSIONER JOHNSON: I'm a little
22 confused? Because that was -- yeah, I am a little
23 confused.

24 CHAIRMAN CLARK: I think that's the
25 difficulty.

1 COMMISSIONER KIESLING: I'm saying they are
2 bound.

3 CHAIRMAN CLARK: To the extent they are
4 subject to a motion to dismiss on res judicata
5 grounds. I agree with that. They can do that. But
6 are you making a decision now that they're bound?

7 COMMISSIONER KIESLING: Yes.

8 CHAIRMAN CLARK: Or will you make the
9 decision when the petition comes in and the motion
10 comes in? I think that illustrates why you have to
11 wait for that.

12 COMMISSIONER KIESLING: To me that
13 illustrates why you have to go forward. I think they
14 should be bound. But I don't feel that I can, in this
15 proceeding, give an advisory opinion about a petition
16 that hasn't even been filed yet. They always have a
17 right to file a petition.

18 CHAIRMAN CLARK: And at that time you
19 determine whether or not there was identity --

20 COMMISSIONER KIESLING: Right. Or changed
21 circumstances.

22 CHAIRMAN CLARK: Right.

23 COMMISSIONER KIESLING: As for preliminary
24 purposes as of this case, my view is everybody is
25 bound. Everybody who litigates in this one is bound

1 by the outcome.

2 CHAIRMAN CLARK: Let me see it if we can get
3 at it a different way. Maybe we can all agree to it.

4 COMMISSIONER JOHNSON: Because we're saying
5 close to the same thing.

6 CHAIRMAN CLARK: Do we want to affirm the
7 Prehearing Officer's determination that they be
8 granted intervenor status?

9 COMMISSIONER KIESLING: That's not before
10 us. That's my concern.

11 CHAIRMAN CLARK: I think to the extent
12 that -- to me they go hand and hand because if you're
13 going to say they are bound then you're saying their
14 substantial interests are affected.

15 COMMISSIONER KIESLING: I'm back at the
16 point where I don't think they have standing. I don't
17 think their substantial interests are affected other
18 than in a speculative way.

19 COMMISSIONER JOHNSON: So then they can't be
20 bound. They need to be dismissed.

21 COMMISSIONER KIESLING: That would be my
22 view. But I thought I understood that was not
23 properly raised by a motion to dismiss, so that I
24 couldn't do that.

25 COMMISSIONER DEASON: It was raised and I

1 ruled upon it.

2 MR. WAHLEN: Right.

3 COMMISSIONER DEASON: There's not been
4 reconsideration of that. The Commission could take
5 that up on its own motion. And that's fine with me if
6 you choose to do that.

7 MR. WAHLEN: And if it would help move
8 things along, I would be glad to make an oral motion
9 to reconsider that --

10 COMMISSIONER JOHNSON: You can't.

11 MR. WAHLEN: I don't think the time for
12 reconsideration has passed.

13 COMMISSIONER KIESLING: There's no such
14 thing as reconsideration in a Prehearing Order in the
15 ordinary course of events. I mean, is there?

16 CHAIRMAN CLARK: Yes. Always.

17 MR. WAHLEN: The Prehearing Order was issued
18 last Friday and certainly the time for --

19 COMMISSIONER JOHNSON: Friday past?

20 MR. WAHLEN: -- for revisiting this has not
21 passed.

22 The fundamental point is that if they are
23 not going to be bound by this decision, they don't
24 have standing. FCTA is not putting on any evidence
25 that shows it's affected by this decision. AT&T is

1 not putting on any evidence that shows how it's
2 affected by this decision.

3 CHAIRMAN CLARK: Mr. Wahlen, what you're
4 saying is by virtue of the fact that they are granted
5 intervenor standing you have the certainty you need.

6 MR. WAHLEN: If the decision is that they
7 are intervenors and going to be bound by the decision,
8 we get the certainty we need. But if they are not
9 going to be bound by the decision, they don't need to
10 be intervenors. They don't have standing.

11 COMMISSIONER JOHNSON: If we allow them
12 status as intervenors, then aren't we, in fact, saying
13 that to the extent that there are issues that are
14 litigated here and they try to raise those issues,
15 those same issues later, they are bound because they
16 are affected by --

17 CHAIRMAN CLARK: They will be subject to a
18 motion to dismiss on res judicata. How about that
19 motion?

20 COMMISSIONER JOHNSON: Oh, boy.

21 COMMISSIONER KIESLING: Could you repeat it
22 again?

23 COMMISSIONER JOHNSON: No. (Laughter)

24 CHAIRMAN CLARK: I'll tell you what, let's
25 take a ten-minute break. It will give me time to find

1 out what the status of Commissioner Garcia is. It may
2 give you all time to think about it. We'll come back
3 here at 10 after 11.

4 (Brief recess taken.)

5

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6 CHAIRMAN CLARK: We'll call the proceeding
7 back to order.

8 Commissioners, we need to try and resolve
9 this issue. Commissioner Garcia is on a flight that
10 we hope there get here at 12:20. But it would be well
11 to try and resolve this so we can move on.

12 Did anyone work on any language? Let me see
13 if this captures a sense that we can all agree on.

14 I'm not sure if -- I guess we can put this
15 by way of being our decision on Issue 15.

16 "By virtue of alleging their substantial
17 interests are affected by this proceeding, and being
18 granted intervenor status, the intervenor subject any
19 future petition they may file before this Commission
20 to set interconnection rates as between them and
21 United/Centel and GTE Florida," if that's the correct
22 nomenclature, "to a motion to dismiss based on res
23 judicata as well as any other appropriate grounds for
24 a motion to dismiss."

25 COMMISSIONER DEASON: Let me tell you the

1 problem I have with that.

2 I think the burden should be on the company,
3 the ALEC, which has been granted intervenor status and
4 who chooses to fully participate in this proceeding,
5 to have to affirmatively show at the very beginning if
6 they negotiate and those negotiations fail and they
7 choose to file a petition, why circumstances are so
8 different that this Commission should even entertain
9 that petition from the very beginning, instead of
10 putting the burden on the LEC to analyze that petition
11 and whatever is filed with it, and then to come
12 forward and have to demonstrate why it should be
13 dismissed.

14 CHAIRMAN CLARK: Let me see. I'm not sure
15 that that -- you're saying that in their original
16 petition they should have to say that they're filing
17 this petition because there are changed circumstances
18 from what was in the other case.

19 COMMISSIONER KIESLING: Yes. And have to
20 affirmatively show what those changed circumstances
21 are and why this Commission should entertain that
22 petition. That's what I would prefer. I'm not saying
23 it has to be that way.

24 CHAIRMAN CLARK: My position is that's what
25 they are going to have to show anyway, and I guess

1 it's a matter of which comes first, if they have to
2 file it in the original petition or if the LEC comes
3 in and says this issue was litigated.

4 I agree with you that it will -- I think all
5 the ALEC will have to do is come in and say, "Our
6 negotiations failed, therefore, we want
7 interconnection rates set." And once you get the
8 motion to dismiss, that you would have the burden of
9 shifting --

10 COMMISSIONER DEASON: Interconnection rates
11 would have been set and there would be rates out there
12 that we would otherwise be saying they are bound to.
13 So we'd already done our job. We would be finished.
14 Unless there's some significantly different justice
15 calls forth that we have got to consider their
16 petition.

17 CHAIRMAN CLARK: My concern is you
18 effectively cut off the negotiation to some extent.
19 And I think you've got to allow that negotiation to go
20 forward just trying to reconcile what's in the
21 statute.

22 COMMISSIONER DEASON: Are you closing off
23 negotiation by letting them participate in this docket
24 to get that tariff that's going to be filed as a
25 result of this docket structured to the point to where

1 it's going to put them in a favorable position, or
2 perhaps in such a position that the negotiations that
3 are subsequent to that are going to be unfair to the
4 LEC.

5 CHAIRMAN CLARK: I wasn't terming it in
6 terms of unfair. I think the fact that we've put
7 something out there is going to affect parties'
8 positions both favorably and unfavorably, presumably.
9 But it seems to me that they still -- attempting to
10 reconcile the fact that they still have the
11 opportunity to negotiate, and the statute says if
12 those negotiations fail -- I still think in order to
13 give them the opportunity, we have to allow them to
14 file a petition. But I think that petition is
15 correctly subject to a motion that you dismiss based
16 on the fact that they're relitigating what was
17 litigated here. And by virtue of becoming an
18 intervenor they are bound by that.

19 COMMISSIONER KIESLING: I see it just a hair
20 differently. I would prefer to find that everyone who
21 fully litigates in this proceeding is bound by the
22 results of this proceeding. And then if -- I mean
23 it's a principle of law. We can't change it. That if
24 there are changed circumstances, they can come back in
25 and file a petition and prove that. But that's simply

1 a principle of law. It has nothing to do with the
2 decision that we make.

3 CHAIRMAN CLARK: I think that's my point.

4 COMMISSIONER KIESLING: That's why I would
5 keep it simple and just say anybody who litigates in
6 this case is bound by the outcome.

7 COMMISSIONER DEASON: I think that's
8 consistent with my argument, it puts the burden on
9 them to come forward and demonstrate what changed
10 circumstances there are and they have that burden at
11 the very beginning when they file their petition
12 subsequent to failed negotiations.

13 COMMISSIONER JOHNSON: But if we bind them
14 in this decision, aren't we, in essence, taking away
15 their right to negotiate?

16 COMMISSIONER KIESLING: No, I don't think we
17 are. They can still negotiate something under this.

18 COMMISSIONER DEASON: And if they think
19 that's an undue risk all they have to do is pack up
20 their bags and leave today and they are not under that
21 risk whatsoever.

22 MR. COHEN: Chairman Clark.

23 CHAIRMAN CLARK: Mr. Cohen.

24 MR. COHEN: In listening to the discussion
25 where this -- I think there are a couple of motions

1 you are discussing now -- but one thing it flies in
2 the face of in 364.162(3) there is the provision that
3 says if one petition is filed you have a proceeding,
4 and if two or more petitions are filed, you have
5 separate proceedings.

6 If we're saying today that everyone is
7 bound, then this statutory right to a proceeding, if
8 you've gone through the process and the normal course,
9 is abrogated.

10 The other part of this is, in terms of the
11 motion to dismiss, part of the problem we have had all
12 through this, and when Commissioner Deason dealt with
13 the -- at the prehearing dealt with the standing
14 issue, it really put us in a different posture.

15 But part of this is normally when someone
16 files a petition to intervene or a petition in
17 administrative proceedings that within 20 days there's
18 a motion to dismiss filed. It's not waited until a
19 week or so before the prehearing and then a motion to
20 dismiss gets filed and then all of a sudden these
21 issues that were first raised back in the original
22 petition, four, five, six months ago, whenever they
23 were filed, are suddenly ripe for determination at
24 that time. Those issues, motion to dismiss, be it for
25 res judicata, be it for collateral estoppel, be it for

1 grounds that the petition doesn't meet the essential
2 requirements of law, exists at the time the petition
3 is filed.

4 Part of the problem today is that
5 Sprint-United waited until the week before the
6 prehearing to suddenly say, "Wait a minute, none of
7 you should even be here, or if you are here, you
8 should be bound by the decision of the Commission."
9 That motion to dismiss should have been filed months
10 ago.

11 We've all participated in this proceeding
12 and many responses were filed and arguments were made
13 today. But the same thing is happening here, where if
14 down the road one of us, one of the petitioning
15 parties or nonpetitioning fully participating parties
16 here today files a petition at a later date after
17 negotiating rates, terms and conditions, that petition
18 will always be subject to an appropriate motion to
19 dismiss for numerous grounds. And I think that -- res
20 judicata issue will be one of those grounds that will
21 be available to any of the parties who would like to
22 file that motion.

23 COMMISSIONER JOHNSON: But what I hear them
24 saying -- I may not agree with the ultimate analysis
25 but they are raising a standing argument. And can't

1 you raise that at any time?

2 MR. COHEN: A standing argument, yes, can be
3 raised at any time. Because in a lot of cases you
4 accept what is stated in the petition as true, and the
5 real proof isn't going to come until after the
6 prefiled testimony or after there is actual discovery
7 and testimony that is actually presented at the
8 hearing.

9 But that's not what I think we're hearing in
10 this standing argument. The standing argument is
11 being made today, and it was made at the prehearing a
12 week ago, is the same argument that could have been
13 made months ago. That is, you shouldn't be in this
14 proceeding if you're not going to be bound by this
15 proceeding. And I don't think the witnesses who have
16 been -- whose testimony has been prefiled and who have
17 been deposed have taken the position that "We're in
18 this proceeding only because we think we're not going
19 to be bound." They are in this proceeding, they went
20 through all of the reasons why rates, terms and
21 conditions should be certain ways, why there are
22 different factors that should be considered by the
23 Commissioners in this docket.

24 CHAIRMAN CLARK: Commissioners, let me tell
25 you the difficulty I'm having with -- you know, I want

1 to resolve this so we can go forward. But the
2 difficulty I have in resolving it the way I see the
3 split going is it seems to me that we either have
4 to -- in terms of giving effect to negotiations, that
5 we either have to say you have no standing and say you
6 cannot be intervenors, or we have to say that it is --
7 you can intervene but to the extent it is litigated in
8 here, when you come back after negotiations, then we
9 will test your petition based on whether it was taken
10 up at that time.

11 My concern being if you, in effect, say they
12 can't even come in, then you don't have any basis on
13 which to negotiate. Because the LEC's response is
14 simply that "Here's the deal, here's the tariff." It
15 seems to me we have to make a decision with respect to
16 intervenor status if we want to go the way you are
17 suggesting. If that's going to be the case, then we
18 need to throw them out.

19 COMMISSIONER JOHNSON: On the standing
20 issue?

21 CHAIRMAN CLARK: Yeah.

22 COMMISSIONER JOHNSON: I would agree with
23 you and that's why I was asking the gentlemen that had
24 suggested it was too late to bring this action or
25 motion before the Commission, and I don't think it's

1 too late. But if it is an issue of standing, then it
2 appears to me, in my mind, that they do have standing.
3 That it can be demonstrated that they will be affected
4 by this agency's action. They might not be bound by
5 the decision, but it will certainly have some
6 precedential impact. And our decision with respect to
7 the rate in this case is real.

8 One of the issues that Mr. Melson had raised
9 is to the extent that we set a rate and they are still
10 in negotiations but would like to start conducting
11 business, then that is the rate that would apply to
12 them. And to the extent that they do have a later
13 action, that that action will probably have some
14 precedential value with respect to their case.
15 Particularly since we must establish nondiscriminatory
16 rates. And to the extent they come in and want
17 something different, they are going to really have to
18 show us that the facts are different. They are going
19 to have to show us -- to me they have a great burden
20 that's placed upon them in the first instance based
21 upon what we do in this particular case. So for that
22 reason I would think that they are proper intervenors
23 in this particular case.

24 CHAIRMAN CLARK: What I have a concern about
25 is reconciling what the statute seems to indicate is

1 their right, and that is to negotiate, and also
2 recognizing the fact that as we move through each of
3 these decisions on interconnection they will have
4 precedential value in the next case. And, therefore,
5 to the extent that they don't participate and try to
6 help shape that policy, that when their turn comes
7 around they won't have that opportunity. And it's the
8 notion of trying to reconcile what the statute says we
9 have to do, and that is, allow them to negotiate, but
10 at the same time set a rate that they can then use.
11 And also make sure as between everybody who wants
12 interconnection, there's no undue discrimination.

13 And I think to that extent the notion of
14 suggesting that they have some interest in whether or
15 not it rises to substantial is correct, that they do
16 have some interest in shaping the proceeding.

17 MR. WAHLEN: Could I throw my two cents in
18 here since Mr. Goldman did.

19 First of all, I'd like to address whether
20 this decision has any precedential value if these
21 parties are not bound by it.

22 Before the Commission applies any incipient
23 policy developed in this case in a subsequent
24 proceeding, it would have the obligation to fully
25 support and explain and develop a factual record basis

1 for that policy in that proceeding. So to the extent
2 that they are not bound by this proceeding and come
3 back in later, they will have an opportunity to fully
4 litigate all of the issues about interconnection. And
5 no one will be able to say that just because it was
6 decided in the Centel case and United case it
7 automatically applies in this case.

8 So that's why their substantial interests
9 are only remotely affected if they are not bound by
10 the decision in this case.

11 As far as the question of when standing was
12 raised is concerned, it is correct it can be raised at
13 any time. But I'd like to point out something that
14 was just discussed, and that is that the statute
15 contemplates proceedings based on petitions between a
16 petitioner and a respondent.

17 The motions to intervene that were filed in
18 this case by MCI and AT&T and FCTA were filed when the
19 BellSouth petitions were filed. None of those parties
20 petitioned to intervene in the litigation between MFS
21 and United, or the litigation between Continental and
22 United, or the litigation between Time Warner and
23 United.

24 Now, I only raise that because they have not
25 filed a pleading which alleges how their substantial

1 interests are affected, and in some cases have not put
2 on any testimony which supports the notion that their
3 substantial interests are affected.

4 The FCTA is a perfect example. They have no
5 testimony in this case about how their substantial
6 interest as an association are affected. Even when
7 Mr. Cresse's testimony was here, they did not explain
8 about how the members of the FCTA would be affected by
9 the decision in this case. And I don't see, frankly,
10 how they can develop that through cross examination in
11 this case.

12 If they are going to be bound by the tariffs
13 and the rates, terms and conditions determined in this
14 case, then they would have standing. If they are not,
15 any effect on them is remote, it's speculative. They
16 have the right to negotiate. They can come in and do
17 that. And if they are unsuccessful then they can
18 litigate.

19 What is happening here is negotiation
20 through litigation. MCI Metro has come in here,
21 they're attempting to try and make it as good as they
22 can when it doesn't count so that they can come in
23 later, if they don't like the result. That is not
24 contemplated by the statute. The statute does not
25 contemplate that kind of negotiation. It contemplates

1 negotiation and then litigation.

2 CHAIRMAN CLARK: Then your first position is
3 they have no standing.

4 MR. WAHLEN: That's correct.

5 MR. TYE: Chairman Clark.

6 CHAIRMAN CLARK: Mr. Tye.

7 MR. TYE: I hate to jump in at this late
8 date but I think we need to point out specifically
9 that AT&T is probably different than any other party
10 sitting at this table.

11 When AT&T intervened in this case, and when
12 we filed our testimony in this case, we had not
13 applied for an ALEC certificate. We intervened
14 because we're an interexchange carrier, and because
15 the issues that are going to be decided in this docket
16 and the resale docket affect our ability to get to our
17 customers, whether we go through the LEC or whether we
18 go through the ALEC.

19 Specifically in this case there's an issue
20 of who gets to keep the residual interconnection
21 charge when a connection is made through a tandem.

22 Those things are issues that AT&T has
23 traditionally intervened in before this Commission.
24 It's not unlike when AT&T intervened in LEC rate cases
25 because access charges were affected.

1 In this case access charges that we have to
2 pay MFS to reach our customers when MFS gets into the
3 ALEC business could be affected by the interconnection
4 rate that MFS pays, by who keeps the RIC. And in the
5 next docket they could be affected by the price MFS
6 may have to pay for an unbundled local loop and an
7 unbundled port. So that's why we intervened in this
8 case. And that's basically what our testimony goes on
9 to.

10 Now, we filed for certification as an ALEC
11 after passage of the federal act, and we have not
12 entered into negotiations with either of these parties
13 as is our right. And we are not prepared to
14 participate in this proceeding as an ALEC. But we are
15 prepared to participate as an IXC and I think we
16 clearly have standing to participate that way.

17 COMMISSIONER KIESLING: And I agree with
18 you. I mean an IXC -- to the extent that you have no
19 testimony, nothing in your filings throughout this
20 entire case has in any way alluded to rights that you
21 may have as an ALEC once that is granted -- they don't
22 belong here then.

23 MR. TYE: I think that's the case,
24 Commissioner Kiesling, but the testimony does go to
25 the proper method and charges for interconnection

1 because that in our view impacts our ability to get to
2 our customers, an IXC. And in the next case the
3 testimony goes to unbundling and resale issues, which
4 we think will affect our right as an IXC.

5 I guess what I'm saying is we're not here
6 because we think a tariff will come out that we will
7 order out of as an ALEC. We're here because we're an
8 IXC and our ability to reach our customers and the
9 prices we have to charge for our services may depend
10 on the outcome of these cases.

11 Now, having said that as an ALEC, we still
12 have the right to conduct negotiations, and I think we
13 will have the right either under statute law -- I
14 assume all these arguments have to do with state law
15 not the federal act, but we should have the right to
16 file petitions when and if it is appropriate.

17 COMMISSIONER KIESLING: I agree with that no
18 matter what happens. I don't know if anyone else does
19 but --

20 CHAIRMAN CLARK: They have the ability to
21 file a petition.

22 COMMISSIONER KIESLING: As an ALEC. They're
23 not participating in this proceeding as an ALEC.
24 They're participating as an IXC.

25 COMMISSIONER KIESLING: But you're saying

1 everyone who participates as an ALEC will be bound
2 even though they haven't gone through negotiations on
3 their own interconnection?

4 COMMISSIONER KIESLING: Yes. I think
5 everyone who intervened --

6 CHAIRMAN CLARK: Is bound or not?

7 COMMISSIONER KIESLING: Yes. I mean I
8 thought I'd made that clear. I thought that everybody
9 that intervened in the setting of the interconnection
10 rates between ALECs and Centel/United and GTE either
11 do not have standing or are bound. It's got to be one
12 or the other. There is no status that fits in between
13 those two.

14 CHAIRMAN CLARK: I guess I might agree with
15 you but for the fact that I think that by doing that
16 you, in effect, cut off negotiation. Because the LEC
17 simply refuses to negotiate because they know what the
18 end deal is going to be. And that's the decision in
19 this case. And it seems to me that they ought to have
20 the opportunity to at least file the petition. But it
21 may be subject to a motion to dismiss to the extent
22 those issues were already litigated.

23 COMMISSIONER KIESLING: I don't disagree.
24 Filing a petition and trying to change circumstances
25 is a right that everybody sitting at this table has.

1 You know, we're not granting them anything by saying
2 "You can do that." They have that right.

3 CHAIRMAN CLARK: I guess my view is I'm
4 trying to reach some reconciliation between what would
5 be normal procedures and what the statute seems to
6 call for, and that is individual negotiations and an
7 opportunity to file a petition after that.

8 COMMISSIONER DEASON: That statute could be
9 interpreted to mean that it's an individual situation.
10 That being that the negotiating parties, they
11 negotiate; they can't reach an agreement, then their
12 petition is filed. And those are the only two people
13 that litigate.

14 CHAIRMAN CLARK: I understand that could be
15 the possibility and that's one way of treating it.
16 But then you also have the other prohibition and that
17 being that it can't be discriminatory. And to that
18 extent I think we benefit by having the parties in
19 here to sort of lay out the whole picture of what the
20 issues may be, so that --

21 COMMISSIONER DEASON: And I agree with you.
22 I'm glad they are here, and that's why I think they
23 need to participate. But they need to be held
24 accountable for their actions. If they want to
25 litigate it, they are going to be bound by the

1 decision. They can't litigate, negotiate and
2 litigate. I think that is fundamentally unfair to the
3 process and was not contemplated by the statute.

4 CHAIRMAN CLARK: I think if you say they are
5 bound by this -- I think if you don't allow at least
6 them to file a petition, and then have it come subject
7 to a motion to dismiss on res judicata, that you're
8 not giving them the opportunity to negotiate their own
9 --

10 COMMISSIONER DEASON: I've never said they
11 can't file the petition.

12 COMMISSIONER KIESLING: Neither have I. In
13 fact, I think they have an absolute right to file that
14 petition.

15 CHAIRMAN CLARK: And that petition would be
16 subject to a motion to dismiss based on res judicata
17 as well as any other appropriate grounds for a motion
18 to dismiss.

19 COMMISSIONER KIESLING: As every petition
20 is. That's why I don't think we have to state that.
21 They have an absolute right to file another petition.
22 And any affirmative defenses or other grounds for
23 dismissal that are raised will get determined then. I
24 mean we're not precluding and we're not granting any
25 rights by saying that.

1 CHAIRMAN CLARK: Then do you have a motion?

2 COMMISSIONER KIESLING: I thought I had --
3 yes. I do.

4 I concur that it would be helpful in this
5 docket to have everyone -- even though standing may
6 have some problems, willing to skip those, and just
7 move that any intervenor ALECs who participate in this
8 proceeding, fully participate in this proceeding, are
9 bound by the outcome.

10 I don't think I need to say anymore because
11 they have an absolute right to file a petition, and
12 GTE and United/Centel have a absolute right to file
13 any motion to dismiss that they want to file.

14 COMMISSIONER DEASON: I agree with that.
15 And I think furthermore, we have an obligation to let
16 all the parties that are at the table today know how
17 we view this matter. And that is guidance to them and
18 they need to choose how they are going to react. I
19 think that's fair. I think we would be doing them a
20 disservice if we made a ruling of this nature because
21 they need to know what risk there is in participating
22 in this docket and they need to evaluate that risk and
23 determine what is best for their client.

24 COMMISSIONER JOHNSON: When you say they are
25 bound by the decision, you mean whatever rates that

1 may be established as a result of this proceeding,
2 those are their rates to --

3 COMMISSIONER KIESLING: Those are their
4 rates unless or until they file another petition and
5 there's a motion to dismiss and we rule on that. And
6 as part of that motion to dismiss they can come back
7 and say, "Well, there's changed circumstances."

8 COMMISSIONER JOHNSON: By them
9 participateing in this case, they have foregone any
10 right they had to negotiations.

11 COMMISSIONER KIESLING: I don't see them as
12 mutually exclusive.

13 COMMISSIONER DEASON: The basis of my second
14 is they are still free to negotiate. And I don't know
15 what the outcome of this proceeding is going to be.
16 And I don't know who thinks they are going to have the
17 upper hand as to what the decision is. I don't think
18 the parties know that either. I don't see where it's
19 precluded negotiations. I think statutorily they have
20 a right to negotiate. But they don't have a right to
21 bind the other party. And I think that, too, is an
22 attempt to try to -- I won't get into what --

23 COMMISSIONER JOHNSON: What benefit will
24 there be to negotiating if we set the rates?

25 COMMISSIONER KIESLING: They could always

1 negotiate for one that is better than that.

2 COMMISSIONER DEASON: The negotiations
3 should be give-and-take, numerous things give-and-take
4 on, that is unique to a particular company. That
5 there's some aspect of interconnection more important
6 to them than some other aspect and there can be some
7 give-and-take. But I think maybe it would be helpful
8 to the negotiating parties to know how we feel,
9 so-called base case scenario should be, which is what
10 we would be doing in this docket. I had your motion
11 as being rather simple, but then more explanation of
12 it and through more explanation I wonder if that
13 doesn't lie the basis for some agreement.

14 COMMISSIONER KIESLING: See, I don't see the
15 four of us, that we're on different sides of it. I
16 think we all agree we want the people here and we
17 agree that we want them to be bound by the kinds of
18 principles and policy, etcetera, that we set forth out
19 of this docket. But that it does not preclude them
20 from exercising any other legal right they may have.
21 Dispose of that then.

22 CHAIRMAN CLARK: Any intervenor ALEC who
23 fully participates in this case are bound by the
24 outcome. Parties are still free to negotiate an
25 interconnection rate and to the extent negotiation

1 fails the affected ALEC may petition this Commission
2 to set interconnection rates.

3 COMMISSIONER KIESLING: I don't see the need
4 to say the last part.

5 COMMISSIONER JOHNSON: I guess in what
6 you're saying in a way we're both, Susan and I, we're
7 saying with respect to if these issues had been
8 litigated and try to come back to us with those same
9 issues we're really telling them they are bound by --

10 COMMISSIONER KIESLING: That's right. But
11 we're not precluding their right to file a petition.

12 COMMISSIONER JOHNSON: Raising new issues.

13 COMMISSIONER KIESLING: Nor are we
14 precluding the LECs' right to file a motion to
15 dismiss, of that petition. I mean, you know, to me
16 that's a advisory opinion on a petition that's never
17 been filed.

18 COMMISSIONER DEASON: If that's the motion,
19 I second.

20 COMMISSIONER KIESLING: I'll adopt that as
21 friendly.

22 CHAIRMAN CLARK: Any intervenor ALEC who
23 fully participates in this proceeding is bound by the
24 outcome. The parties are still --

25 COMMISSIONER KIESLING: Could I make one

1 change, "bound by the outcome." I would like to say
2 "bound by the resolution of the issues."

3 CHAIRMAN CLARK: I thought that was better.
4 I know it's supposed to make sure everything is in the
5 sunshine.

6 COMMISSIONER JOHNSON: And I said yes.

7 CHAIRMAN CLARK: Okay. The parties and I
8 think we need to be clear on that.

9 COMMISSIONER KIESLING: Petition.

10 CHAIRMAN CLARK: Those parties who haven't
11 negotiated. I mean and I want to suggest that MFS
12 can, once we litigate this --

13 COMMISSIONER KIESLING: I agree. But they
14 can't. That's what I'm saying. Okay, they litigate
15 this and at some point they think there are changed
16 circumstances. They can come back in and file another
17 petition.

18 MR. RINDLER: Madam Chairman, someone
19 uniquely situated, being the petitioner in both
20 proceedings, I do have a question to the Commission,
21 and it relates to Commissioner Kiesling's issue
22 advisory opinion.

23 If the Commission were to move and approve
24 the intervenor status of those people who sought and
25 have intervened in this proceeding, and on that point

1 it's my understanding that the Commission had
2 determined that a single intervention in this docket
3 was intervention in the entire -- each proceeding
4 under that. But if we were to go ahead and move on
5 that motion, that we let the parties take the result,
6 the chips will fall where they may. There's no reason
7 to go beyond that. And, frankly, anything beyond that
8 seems to simply complicate this matter unduly. And as
9 the petitioner, I would like to see this matter move
10 on.

11 CHAIRMAN CLARK: Let me see. Commissioner
12 Keisling, is this your motion? "Any intervenor ALEC
13 who fully participates in this proceeding is bound by
14 the resolution of the issues."

15 COMMISSIONER KIESLING: That's my motion.

16 CHAIRMAN CLARK: "Such a LEC is still free
17 to negotiate its own interconnection rate. And to the
18 extent negotiations fail, affected ALEC may petition
19 this Commission to set interconnection rates."

20 COMMISSIONER KIESLING: The second part
21 really isn't --

22 CHAIRMAN CLARK: In order for us to move
23 along, we need that.

24 COMMISSIONER JOHNSON: Yes.

25 CHAIRMAN CLARK: What I want to make clear

1 is they are still free to negotiate.

2 COMMISSIONER KIESLING: I can live with it
3 like that.

4 CHAIRMAN CLARK: And they still have the
5 right to petition us. And I think we're in agreement
6 that then that petition is subject to a motion to
7 dismiss.

8 COMMISSIONER KIESLING: I agree, through
9 your language that says they still have a right to
10 negotiate. Everything from there on they have an
11 absolute right to do those things by saying --

12 CHAIRMAN CLARK: We should have no problem
13 saying --

14 COMMISSIONER KIESLING: By saying in our
15 motion we grant them what we don't have the authority
16 to give them, but they already have that right. They
17 can file a petition a week for the rest of their lives
18 if they want to.

19 CHAIRMAN CLARK: If you don't take issue
20 with it.

21 What I'm trying to do is reach a concensus
22 on this so we can move forward. I can live with it.

23 COMMISSIONER DEASON: I guess the question
24 is do you take that entire language that was just read
25 by the Chairman as a friendly amendment to your prior

1 motion?

2 COMMISSIONER KIESLING: All right.

3 COMMISSIONER DEASON: You do accept it?

4 COMMISSIONER KIESLING: Yes.

5 COMMISSIONER DEASON: I still maintain my
6 second. I think what we've done here today, which is
7 something he wanted to accomplish, and that is to give
8 the parties an idea of where this Commission is coming
9 from, and I think they are getting the message loud
10 and clear. At least I hope they are.

11 CHAIRMAN CLARK: Okay. There's a motion and
12 a second. All in favor say "aye."

13 COMMISSIONER JOHNSON: Aye.

14 COMMISSIONER DEASON: Aye.

15 COMMISSIONER KIESLING: Aye.

16 CHAIRMAN CLARK: Aye. Opposed, nay. We
17 have an unanimous vote.

18 COMMISSIONER DEASON: Thanks to the
19 Chairman.

20 CHAIRMAN CLARK: I have a lunch date. I'm
21 just kidding. (Laughter)

22 Now where are we?

23 MR. WAHLEN: Entertaining dismissals from
24 the parties that don't want to be bound.

25 COMMISSIONER KIESLING: Does anyone want to

1 withdraw?

2 MR. MELSON: MCI intends to stay for the
3 duration.

4 MR. TYE: I've got one question. Chairman
5 Clark, with respect to the stipulated issues, I assume
6 those are not issues resolved by the Commission under
7 the ruling?

8 CHAIRMAN CLARK: That's a good point. And I
9 don't think they are. I think that would be
10 consistent with what we did in the other
11 interconnection docket to the extent there was a
12 separate stipulation reached by some parties with
13 BellSouth, that stipulation was allowed to go forward.

14 COMMISSIONER DEASON: Only for those parties
15 signing that stipulation.

16 CHAIRMAN CLARK: Correct. Is that clear,
17 Mr. Tye?

18 MR. TYE: I think so. I think so.

19 Now, this ruling, will it also apply to the
20 docket, the next docket, the 984 docket?

21 CHAIRMAN CLARK: That was my understanding.

22 MR. TYE: One other question. I understand
23 that this case is to be decided under Chapter 364. Is
24 that everybody's understanding?

25 COMMISSIONER JOHNSON: As opposed to what?

1 MR. TYE: As opposed to any other law.

2 COMMISSIONER KIESLING: Now that we're a
3 court of equity, we can't exercise your equitable
4 powers.

5 MR. TYE: Decided under state law as opposed
6 to federal law.

7 CHAIRMAN CLARK: That is my understanding of
8 it. You know, that's where we are now. That's what
9 the testimony has been filed on. I don't know enough
10 about the federal law to apply it, Mr. Tye.

11 MR. TYE: That was my only problem.

12 COMMISSIONER DEASON: I think to the extent
13 what we do here is not inconsistent with the federal
14 law, it will be in compliance with the federal law and
15 will have met whatever requirements are placed on this
16 Commission under that federal law. I don't want to go
17 through this proceeding not complying with some
18 language in the federal law. In essence what we're
19 doing is in harmony and consistency with the federal
20 law.

21 MR. TYE: Because the fact is the federal
22 law has specific negotiating language in it. And
23 that's what I want to make sure if I stay in this
24 case, when I go to one of these parties to negotiate
25 under the federal act I'm not told no, the Commission

1 has already decided that.

2 COMMISSIONER KIESLING: As an ALEC or IXC?

3 MR. TYE: As an ALEC. I'm in this case as
4 an IXC, but understand that the same company that's
5 holding the IXC certificate now also has an ALEC
6 certificate. So we got in this case as an IXC. But I
7 think it's pretty important to understand that to the
8 extent the federal act is different and it has
9 different procedures, that we're not foreclosed by
10 virtue of being in this case to do what the federal
11 act tells us on it.

12 COMMISSIONER DEASON: As one Commissioner,
13 to the extent it appears that same petition is filed,
14 instead of quoting the authority as Chapter 364, does
15 the federal statute do this, same litigation, that's
16 the second bite of the apple, and as one Commissioner,
17 you've already had your opportunity.

18 MR. TYE: I don't think they are the same,
19 Commissioner Deason. I think that there will not be a
20 problem showing sufficient changed circumstances. I
21 guess what I'm making sure of the circumstances under
22 the federal act are not the ones that are under issue
23 here.

24 COMMISSIONER JOHNSON: You know, you raise
25 an interesting question. And what would be helpful, I

1 would think that is to the extent that we're going
2 through this and perhaps it's too late, I don't know
3 what you intend to do -- but to the extent that there
4 are provisions of the Florida law that you believe are
5 inconsistent with the federal law, it would be helpful
6 for this Commission to be put on notice as to those
7 provisions. I know in the federal law with respect to
8 negotiations, after negotiation it calls for
9 arbitration by state commissions. And you know what
10 we're sitting here doing. Are you suggesting that
11 someone may come back and say, "No, you all set rate,
12 you all didn't arbitrate."

13 MR. TYE: I'm suggesting when we go to the
14 LECs to negotiate under the federal act some of them
15 may say that the Commission has decided that we don't
16 have to negotiate with you. And then if I came to you
17 with an arbitration case under that act, the LEC may
18 say no, that case should be dismissed. It's res
19 judicata. I don't view the issues as the same because
20 the law is different and that's what I'm saying here.

21 I don't intend to litigate federal issues in
22 this case if we stay in this case. And I don't think
23 that's what the testimony goes to. I just wanted to
24 make sure that the parties all were in agreement
25 there.

1 CHAIRMAN CLARK: Does any other party wish
2 to comment on that? Mr. Tye, I view us as carrying
3 out our responsibilities under the state law. But as
4 Commissioner Deason says, to the extent you want to
5 come in and ask us to do some arbitration under the
6 federal law, which is really what we've done, it seems
7 to me what we've done will have a bearing on that.

8 MR. TYE: If they are the same issues and
9 the legal standards are the same, I appreciate that
10 ruling, Chairman Clark and Commissioner Deason. I
11 think they will be different, is what I'm saying. And
12 I'm not prepared to litigate the federal issues today.

13 CHAIRMAN CLARK: As far as I know we're not
14 litigating federal issues today.

15 MR. TYE: Given that assurance, AT&T will
16 stay in the case then. Thank you.

17 MS. WILSON: FCTA will stay in the case.

18 MR. CROSBY: Consistent with our voluntary
19 dismissal of our petition against GTE, Continental
20 would seek the dismissal of itself as a party,
21 intervening party with respect to GTE only in this
22 case.

23 CHAIRMAN CLARK: Okay. And you will remain
24 as intervenor in the docket as it applies to
25 United/Centel?

1 MR. CROSBY: No, ma'am. We'll remain as a
2 petitioner with respect to United and Centel and we
3 would seek to be dismissed as an intervenor with
4 respect to GTE. And I would request that the order
5 would reflect that, please.

6 CHAIRMAN CLARK: You're taking a voluntary
7 dismissal?

8 MR. CROSBY: With respect to GTE.

9 CHAIRMAN CLARK: We'll recognize that
10 voluntary dismissal.

11 MR. CROSBY: Thank you.

12 CHAIRMAN CLARK: Any further preliminary
13 matters?

14 MR. COHEN: Chairman Clark, so the record is
15 clear, Time Warner will be remaining in both dockets.

16 CHAIRMAN CLARK: Thank you.

17 MR. COHEN: In the same capacity in which it
18 has entered the dockets today.

19 CHAIRMAN CLARK: Thank you.

20 MS. CANZANO: Time Warner is remaining a
21 petitioner to with regards to United and intervenor
22 with all of the other LECs in both the unbundling and
23 interconnection dockets.

24 MR. COHEN: Correct.

25 MS. CANZANO: I wanted to make that clear.

1 CHAIRMAN CLARK: We're going to go ahead and
2 start with testimony.

3 MS. CANZANO: Before we do that, could we
4 take up the one remaining preliminary matter?

5 CHAIRMAN CLARK: Stipulation.

6 MS. CANZANO: Stipulation.

7 MR. GILLMAN: I do have one other
8 preliminary matter that hopefully won't be that
9 controversial.

10 CHAIRMAN CLARK: Okay.

11 MR. GILLMAN: It deals with the order of
12 cross examination.

13 I would make a motion that similarly aligned
14 parties go first on cross examination, and then those
15 parties who are adverse to the position of the witness
16 go last.

17 CHAIRMAN CLARK: Is there any objection to
18 that? I may need to be educated as to whom you are
19 aligned because it's not always clear.

20 MR. GILLMAN: GTE is aligned with Sprint, I
21 think, on all issues.

22 CHAIRMAN CLARK: Is it Sprint or
23 United/Centel?

24 MR. WAHLEN: Us against the world.

25 CHAIRMAN CLARK: Okay.

1 MR. GILLMAN: I guess the only thing I have
2 to say about that is some issues have been stipulated
3 for us and not for them.

4 CHAIRMAN CLARK: I appreciate that. I think
5 I can keep them clear. And it probably is the most
6 appropriate to have what can be termed as friendly
7 cross to precede that which is more adverse. Is there
8 any objection to that?

9 If I get out of line, somebody let me know
10 that I need to go back to somebody else before the
11 cross examination proceeds. Ms. Wilson.

12 MS. WILSON: I didn't have a question.

13 CHAIRMAN CLARK: Okay.

14 MR. GILLMAN: Chairman Clark, are we going
15 to take up the MFS GTE stipulation at this time?
16 Or --

17 CHAIRMAN CLARK: I think that's what our
18 Staff has requested we do.

19 MS. CANZANO: Yes.

20 CHAIRMAN CLARK: And now is the appropriate
21 time to take that up.

22 MR. COHEN: Chairman Clark, I have one other
23 preliminary issue and it's related to your previous
24 ruling, if I could take this up for 30 seconds before
25 the stipulation.

1 We need to make a change in terms of our
2 testimony. Joan McGrath is also going to testify
3 concerning Issue 1, and Dan Engleman is not going to
4 testify concerning Issue No. 13.

5 COMMISSIONER KIESLING: 13?

6 MR. COHEN: 13. Correct.

7 CHAIRMAN CLARK: Okay. I've made the
8 corrections on my list.

9 MR. COHEN: Thank you.

10 CHAIRMAN CLARK: All right. Ms. Canzano,
11 where do I look for the stipulation again?

12 MR. GILLMAN: I have copies I can hand out
13 but it was attached to the rebuttal testimony of
14 Mr. Devine, his Exhibit TTD-8. I have extra copies.

15 CHAIRMAN CLARK: Mr. Devine's TTD-8.
16 Mr. Gillman, maybe you better give me a copy.

17 MS. WEISKE: Could you have them hand them
18 out to the intervenors since this may impact how the
19 case proceeds.

20 CHAIRMAN CLARK: I think Ms. Menard is doing
21 that now.

22 Ms. Canzano?

23 MS. CANZANO: Yes.

24 CHAIRMAN CLARK: Is it the party's desire to
25 approve that stipulation now?

1 MS. CANZANO: Yes. I believe so. This way
2 we don't have to conduct cross examination if the
3 Commission can determine this is acceptable.

4 CHAIRMAN CLARK: And Staff's recommendation.

5 MS. CANZANO: Staff recommends approval.

6 CHAIRMAN CLARK: Is there any discussion?

7 COMMISSIONER DEASON: I move approval.

8 COMMISSIONER KIESLING: Second.

9 CHAIRMAN CLARK: Without objection the
10 agreement stipulation between MFS and GTE is approved.

11 MR. GILLMAN: Chairman Clark.

12 CHAIRMAN CLARK: Yes, Mr. Gillman.

13 MR. GILLMAN: Commissioner Deason had
14 recommended we be prepared to strike the testimony
15 that would go to the stipulated issues. We're
16 prepared to do so, but I suspect the time to do that
17 would be at the time the witnesses take the stand.

18 CHAIRMAN CLARK: Okay. Thank you.

19 CHAIRMAN CLARK: Any further preliminary
20 matters?

21 MS. CANZANO: None that I'm aware.

22 MS. WEISKE: Could I ask one question for
23 clarification? Does this mean if Time Warner does not
24 agree with the way these issues should be resolved
25 between MFS and GTE, that we would have to go forward

1 and file a separate petition on these issues? I mean
2 I assume that's the end result given our discussion
3 this morning, but I want to be clear on that before we
4 break to lunch. It's not clear to me what you're
5 asking. There are a number of interconnection terms
6 and conditions of interconnection.

7 CHAIRMAN CLARK: Between MFS and GTE.

8 MS. WEISKE: Those issues up until now were
9 going to be addressed at the hearing that's been
10 eliminated by this stipulation. So if Time Warner
11 does not want to be bound by this resolution, assume
12 to get these issues back before you.

13 CHAIRMAN CLARK: What we said was that to
14 the extent they were not litigated and resolved by
15 this Commission; you're not bound by them if they are
16 the stipulation, they are as between the parties.

17 MS. WEISKE: Okay. Thank you.

18 CHAIRMAN CLARK: Anything further? Any
19 further preliminary matters? Okay.

20 We're now ready to take testimony. The
21 first witness is Mr. Schleiden.

22 Mr. Schleiden, if you will come to the
23 stand, and every witness who is going to present
24 testimony in this proceeding, if you would please
25 stand and raise your right hand and be sworn in at the

1 same time as Mr. Schleiden.

2 (Witnesses collectively sworn)

3 MS. CANZANO: Chairman Clark.

4 CHAIRMAN CLARK: Ms. Canzano.

5 MS. CANZANO: We don't need to do this, but
6 I'd prefer if we at least identify the stipulation
7 between MFS and GTE with an exhibit number so it's
8 easier to refer to in the recommendation.

9 CHAIRMAN CLARK: All right. It will be
10 marked as Exhibit No. 4. And if I haven't done it,
11 let's show Exhibits 1, 2, 3 and 4 admitted in the
12 record without objection.

13 MS. CANZANO: Thank you very much.

14 (Exhibit Nos. 1, 2, 3 received in evidence,
15 and Exhibit No. 4 marked for identification and
16 received into evidence.)

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1 CHAIRMAN CLARK: Mr. Crosby.

2 ALBERT RICHARD SCHLEIDEN

3 was called as a witness on behalf of Continental
4 Cablevision, Inc. and, having been duly sworn,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. CROSBY:

8 Q Mr. Schleiden, would you state your name
9 and address, please?

10 A My name is Albert Richard Schleiden. I go
11 by my nickname "Dick". My address is 7800 Belfort
12 Parkway, Suite 270, Jacksonville, Florida 32256.

13 Q By whom are you employed and what is your
14 position?

15 A Continental Cablevision is my employer. I
16 am the Regional Telecommunications Manager for the
17 telephone companies in Continental, they being two in
18 Florida and two in the state of Virginia.

19 Q On whose behalf are you appearing in this
20 proceeding?

21 A Continental.

22 Q Did you file direct and rebuttal testimony
23 earlier in this proceeding?

24 A I did.

25 Q With respect to your direct testimony, do

1 you have any changes or corrections to that testimony?

2 A I do not.

3 Q With respect to your rebuttal testimony, do
4 you have changes or corrections to that testimony?

5 A There are corrections for two pages of the
6 rebuttal testimony.

7 MR. CROSBY: Madam Chairman, I've handed out
8 corrections to the rebuttal testimony of
9 Mr. Schleiden.

10 Q (By Mr. Crosby) Mr. Schleiden, would you
11 tell us what those corrections are?

12 A The corrections are on Page 2, Lines 4, 7
13 and 8. The references to Sprint-United/Centel
14 should be replaced with BellSouth. I'm sorry, that's
15 on Page 2, Lines 4, 7 and 11. And on Line 8, remove
16 United/Centel.

17 On Page 7, Line 12, we're to remove the
18 second "to", T-O.

19 Q If I were to ask you the same questions
20 today in both your direct and rebuttal testimony, with
21 those corrections and changes, would your answers be
22 the same?

23 A They would.

24 COMMISSIONER KIESLING: Mr. Crosby, is your
25 mike on?

1 MR. CROSBY: I have it now, Commissioner.
2 I'm sorry.

3 Madam Chairman, I would ask that
4 Mr. Schleiden's prefiled direct testimony and revised
5 rebuttal testimony be marked for identification.

6 CHAIRMAN CLARK: The prefiled direct
7 testimony of Mr. Schleiden will be inserted into the
8 record as though read. And the prefiled rebuttal
9 testimony of Mr. Schleiden with the corrections noted
10 today will be inserted into the record as though read.

11 MR. CROSBY: Thank you. I've gotten ahead
12 of myself.

13 Q (By Mr. Crosby) Mr. Schleiden, you had
14 exhibits to your direct and rebuttal testimony, did
15 you not?

16 A I did.

17 Q How many do you have?

18 A Three.

19 Q And I believe they are identified as ARS-1,
20 that's your first one, and Cont-1 and Cont-2 are your
21 second and third ones?

22 A That's correct.

23 MR. CROSBY: Madam Chairman, may those be
24 identified?

25 COMMISSIONER KIESLING: I'm confused. I

1 have Cont-1, Cont-2, Cont-3. I don't have a ARS-1.

2 Where was that one located?

3 MR. CROSBY: Commissioner, I think this may
4 be because of the filing and refiling that has taken
5 place in this case. If you'll give me a second, I'll
6 grab the testimony.

7 COMMISSIONER KIESLING: I can tell you what
8 I have. I have his resume as Cont-1. I have a letter
9 to Chairman Clark from Scott Clemmons as Cont-2 and
10 then attached to his rebuttal is CONT-3. I have a
11 compilation of essential elements of local
12 competition. Am I missing one?

13 MR. CROSBY: No, ma'am. Those are the three
14 exhibits.

15 CHAIRMAN CLARK: All right. Exhibit 5 will
16 be Cont-1 and 2 attached to the direct testimony. And
17 Cont-3 will be identified as Exhibit 6.

18 (Exhibit Nos. 5 and 6 marked for
19 identification.)

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1 **DIRECT TESTIMONY OF A.R. (DICK) SCHLEIDEN**
2 **ON BEHALF OF**
3 **CONTINENTAL CABLEVISION, INC.**
4 **DOCKET NO. 950985A-TP**
5 **DATED DECEMBER 22, 1995**

6 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS AND**
7 **IDENTIFY THE PARTY ON WHOSE BEHALF YOU ARE TESTIFYING.**

8 **A. A.R. (Dick) Schleiden, Continental Fiber Technologies, Inc. doing/business/as**
9 **AlterNet, 4455 Baymeadows Road, Jacksonville, Florida. Continental Fiber**
10 **Technologies, Inc. and Continental Florida Telecommunications, Inc. are wholly-**
11 **owned subsidiaries of Continental Telecommunications Corporation, which is a**
12 **wholly-owned subsidiary of Continental Cablevision, Inc. I am testifying on**
13 **behalf of Continental Cablevision, Inc., and its affiliated companies operating in**
14 **Florida.**

15 **Q. WHAT IS YOUR POSITION WITH ALTERNET?**

16 **A. I am the General Manager of AlterNet, which was originally certified as an**
17 **alternative access vendor and is currently certified as an alternative local exchange**
18 **telecommunications company.**

19 **Q. WHAT ARE YOUR RESPONSIBILITIES IN THAT POSITION?**

20 **A. I have overall responsibilities for the day-to-day operations of AlterNet.**

21 **Q. DESCRIBE YOUR PREVIOUS PROFESSIONAL EXPERIENCE.**

22 **A. I have over 40 years of telecommunications experience in most disciplines of the**
23 **former Bell system. During my tenure there, which began in 1954, I served in a**
24 **number of different positions, mostly managing and supervising sales, marketing**
25 **and technical teams. After retiring from AT&T and prior to joining AlterNet, I**

1 was employed as Director of Sales for an alternative access vendor operating in
2 Florida. I have been the General Manager of AlterNet for the past two and one-
3 half years. A copy of my resume is attached as Exhibit CONT-1.

4 **Q. Have you previously testified before the Commission in any other**
5 **proceeding?**

6 A. Yes, as a member of a panel of witnesses, I filed direct testimony on behalf of the
7 Florida Cable Telecommunications Association in Docket No. 950985-TP relating
8 to the petition of Teleport Communications Group (TCG). Later, I filed
9 testimony individually on behalf of Continental in Docket No. 950985A-TP
10 relating to Continental's petition involving BellSouth Telecommunications, Inc.
11 ("BellSouth").

12 **Q. Do you wish to withdraw both these sets of testimony, and if so, why?**

13 A. Yes, I wish to withdraw both sets of testimony because Continental and Teleport
14 have reached a settlement with BellSouth. Both parties entered into a Stipulation
15 and Agreement ("the Stipulation") with BellSouth and various other parties to this
16 docket. The Stipulation was approved by the Commission on December 19, 1995,
17 thereby resolving the issues relating to interconnection between Continental and
18 BellSouth. Continental is dismissing BellSouth from its petition; however,
19 Continental seeks to continue Docket No. 950985A-TP in order to obtain an
20 interconnection arrangement with Sprint/United-Florida and Sprint/Centel-Florida
21 ("United/Centel").

22 **Q. What is the purpose of your testimony here?**

1 A. The purpose of this testimony is to describe the type of interconnection that
2 Continental and United/Centel should provide to each other for exchanging traffic
3 bound for the other's network and the compensation arrangement that should
4 cover such interconnection. As discussed in its petition, Continental requires
5 technically feasible and economically viable interconnection arrangements with
6 the incumbent local exchange companies (LECs). It is Continental's intent to
7 inaugurate local exchange service to residential and business customers as soon as
8 possible after January 1, 1996. Continental's ability to provide effective local
9 services in this timely manner is largely dependent upon its ability to complete
10 calls between its customers and those of other service providers on Florida's
11 Public Switched Network (PSN) under reasonable compensation arrangements.
12 My testimony is being submitted in order to recommend to the Commission the
13 appropriate arrangements that it should establish for the purpose of fostering the
14 robust competition foreseen by the recently-enacted legislation ("New
15 Legislation").

16 **Q. Have you negotiated with representatives of United/Centel; and if so, has any**
17 **agreement been reached?**

18 A. Yes, I have communicated with representatives of United/Centel; no, we have not
19 reached any agreement. A meeting took place between Continental and
20 United/Centel representatives in Jacksonville where interconnection was
21 discussed. While Continental intends to continue negotiating with United/Centel
22 in the hope of reaching a settlement, Continental must pursue the Commission's

1 establishment of an interconnection arrangement with United/Centel in the event
2 that such negotiations are unsuccessful.

3 **Q. Are the interconnection arrangements being sought by Continental specific**
4 **to your company or would they have applicability to other alternative local**
5 **exchange telecommunications companies (ALECs)?**

6 A. They would be specific to Continental; however, they would be applicable to
7 other providers to the extent that discrimination is forbidden. While I am not an
8 attorney, I am aware that the New Legislation requires the incumbent LECs to
9 make interconnection available to ALECs and other providers on a
10 nondiscriminatory basis. I am also aware that this legislation directs the
11 Commission, upon petition, to set nondiscriminatory prices, terms and conditions
12 of interconnection. I conclude that identical arrangement adopted by the
13 Commission for Continental and United/Centel does not have to be established
14 for other providers who seek different rates, terms, or conditions. However, the
15 differences have to be justifiable on some basis which is not discriminatory. To
16 me, a different rate could be justified by differences in equipment or topography;
17 however, different rates could not be justified for the same interconnection service
18 just because it is furnished to two different ALECs.

19 **Q. What do you mean by the term "interconnection?"**

20 A. It means the procedure by which Continental will integrate its present and future
21 facilities into Florida's public switched network (PSN). To me, Florida's PSN is
22 the aggregation of all facilities being used, and to be used, by all providers to

1 furnish switched telecommunications services to the public in this state. No one
2 entity "owns" the PSN by virtue of its ownership of facilities that are integrated
3 into it. Nevertheless, concentrated ownership of large portions of those facilities
4 by a few entities gives them control over access to the PSN. In my opinion, the
5 New Legislation was enacted for the purpose of opening Florida's PSN to more
6 providers to make the benefits of competition available to Floridians. These
7 benefits include: (1) lower consumer prices; (2) enhanced services; and (3)
8 expanded customers choice.

9 **Q. What is the nature of the market that Continental seeks to enter through**
10 **interconnection with the incumbent LECs?**

11 A. Each local exchange market is characterized by the overwhelming dominance of
12 one player--the incumbent LEC. The incumbent LECs own and control the
13 facilities encompassing the total local exchange market of Florida's PSN,
14 including subscriber loops and switches, access to which must be obtained in
15 order to originate or terminate traffic. In order for the Florida PSN to appear
16 seamless to consumers, there will always be a need for efficient interconnection
17 between service providers. The only alternative is the unacceptable circumstance
18 which existed at the beginning of this century when consumers often needed more
19 than one telephone to communicate with other consumers. The incumbent LEC
20 enjoys ubiquitous facilities throughout its market area. It begins the process of
21 transitioning to competition with virtually all of the market as well as customer
22 recognition which comes from decades of being the only provider.

1 The incumbent LEC may elect price regulation on January 1, 1996 even though it
 2 may actually face no competition in many areas. However, the ALEC will always
 3 face at least one competitor--the entrenched incumbent LEC. The incumbent LEC
 4 is the only competitor known and recognized as a provider of local exchange
 5 service and the only competitor controlling the essential market that rivals must
 6 access in order to provide service throughout an entire service area. Incumbent
 7 LECs have an enormous competitive advantage simply due to customer inertia.
 8 They have the ability to exercise market power gained from decades of
 9 advertising and from the leverage over end users based on long-standing business
 10 relationships.

11 ALECs, on the other hand, face many obstacles in order to compete. They must
 12 first make large investments in their own facilities. They must then connect these
 13 facilities to the ubiquitous LECs' facilities and attempt to overcome customer
 14 inertia and the incumbents' brand loyalty by providing superior service at the
 15 same or lower prices than the incumbent LECs. Because the incumbent LECs
 16 stand to lose market share (although not necessarily revenues) by such
 17 interconnection, they have little incentive to enter into interconnection
 18 arrangements that are economically viable or technically efficient for the new
 19 entrant. Yet, if ALEC services are perceived as inferior or more expensive to
 20 incumbent LECs' services, the effect on competition could be fatal. As it is, the
 21 ALEC currently enters the market with a serious risk of being placed at an
 22 immediate competitive disadvantage because of the effects of technical issues,

1 such as a technologically inferior interim number portability mechanism, that are
2 under the complete control of the incumbent LEC.

3 **Q. Given this context, what factors should the Commission consider in setting**
4 **incumbent LECs' interconnection parameters in this proceeding?**

5 A. First, the Commission should recognize that the intent of the New Legislation is
6 to promote competition and consumer choice among a wide array of services.
7 Indeed, worldwide experience indicates that competition lowers prices, provides
8 greater freedom of choice, encourages the introduction of new technology and
9 innovation as well as investment in telecommunications infrastructure, and
10 promotes the usage of telecommunications services. Therefore, a competitive
11 environment uses the least amount of society's scarce resources while providing
12 the greatest amount of goods and services to the consumer.

13 As the Chairman of the Florida House Committee on Telecommunications
14 recently stated in a letter to Chairman Clark, the Commission should view its new
15 role as that of the "catalyst of competition." See Exhibit CONT-2. In other
16 words, the Commission should be "promoting" competition rather than simply
17 "permitting" it. As a result, the Commission should consider the impact of
18 various rate structures and levels on the development of competition and
19 residential consumer choice. I agree with Chairman Clemons' statement that,
20 ultimately, the best way to protect consumers is by providing them with superior,
21 innovative choices. Interconnection arrangements must permit ALECs to
22 economically deliver competitive local telecommunications services.

1 Second, the Commission should consider that interconnection is an essential
2 monopoly service. Only the incumbent LECs today enjoy ubiquitous facilities
3 throughout their market areas, which is a great advantage to them. To spite the
4 argument that having to serve everyone everywhere is a burden, this ubiquity
5 confers immense positive effects from a marketing perspective. Because of
6 incumbent LEC ubiquity, new entrants must interconnect with the incumbent
7 LEC as a condition of doing business. Moreover, incumbent LECs, e.g.,
8 BellSouth, is investing in operations worldwide. The current wisdom is that
9 telecommunications companies, regardless of their origination, will ultimately
10 offer consumers a full package of services: video, local, toll, long-distance, data,
11 security, and environmental controls. The investments of both the incumbent
12 LECs and the ALECs will be amortized across that package, making the “burden
13 of maintaining a ubiquitous network” less costly. It also provides the monopolist
14 absolute market power and a marketing advantage the likes of which have not
15 been seen in modern industry.

16 Third, interconnection structure and rates should promote technological
17 innovation and innovative pricing strategies. This, too, is one of the basic
18 premises of the New Legislation. Not only are consumers to have choices of new
19 providers, but of new services. Further, the price structure for interconnection
20 should permit carriers to pursue their own independent retail marketing strategy.
21 Price structures for interconnection should not be tied to existing incumbent LEC
22 price structures so as to force new market entrants to mimic those pricing

1 structures. Nor should consideration be given to the incumbent LECs for keeping
2 their current revenues whole. That would be resorting to traditional, rate-of-return
3 regulation after that approach has been removed for the large incumbent LECs in
4 the New Legislation. ALECs must be permitted to exercise the greatest possible
5 latitude in developing their retail marketing strategies for local services.

6 Fourth, interconnection rates should not include a contribution to universal
7 service. We understand that as the Florida Legislature considered revisions to the
8 statutes governing regulation by the Commission of Florida's telecommunications
9 industry, it explicitly "de-linked" interconnection rates from universal service
10 considerations. I agree that these are two entirely different concepts, and should
11 not be treated together.

12 Fifth, the interconnection rate should take into account any technical
13 considerations placing new entrants at a competitive disadvantage. For example,
14 Remote Call Forwarding is the only currently available option for number
15 portability. It is an inefficient process for maintaining number portability. The
16 known disadvantages of Remote Call Forwarding include impairment of the
17 availability of CLASS features, degradation of service quality, call completion
18 delays, cost burdens for all, and--potentially--customer dissatisfaction for the
19 ALECs. Nevertheless, number portability is an essential element of providing
20 competitive local service from both a price and quality perspective. The
21 Commission should therefore take this shortcoming into account in setting
22 interconnection rates and terms.

1 Finally, interconnection rates and rate structures should create incentives for
2 competitive infrastructure development. The only way for sustainable
3 competition to develop is if competitors do not have to rely exclusively on the
4 incumbent LEC for the provision of service. Interconnection rates and structures
5 should encourage companies to invest in plant, which would inure to the benefit
6 of Florida's economy. I recommend that the Commission look down the road to
7 consider how the structure for interconnection fits into the ultimate goal of
8 achieving full and widespread competition so that as many consumers as possible
9 benefit from the widest possible range of choice as quickly as possible. The
10 Commission should view the competitive local market as evolving and thus
11 should adopt policies today which promote the changes and advances that
12 competition promises.

13 **Q. Based upon these criteria, what is the most appropriate interconnection**
14 **arrangement?**

15 A The most appropriate arrangement is a "bill and keep" arrangement.

16 **Q. Describe how a "bill and keep" arrangement operates.**

17 A. I understand that "bill and keep" is the method often used as an interconnection
18 arrangement between incumbent LECs when interconnecting with each other's
19 facilities today in Florida. With "bill and keep," two participants exchange traffic
20 originating on their own facilities bound for termination on the other's facilities at
21 some agreed-upon point. Each participant bears the cost of its own facilities,

1 keeping the revenues it generates and not charging the other participant to use its
2 facilities.

3 **Q. Why do you recommend a “bill and keep” arrangement?**

4 A. There are a number of reasons why I recommend a “bill and keep” arrangement.

5 First, it is reciprocal, thus acknowledging that all participants in the local
6 exchange market are co-carriers. Competing local exchange carriers should be
7 treated as co-carriers, meaning as carriers having equal status with the incumbent
8 LEC, in light of the fact that the public necessity for interconnection is mutual
9 once an entrant signs up its first customer. Once an entrant gains that first
10 customer, both the incumbent LEC and the ALEC have a mutual and equal need
11 for services and compatible systems to enable their customers to reach all other
12 telephone subscribers in the local calling area, maintaining the maximum number
13 of features.

14 Second, because “bill and keep” is the least-cost method of compensation, it is the
15 approach that is most likely to encourage lower local exchange rates for
16 consumers.

17 Third, “bill and keep” presents the least possibility of creating barriers to entry.
18 With “bill and keep,” it is unlikely that the compensation mechanism will place
19 unnecessary and unfair burdens upon the ALECs, as they enter the market with
20 limited resources that are better spent investing in the companies’ facilities to
21 offer better service in wider areas.

1 Fourth, "bill and keep" provides economic incentives for ALECs to invest in and
2 strengthen the State's local telecommunications infrastructure and its economy
3 through job creation and purchases of goods and services. It will encourage
4 expansion of the Florida PSN and multiple points of interconnection, increasing
5 reliability. It is also neutral in terms of both the technology and architecture that
6 ALECs might choose to adopt. Compensation arrangements for terminating
7 traffic must not inhibit the ALECs' choice of technology or architecture. This is a
8 crucial goal if the regulatory environment is to allow for flexibility and feature
9 enhancements in the future.

10 Fifth, "bill and keep" is necessary in order to achieve traffic flow balance. In
11 other words, traffic carried on each participant's facilities on the Florida PSN is
12 more likely to be balanced between terminating and originating traffic, *i.e.*, the
13 minutes of use of inbound traffic equals the outbound minutes of use.

14 Finally, any other method of interconnection involving compensation is
15 dangerous. Compensation, in any form, is an incentive that will drive behavior.
16 It is difficult to foresee the behavior that might develop, but I will illustrate one
17 type of behavior that could occur. To avoid paying under a reciprocal
18 compensation arrangement based on measured terminating traffic, an ALEC could
19 direct its marketing efforts toward inbound calling customers. This would skew
20 the reciprocal compensation being paid toward the ALEC. It could just as readily
21 be skewed in the other direction, depending on the incumbent LECs' practices.
22 The only method of compensation for interconnection that will diminish the need

1 for regulatory intervention and contention between the service providers, perhaps
2 involving the general public, is a "bill and keep" arrangement. Also diminished
3 by the "bill and keep" arrangement is the potential for contention among the
4 parties.

5 **Q. How does "bill and keep" minimize costs that could otherwise act as a**
6 **barrier to entry?**

7 A. Once the conditions for effective competition have been met, it is certain that the
8 amount of compensation owed to one participant would be offset by the amount
9 owed to the other. Unless there are significant distortions between facilities, the
10 traffic exchanged by participants tends to be in approximate balance over time.
11 This means that it is inefficient for companies to develop measurement and billing
12 arrangements that can significantly increase the cost of doing business when the
13 amounts to be paid are going to cancel out over relatively short periods of time.
14 The cost of such equipment which measures traffic in today's climate is immense.
15 Moreover, new and imminent technologies, such as personal communications
16 systems (PCS), might or might not be compatible with such equipment, which
17 could mean investment dollars earmarked for infrastructure development could
18 well be wasted on equipment which serves only to front load costs onto
19 competitors.

20 **Q. Have any other states adopted "bill and keep?"**

21 A. Yes. The commissions in Connecticut, California and Washington have done so.
22 I also understand that the commission in Tennessee has very recently adopted the

1 "bill and keep" method. In addition to the simplicity of "bill and keep," these
2 commissions believe it is too difficult to predict the outcome of any compensation
3 schemes or their impact on competition. As such, they did not want to adopt any
4 plan which would clearly place one company at an advantage over another, as an
5 immediate compensation plan based on minutes-of-use would. "Bill and keep,"
6 with a provision for traffic that is substantially out of balance, allows new entrants
7 to predictably invest in facilities and expansion of the Florida PSN to the public
8 good.

9 **Q. If the Commission sets rates, terms, and conditions for interconnection**
10 **between the ALECs and United/Centel, should United/Centel tariff the**
11 **interconnection rate(s) or other arrangements?**

12 A. I do not have a position on this issue at this time.

13 **Q. What are the appropriate technical and financial arrangements which should**
14 **govern interconnection between the ALECs and United/Centel for the**
15 **delivery of calls originated and/or terminated from carriers not directly**
16 **connected to the ALECs' network?**

17 A. United/Centel should provide intermediary tandem switching and transport to
18 connect the ALECs' end users to any other provider of service on Florida's PSN
19 for the purpose of making local and toll calls. These procedures benefit
20 consumers not only to complete calling efforts, but to provide alternative paths
21 when normal trunks are busy. At critical times, e.g., during hurricanes, they

1 minimize the opportunity for communities to become isolated. The ALECs
2 should be permitted to reciprocate this arrangement.

3 **Q. What are the appropriate technical and financial requirements for the**
4 **exchange of intraLATA 800 traffic which originates from an ALEC customer**
5 **and terminates to an 800 number served by United/Centel?**

6 A. United/Centel should compensate the ALEC for the origination of 800 traffic
7 terminated to them pursuant to the ALEC's originating switched access charges.
8 Continental will provide to United/Centel the appropriate records necessary for
9 United/Centel to bill its customers. At such time as Continental elects to provide
10 800 services, United/Centel should reciprocate this arrangement.

11 **Q. What are the appropriate technical arrangements for the interconnection of**
12 **the ALECs' networks to United/Centel's 911 provisioning network such that**
13 **the ALECs' customers are ensured the same level of 911 service as they**
14 **would receive as a customer of United/Centel?**

15 A. The ALECs' customers must have the same level of access to reliable 911 service
16 as customers of United/Centel. For basic 911 service, United/Centel should
17 provide a list consisting of each municipality it serves in Florida that subscribes to
18 basic 911 service. The list will also provide the E911 conversion date and, for
19 network routing purposes, a ten-digit directory number representing the
20 appropriate emergency answering position for each municipality subscribing to
21 basic 911 service. The ALECs should arrange to accept 911 calls from their
22 customers in the municipalities that subscribe to basic 911 service and translate

1 the 911 call to the appropriate ten-digit directory number as stated on the list
2 provided by United/Centel and route that call to United/Centel at the appropriate
3 tandem or end office. When a municipality converts to E911 service, the ALEC
4 should discontinue the basic 911 procedures and begin the E911 procedures.

5

6 For E911 service, the ALECs should connect Feature Group D trunks to the
7 appropriate E911 tandem, including the designated secondary tandem. If a
8 municipality has converted to E911 service, the ALECs should forward 911 calls
9 to the appropriate E911 primary tandem, along with Automatic Number
10 Identification ("ANI"), based upon the current E911 end office to tandem homing
11 arrangement as provided by incumbent LECs. If the primary tandem trunks are
12 not available, the ALECs should alternate route the call to the designated
13 secondary E911 tandem. If the secondary tandem trunks are not available, the
14 ALECs should alternate route the call to the appropriate Traffic Operator Position
15 System (TOPS) tandem.

16 Under my proposal, 911 services will be preserved for the communities that the
17 ALECS serve. Arrangements should be made to bill the ALECs' customers in
18 order to appropriately compensate the entity providing 911 emergency services.
19 Continental reserves the right to deal directly with the 911 entity.

20 **Q. What procedures should be in place for the timely exchange and updating of**
21 **the ALECs' customer information for inclusion in appropriate E911**
22 **databases?**

1 A. In order to ensure the proper working of the system along with accurate customer
2 data, the ALECs should provide daily updates to the E911 database.

3 United/Centel must be required to work cooperatively with the ALECs to define
4 record layouts, media requirements and procedures for this process.

5 **Q. What are the appropriate technical and financial requirements for operator
6 handled traffic flowing between the ALECs and United/Centel including
7 busy line verification and emergency interrupt services?**

8 A. United/Centel and the ALECs should mutually provide each other busy line
9 verification and emergency interrupt services.

10 **Q. What are the appropriate arrangements for the provision of directory
11 assistance services and data between the ALECs and United/Centel?**

12 A. United/Centel should include the ALECs' customers' primary listings (residence
13 and business listings) and yellow page (business) listings in its directory
14 assistance database at no charge.

15 **Q. Under what terms and conditions should United/Centel be required to list the
16 ALECs' customers in its white and yellow pages directories and to publish
17 and distribute these directories to the ALECs' customers?**

18 A. United/Centel should include the ALECs' customers' primary listings in the white
19 page and yellow page directories, distribute directories to the customers of each
20 and recycle all customers' directory books at no charge. United/Centel and the
21 ALECs should work cooperatively on issues concerning lead time, timeliness,
22 format, and content of list information.

1 **Q. What are the appropriate arrangements for the provision of billing and**
2 **collection services between the ALECS and United/Centel, including billing**
3 **and clearing credit card, collect, third party and audiotext calls?**

4 A. The ALECs and United/Centel should bill and clear credit card, collect and third
5 party calls (calls where the recording company is different from the billing
6 company) through Centralized Message Distribution Service (CMDS) provided
7 by United/Centel.

8 **Q. What arrangements are necessary to ensure the provision of CLASS/LASS**
9 **services between the ALECs' and United/Centel's networks?**

10 A. United/Centel and the ALECs should provide LEC-to-LEC Common Channel
11 Signaling (CCS) to one another, where available, in conjunction with all traffic in
12 order to enable full interoperability of CLASS features and functions. All CCS
13 signaling parameters should be provided, including ANI, Originating Line
14 Information (OLI) calling party category, charge number, etc. All privacy
15 indicators should be honored. United/Centel and the ALECs should cooperate on
16 the exchange of Transactional Capabilities Application Point (TCAP) messages to
17 facilitate interoperability of CCS-based features between their respective
18 facilities. CCS should be provided Signal Transfer Point to Signal Transfer Point.
19 The features provided to each customer should be billed by United/Centel or the
20 ALEC providing service. I note that all Class 5 offices cannot provide CLASS
21 features. This dictates that all vertical features should be part of the "bill and
22 keep" arrangement.

1 **Q. What are the appropriate arrangements for physical interconnection**
2 **between the ALECs and United/Centel, including trunking and signalling**
3 **arrangements?**

4 A. The technical interface for the delivery of all calls by one company to the other
5 should all be identical. Such interconnecting facilities should conform, at the
6 minimum, to the telecommunications industry standard of DS1 pursuant to
7 BellCore Standard No. TR-NWT-00499 (or higher in the digital hierarchy) for
8 facilities terminating as trunks on both companies' switching devices. Signalling
9 System 7 (SS7) connectivity should also be required.

10 **Q. To the extent not addressed in the number portability docket, Docket No.**
11 **950737-TP, what are the appropriate financial and operational arrangements**
12 **for interexchange calls terminated to a number that has been "ported" to the**
13 **ALECs?**

14 A. I understand that this issue involves an IXC delivering incoming calls, bound for
15 an ALEC, to United/Centel because the NXX code involved is assigned to
16 United/Centel. The called party, however, is a customer of the ALEC and the call
17 must be "ported" through United/Centel's call forwarding function to the ALEC
18 for completion. However, this call will appear to the ALEC as a "local" call since
19 it is delivered from a United/Centel end office. Clearly, United/Centel will bill
20 the IXC for terminating switched access charges associated with this call. Since
21 this has great possibility of working in both directions and, over time, traffic
22 should be equalized, I believe that this call should be handled on a "bill and keep"

1 basis. In my view, every exchange of traffic on end office trunks should be under
2 the "bill and keep" financial arrangement.

3 **Q. What arrangements, if any, are necessary to address other operational**
4 **issues?**

5 A. There are a number of operational issues that must be resolved in order for local
6 interconnection to function between companies. Any issue which cannot be
7 negotiated to the satisfaction of both interconnecting companies should be
8 resolved by the Commission through an expedited complaint procedure. An
9 example of such issues is the handling of maintenance calls that are reported to
10 the wrong company. Such misdirected calls must be handled in a manner that
11 holds the consumer interest foremost. Both United/Centel and the ALECs must
12 develop consumer educational campaigns for maintenance management. These
13 campaigns should assure that consumers are made aware of the proper
14 maintenance numbers. In certain circumstances, the receiving company should
15 forward trouble reports to the appropriate company.

16 **Q. What arrangements, if any, are appropriate for the assignment of NXX codes**
17 **to the ALECs?**

18 A. It is imperative that telephone numbers be conserved as valuable resources.
19 Nevertheless, such valuable resources must be shared and should not be controlled
20 by the dominant competitor in the marketplace. However, that is the situation at
21 the initiation of competition. An ALEC ought to be able to enlist the
22 Commission's assistance in overcoming any delays that occur in obtaining NXX

1 codes. The Commission should handle such requests for assistance on an
2 expedited basis, preferably in less than 30 days. Minimally, the ALECs should be
3 able to get an NXX for each United/Centel office with which the ALECs
4 interconnect. They should also be able to get additional NXXs when 60% or
5 more of the numbers in an existing NXX have been allocated. ALEC requests for
6 NXXs should be expected to be fulfilled by United/Centel in 30 days or less.

7 **Q. Does that conclude your testimony?**

8 **A. Yes.**

1 **REBUTTAL TESTIMONY OF A.R. (DICK) SCHLEIDEN**
2 **ON BEHALF OF CONTINENTAL CABLEVISION, INC.**
3 **DOCKET NO. 950985-TP**
4 **JANUARY 26, 1996**
5

6 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS AND**
7 **IDENTIFY THE PARTY ON WHOSE BEHALF YOU ARE TESTIFYING.**

8 A. A.R. (Dick) Schleiden, Continental Fiber Technologies, Inc. doing/business/as
9 AlterNet, 4455 Baymeadows Road, Jacksonville, Florida. Continental Fiber
10 Technologies, Inc. and Continental Florida Telecommunications, Inc. are wholly-
11 owned subsidiaries of Continental Telecommunications Corporation, which is a
12 wholly-owned subsidiary of Continental Cablevision, Inc. I am testifying on
13 behalf of Continental Cablevision, Inc., and its affiliated companies operating in
14 Florida.

15 **Q. WHAT IS YOUR POSITION WITH ALTERNET?**

16 A. I am the General Manager of AlterNet, which was originally certified as an
17 alternative access vendor and is currently certified as an alternative local exchange
18 telecommunications company.

19 **Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY IN THIS**
20 **PROCEEDING?**

21 A. Yes. I submitted direct testimony in this proceeding.

22 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

23 A. I will examine and rebut the testimony of the witness for Sprint-United/Centel,
24 Mr. F. Ben Poag.

1 Q. PLEASE SUMMARIZE YOUR TESTIMONY.

2 A. I take issue with some areas of Mr. Poag's testimony.

3 First, his testimony makes reference to the Stipulation and Agreement entered
4 into by Continental and ~~Sprint-United/Centel~~^{Bell South}, as well as various other parties to
5 this proceeding, and approved by the Commission. I believe it is improper to
6 introduce that stipulation into this proceeding for several reasons. I do not
7 believe that Continental's agreeing to resolve an issue relating to ~~Sprint-~~^{Bell South}
8 ~~United/Centel~~ in a particular manner compels Continental to agree to resolve that
9 issue relating to Sprint-United/Centel in the identical manner. Nor do I believe
10 that the Commission's approval of the Stipulation requires it to establish the
11 Continental/~~Sprint-United/Centel~~^{Bell South} solution in resolution of that issue between
12 Continental and Sprint-United/Centel. The fact remains that Continental has not
13 reached agreement with Sprint-United/Centel on the issues that separate our
14 companies. Thus, the Commission should disregard all references in Mr. Poag's
15 testimony to the Stipulation.

16 Mr. Poag's attempt to use the Stipulation as evidence of Continental's views on
17 the proper interconnection arrangement that the Commission should establish for
18 Sprint-United/Centel illustrates why his testimony concerned the Stipulation
19 deserves to be disregarded. The Stipulation was a comprehensive solution of
20 various matters. Mr. Poag takes one matter, interconnection compensation, out
21 of the context of the Stipulation and points to it as evidence of Continental's
22 beliefs. It is not Continental's opinion that interconnection compensation will not

1 have anti-competitive effects in some cases. Mr. Poag's testimony on this subject
2 leads to a misconception regarding Continental's true beliefs because the matter
3 is taken out of context. This furnishes an independent reason for the
4 Commission to disregard Mr. Poag's testimony about the Stipulation.
5 Secondly, Mr. Poag's testimony incorrectly asserts that the "Bill and Keep"
6 arrangement that I have recommended to the Commission for adoption in this
7 proceeding fails to provide compensation to cover Sprint-United/Centel's costs of
8 furnishing interconnection. For the reasons set out below, I believe that the "Bill
9 and Keep" arrangement does provide compensation to the extent that any such
10 additional costs are incurred. His testimony alleges additional defectives with
11 this arrangement which I will also address.

12 **Q. DOES THE "BILL AND KEEP" ARRANGEMENT COVER ANY**
13 **ADDITIONAL COSTS OF INTERCONNECTION INCURRED BY**
14 **SPRINT-UNITED/CENTEL?**

15 **A.** Yes. There should be general agreement that the Florida Legislature intends to
16 benefit consumers by keeping as low as possible the costs of providing them
17 telecommunications services. It defies logic to argue that the recent legislation
18 ties the hands of the Commission, forcing it to establish an interconnection
19 arrangement that will, in and of itself, drive up the costs of providing such
20 services. I do not believe that was intended; indeed, I believe this legislation
21 directs the Commission to seek an arrangement, such as "Bill and Keep," which
22 keeps costs down.

1 I do not concede that there will be additional costs of interconnection.

2 Nevertheless, in my view, Continental should seek to recover all of its costs from
3 its customers while Sprint-United/Centel recovers all of its costs from its own
4 customers. This is appropriate because the Sprint-United/Centel customers will
5 benefit from contacting the Continental customers and vice versa. It is possible
6 that from the very onset of competition, the traffic flowing between both sets of
7 customers will be in balance. In such an event, no compensation arrangement
8 calling for the companies to swap funds makes sense.

9 However, even if traffic is unbalanced for an initial period, Sprint-United/Centel
10 should incur, at most, only a negligible amount of cost in interconnecting traffic
11 with Continental. Further, all costs incurred by Sprint-United/Centel will be
12 falling as customers migrate to Continental, and all of Continental's costs will be
13 rising as its customer base increases. This demonstrates the reciprocal nature of
14 cost changes to be expected as we move from a monopoly to a competitive
15 environment.

16 **Q. SHOULD INTERCONNECTION BE PRICED TO COVER THE COSTS**
17 **OF PROVIDING UNIVERSAL SERVICE AND CARRIER-OF-LAST-**
18 **RESORT OBLIGATIONS?**

19 A. No. Interconnection should be priced strictly in accordance with the Legislature's
20 directives in the New Legislation. In a different proceeding, the Commission has
21 carried out its statutory mandate to protect universal service. There is no reason
22 for Sprint-United/Centel to attempt, in this proceeding, to obtain compensation for

1 interconnection that would include contributions toward covering the costs of
2 providing universal service and carrier-of-last-resort obligations. The Legislature
3 obviously feared that these subjects could become confused if considered in the
4 same proceeding and if similar methodology were employed, possibly leading to
5 more support being provided for universal service than needed. As a result, the
6 New Legislation carefully separates the subjects of interconnection, resale,
7 universal service and number portability separate and keeps them independent of
8 each other.

9 The Legislature intended for the Commission to hold different proceedings for
10 interconnection and universal service, each with its own set of pricing directions,
11 to implement the New Legislation. The Commission has complied with this
12 requirement, holding a separate universal service proceeding and establishing a
13 procedure for use by any incumbent LEC that needs universal service support..
14 This separate treatment of universal service and interconnection by the Legislature
15 recognizes the "sea change" in the Commission's regulatory techniques that is
16 accomplished by the New Legislation. Whereas the Commission traditionally
17 employed ratesetting methods that include contributions in support of universal
18 service, the New Legislature replaces this regulatory methodology with bifurcated
19 treatment. In supporting the addition of contribution to the interconnection rate,
20 Mr. Poag's testimony harkens back to this out-moded methodology which the
21 Florida Legislature has replaced with price regulation.

1 I believe that, in its white paper entitled "Essential Elements of Local Telephone
2 Competition," a copy of which is attached as Exhibit CONT-3, Sprint-
3 United/Centel addresses best the legislative concern underlying this treatment.
4 On page 2, Sprint-United/Centel states that interconnection compensation should
5 not be a source of universal service subsidy and "should not be designed to
6 produce contribution, subsidies, or universal service support;". It is perplexing to
7 me that Mr. Poag testifies otherwise. At page 10, lines 14 through 20, of his
8 testimony, he states that contribution is an appropriate element of a local
9 interconnection rate, implying that such a subsidy is proper.

10 The Legislature had a compelling reason of historical significance to follow this
11 course. The Commission, the incumbent LECs and the IXC's recognized years
12 ago a need to recover the costs for specific elements of various
13 telecommunications services by tariffing their rates, terms and conditions
14 individually, such as Directory Assistance. In my view, the majority of the
15 participants in the Public Switched Network should now have the opportunity to
16 freely structure their rates in accordance with their value to end users. This
17 freedom should also be extended to the incumbent LECs as soon as the
18 Commission detects that their current dominant monopoly market power has been
19 met with effective competition and they no longer are the local loop "bottleneck."

20 **Q. Must the Commission set rates for interconnection that are usage based and**
21 **that depend on measuring and recording the calls exchanged by Continental**
22 **and Sprint-United/Centel?**

1 A. No. I note that Mr. Poag suggests an alternative to such usage-based pricing, the
2 proposed "port" charge, and I agree that such an alternative offers the possibility
3 of avoiding the problems associated with measuring and recording calls and
4 engaging in contentious billing procedures that do not justify the time and money
5 expended. I will address the "port" charge proposal later. Turning first to Mr.
6 Poag's proposal that rates for interconnection be priced on a measured and
7 recorded usage basis, including the notion that some charge be established for the
8 exchange of any unbalanced amount of traffic, I do not believe that this is
9 supportable for several reasons. First, measured service leaves the opportunity for
10 marketing incentives that may not be in the best interest of consumers and of the
11 local exchange telecommunications companies, both alternative and incumbent,
12 alike. It certainly does not appear to me ~~X~~ that such pricing would stimulate the
13 kind of competitive activity that the Legislature envisioned in rewriting the law
14 governing the regulation of telecommunications.

15 Second, other witnesses have submitted testimony in this proceeding alleging that
16 the incumbent LECs lack the capability of measuring and recording terminating
17 traffic in all of their Class 5 central offices, and I believe this to be the case. This
18 being the case, it raises a host of technological issues that would likely delay
19 *choice in local service for many citizens of Florida.*

20 Third, to diminish the cost of furnishing universal service to the public, cost must
21 be driven out of the business. The development and installation of systems to

1 process this terminating traffic data would drive up cost; thereby increasing prices
2 to consumers and absolutely moving this industry in the wrong direction.

3 Fourth, any interconnection procedure relying upon measured service ultimately
4 dictates that competition must look like the "traditional" monopoly. My
5 recommendation is that the Commission establish interconnection arrangements
6 that will force both incumbents and new entrants to look instead for innovative
7 "new" competitive services that meet consumers needs. ALECs must be free to
8 attract customers through offering services that meet customers' needs and not
9 bound to "traditional" monopoly restrictions on service offerings.

10 Fifth, pricing interconnection strictly under a measured usage methodology flies
11 in the face of the Legislature's clear mandate, found at Section 364.337(2), Florida
12 Statutes (1995), that ALECs offer their end users a flat-rated pricing option for
13 basic local service and not impose mandatory measured service.

14 Sixth, interconnection rates that rely on measuring and recording usage will lead
15 to many confrontational issues between the parties. The Commission will have to
16 be called upon to preside over the resolution of such issues that occur. There is
17 ample opportunity for abundant disagreement between the parties if the times
18 recorded by all parties for traffic do not begin and end at precisely the same
19 moments. I am led to wonder at the number and intensity of argumentative
20 discussions that would evolve out of a single, faulty measuring and recording
21 device.

1 For the above reasons, I have concluded that interconnection through reciprocal,
2 mutual exchange of both local and toll traffic, at the proper levels, is the manner
3 that will give Florida citizens the lowest possible telecommunications cost with
4 the highest degree of flexibility and feature-rich innovation obtainable anywhere
5 in the world. A "Bill and Keep" arrangement, which has gained the acceptance of
6 regulatory agencies in Connecticut and California, is the logical choice for
7 Florida.

8 Turning back to Mr. Poag's "port" charge proposal, I believe that such a flat-rated
9 charge may alleviate some of the problems identified above in connection with the
10 usage-based compensation arrangement. Continental has given Sprint-
11 United/Centel's "port" charge proposal serious consideration; however, I agree
12 with Time-Warner's witness, Mr. Engleman, that the level of the charge proposed
13 by Sprint-United/Centel is highly excessive. Set at a vastly lower level, the "port"
14 charge compensation arrangement may be entirely acceptable to Continental.

15 **Q. Do technical restrictions on interconnection exist that might favor one of the**
16 **parties under a "Bill and Keep" arrangement?**

17 A. In the event that a specific grade of service is either agreed to by the parties or
18 ordered by the Commission, the answer is definitely "NO."

19 **Q. Does that conclude your testimony?**

20 A. Yes.

1 Q (By Mr. Crosby) Mr. Schleiden, have you
2 prepared a summary of your testimony?

3 A I have.

4 Q Would you present that now?

5 A It seems to those of us who work at
6 Continental that the legislation here in the state of
7 Florida has opened up the marketplace of the local
8 telecommunications to competition.

9 The purposes of those -- of that litigation
10 and of competition in the local arena should provide
11 the consuming public with three things: Number one,
12 choice; secondly, enhanced services as we go forward,
13 and finally lower prices.

14 From a marketing perspective, the local
15 exchange company today commands a controlling position
16 with the existing telephone users in the state of
17 Florida.

18 That will represent to us a formidable
19 obstacle to overcome in that they will have control,
20 and do have control, of those customers today, that
21 marketplace. Therefore, we feel that the structure of
22 the competitive aspects should be structured in such a
23 way as to not only allow competition but that
24 competition should be encouraged or promoted.

25 It must be positioned so that effective

1 marketing can be permitted.

2 We think that there are some adjustments
3 that have to take place in the future. For example, I
4 don't think that there's anyone that agrees that the
5 number portability situation is a situation that we
6 want to retain for a long period of time.

7 And, finally, I think that for the economy
8 of the state of Florida and for other good and just
9 reasons that we need to create an incentive to develop
10 infrastructure. So in keeping those things in mind
11 and clearly the interconnection arrangement, that
12 portion of the numbers of decisions that have to be
13 made to structure the competitive arena in Florida,
14 clearly, the interconnection arrangement should be
15 mutual traffic exchange. This has also been referred
16 to as bill and keep.

17 There are several reasons why I think that
18 we ought to have mutual traffic exchange. First of
19 all, it's fair in that it is both reciprocal and
20 mutual. Traffic under this situation should be
21 balanced. Some areas with cost centers might change
22 that balance somewhat but overall we feel that the
23 traffic will be balanced.

24 The cost of the bill and keep arrangement
25 will be minimized. That is it is the least cost

1 method. I don't think there's anybody that would
2 argue that point, and it, therefore, helps us to keep
3 the costs out of the business, and to cover other
4 costs. I think it also, in that line, incents
5 infrastructure development and presents for us with
6 infrastructure development, particularly with
7 interconnection at the end offices, for a far greater
8 opportunity for things like disaster recovery should a
9 hurricane, for example, hit with the additional
10 facilities running between the end offices and an ALEC
11 switch, there is far greater opportunity for disaster
12 -- what we like to refer to as disaster avoidance.

13 The focus of Continental is threefold: The
14 focus is a) on quality; b) on reliability, and finally
15 on responsiveness, customer responsiveness. And it's
16 to that customer service and to the quality and
17 reliability factors that we must be better than the
18 incumbent local exchange company if we're to gain any
19 part of the market.

20 It facilitates or promotes competition in
21 that it diminishes the barriers to entry. So in that
22 regard I think we would be promoting competition. It
23 facilitates traffic flow to equalize ingress and
24 egress. Any compensation, any compensation, we feel
25 would drive biased market behavior. And I just want

1 to make it clear there that if I am forced to market
2 to certain call centers to make traffic balance or
3 imbalance actually to flow in my favor, then that's
4 something that another decision might force me to do.

5 It diminishes the potential for what I view
6 as never ending contention. If our measuring devices,
7 if we don't start at precisely the same time on
8 precisely the same day there will be contention about
9 balance of traffic or how much traffic flowed in one
10 direction versus the other. And, again, I believe
11 that that will be never ending.

12 I think the stipulation that has been
13 presented to us has its base in rate of return
14 regulation and not the new regulation.

15 I think that the final item that I would
16 make is that bill and keep, or mutual traffic
17 exchange, is being widely recognized as the
18 appropriate interconnection process. It's been
19 recognized in the states of Oregon and Washington, in
20 California and Connecticut, and most recently in Ohio.
21 And, of course, it's been recognized at the federal
22 level both by the FCC for mobile telephone service, as
23 well as being recognized as acceptable in the most
24 recent federal legislation. And so to that end
25 Continental's stance is that the interconnection rate

1 and structure should be bill and keep.

2 Q Does that conclude the summary of your
3 testimony, Mr. Schleiden?

4 A It does.

5 Q One final matter. A moment ago the Chairman
6 identified the three exhibits to your direct and
7 rebuttal testimony as Exhibits 5, 6 and 7. Are those
8 true and correct to your knowledge and belief?

9 COMMISSIONER KIESLING: That's not right. 1
10 and 2 two 5. 3 was 6.

11 MR. CROSBY: They are combined then.

12 COMMISSIONER KIESLING: Two of them are
13 combined. One of them stands alone.

14 MR. CROSBY: I'm sorry.

15 A As described they were the exhibits that we
16 submitted, yes.

17 MR. CROSBY: Thank you. We tender the
18 witness for cross examination.

19 COMMISSIONER JOHNSON: I have a couple of
20 clarifying questions.

21 You listed quite a few states that have
22 adopted the mutual traffic exchange. You said Ohio.
23 I think you said Oregon. I see in your testimony on
24 Page 13, if I'm looking at the right thing, you've
25 listed three states, four states counting Tennessee,

1 you've just rattled off more. And if you can show me
2 where they are in the testimony that would be helpful.

3 Also you talked about the federal
4 legislation also being supportive of mutual traffic
5 exchange. Where is that in your testimony?

6 WITNESS SCHLEIDEN: That testimony was
7 submitted before those elements were passed.

8 COMMISSIONER JOHNSON: Oh, so this is
9 supplemental.

10 WITNESS SCHLEIDEN: That's right.

11 MR. CROSBY: Commissioner Johnson, we have
12 been granted official recognition of those in the list
13 of decisions that we handed out.

14 COMMISSIONER JOHNSON: Okay. So those are
15 listed on your --

16 MR. CROSBY: Yes, ma'am.

17 COMMISSIONER JOHNSON: And with respect to
18 the point it would be helpful for me to know the
19 provision of the federal law that you're citing to
20 when you testify that they are supportive of the
21 notion of mutual traffic exchange.

22 WITNESS SCHLEIDEN: On page -- the reference
23 that I have here is Page 13, the federal law, it says
24 "Rules of construction. This paragraph shall not be
25 construed to preclude arrangements that afford the

1 mutual recovery of costs through the offsetting of
2 reciprocal obligations, including arrangements that
3 waive mutual recovery," and in parentheses, "(such as
4 bill and keep arrangements)."

5 COMMISSIONER JOHNSON: Say that again. I'm
6 sorry.

7 MR. CROSBY: Commissioner Johnson, I think
8 there's some confusion here over federal law. Our
9 lists of decisions and actions by other states in the
10 federal government for official recognition, we listed
11 action by a federal agency, and I believe what the
12 witness is referring to is a decision by the FCC in a
13 notice of proposed rulemaking.

14 COMMISSIONER JOHNSON: And that dealt with
15 the commercial mobile radio service providers?

16 MR. CROSBY: Yes, ma'am.

17 COMMISSIONER JOHNSON: That was the first
18 point but he made another point about the legislation
19 itself being supportive of the notion of mutual
20 compensation. I think that's what you were just
21 reading from.

22 WITNESS SCHLEIDEN: Yes. I said it allowed
23 for it.

24 COMMISSIONER JOHNSON: Oh, it allowed for
25 it.

1 WITNESS SCHLEIDEN: Yes.

2 COMMISSIONER JOHNSON: And on the provision
3 that you just read, however, doesn't that speak to the
4 parties themselves that are negotiating and if they
5 wanted to waive -- what did you just read? I'm sorry.

6 WITNESS SCHLEIDEN: It's my understanding
7 that I'm reading from the federal law.

8 COMMISSIONER JOHNSON: You are, but could
9 you just read the provision again?

10 WITNESS SCHLEIDEN: Sure. It says, "Rules
11 of construction. This paragraph shall not be
12 construed to preclude arrangements that afford the
13 mutual recovery of costs through the offsetting of
14 reciprocal obligations, including arrangements that
15 waive mutual recovery," and then parenthesis, "(such
16 as bill and keep arrangements)."

17 COMMISSIONER JOHNSON: I'd like to see a
18 copy of that because you -- someone took official
19 notice of the federal law, but I don't see that here
20 on your --

21 MR. RINDLER: I did.

22 COMMISSIONER JOHNSON: You did.

23 MR. RINDLER: Yes, ma'am.

24 COMMISSIONER JOHNSON: The entire statute.

25 MR. RINDLER: Yes, ma'am. This seems to --

1 and this is just a point -- I was reading this
2 provision and it was confusing to me and I thought
3 that's what you were citing to -- and this provides
4 that this paragraph shall not be construed to preclude
5 arrangements, so it won't be -- it doesn't stop other
6 parties in their negotiations from agreeing to bill
7 and keep. But it doesn't necessarily suggest that
8 bill and keep is appropriate for Commissioners or
9 commissions to impose upon parties. And I was just
10 wondering if you were going to get into that, or if
11 you got into that discussion --

12 WITNESS SCHLEIDEN: No, no I don't intend to
13 get into it, but I believe my statement was it allows
14 for a bill and keep arrangement.

15 COMMISSIONER JOHNSON: And by that
16 statement, do you mean, is it your interpretation that
17 this provision allows states to actually adopt a bill
18 and keep or is it that it allows parties to negotiate
19 a bill and keep?

20 WITNESS SCHLEIDEN: I'm not an attorney, so
21 I don't know that I would necessarily want to comment
22 on that. But in just the reading of that particular
23 portion it seems to me that it allows for bill and
24 keep.

25 COMMISSIONER JOHNSON: And your

1 interpretation then that it allows -- this provision
2 is what you would use to suggest that commissions
3 themselves could adopt a bill and keep mechanism under
4 the federal law?

5 WITNESS SCHLEIDEN: That's my understanding.

6 COMMISSIONER JOHNSON: Okay. Thank you.

7 Sorry.

8 CHAIRMAN CLARK: Ms. Wilson?

9 CROSS EXAMINATION

10 BY MS. WILSON:

11 Q Good afternoon, Mr. Schleiden, I'm Laura
12 Wilson representing the Florida Cable
13 Telecommunications Association. I have just a few
14 questions for you.

15 Didn't your company sign an agreement with
16 BellSouth that is not bill and keep?

17 A It did.

18 Q Why?

19 A It was the best negotiation that we could
20 perform at the time. We had prepared to provide local
21 telephone service well in advance of the January 1
22 date and had anticipated doing so, and so we were
23 anxious to arrive at a stipulation at that point in
24 time going back to September of last year to be
25 prepared to provide local telephone service come

1 January 1 of '96.

2 Q Have there been any other changed
3 circumstances since you signed the BellSouth
4 agreement?

5 A There have been a number of changes. There
6 have been, I think as was just pointed out, a number
7 of decisions, one by the State of Ohio as recently as
8 last week for bill and keep. There have been a number
9 of changes, including the passage of the federal law
10 itself, which is a significant change to the
11 environment.

12 Q Was the BellSouth agreement signed prior to
13 this Commission's decision in the universal service
14 and number portability dockets?

15 A It was.

16 Q Now, Mr. Schleiden, if you had favorable
17 interconnection terms how quickly could you be in
18 business in Sprint-United/Centel's territory?

19 A Well, we could be in business in Lee and
20 Collier Counties probably in as short a period as 60
21 days.

22 Q And what types of customers would you market
23 to?

24 A Business and residential alike.

25 Q And just so we're clear, can you name some

1 cities in Lee and Collier County?

2 A In Lee and Collier Counties, Fort Myers,
3 Bonita Springs, Naples.

4 MS. WILSON: That concludes my questions.

5 MR. MELSON: No questions.

6 COMMISSIONER JOHNSON: I have one other
7 question. You mentioned Ohio. Is that something we
8 have taken official notice of? Because I don't see it
9 in our packets, either. And if it's one of the states
10 that adopted bill and keep, is someone going to offer
11 this?

12 MR. CROSBY: No, ma'am. That was not placed
13 on my list for official recognition for the reason I
14 don't have a decision from Ohio. My understanding is
15 that was announced from the bench in Ohio last week in
16 the Ameritech case with Time Warner. I have a news
17 release that the Public Utility Commission of Ohio
18 released and I would be happy to let you look at that,
19 but that's all I have.

20 COMMISSIONER JOHNSON: I was just wondering
21 why it hadn't been attached to any of the exhibits,
22 but if it is not available, I understand.

23 CHAIRMAN CLARK: Mr. Melson.

24 MR. MELSON: No questions.

25 CHAIRMAN CLARK: Ms. Dunson?

1 MS. DUNSON: I just have a couple questions.

2 CROSS EXAMINATION

3 BY MS. DUNSON:

4 Q Mr. Schleiden, I'm Robin Dunson representing
5 AT&T. Mr. Poag states in his testimony that a bill
6 and keep arrangement will discourage investment in
7 infrastructure and the economy. Do you agree with
8 this?

9 A I do not.

10 MR. WAHLEN: Could I object to the question?
11 That is not a question about his testimony, she's
12 cross examining on Mr. Poag's testimony and that's
13 improper cross examination.

14 CHAIRMAN CLARK: Ms. Dunson?

15 MS. DUNSON: Actually, I believe
16 Mr. Schleiden addressed this point in his testimony.
17 In his direct testimony he talks about a bill and keep
18 arrangement will provide an economic incentive for the
19 development of infrastructure, and I was just
20 wondering what his view was on it and why he disagreed
21 with Mr. Poag.

22 CHAIRMAN CLARK: I'll allow the question.

23 A I disagree. I think it will incent
24 infrastructure development primarily because more
25 monies will be made available to perform that

1 function.

2 I would hesitate to speak for anyone else,
3 but I can speak by example from Continental's
4 perspective in our focus on reliability. We are
5 currently trying to build infrastructure in
6 Jacksonville into 12 BellSouth LSOs. So that gives
7 you some idea of the infrastructure that we are
8 already setting about developing.

9 Q So you believe because this is, if I can try
10 and rephrase what I heard you say, that because there
11 will be more money available it will be an incentive
12 for customers to then -- for companies to then develop
13 their infrastructure?

14 A It would be a redirection of our costs, yes.

15 Q Okay. I also believe you state in your
16 direct testimony that interexchange calls terminated
17 to a number that has been ported should be handled on
18 a bill and keep basis. Could you explain to me why
19 you think that's appropriate.

20 A Well, in order to try to sort all that
21 out -- I think it is going to happen infrequently
22 enough that in order to try to sort all that out, the
23 costs of attempting to do that is not worthy of the
24 revenues that we would retain from that.

25 MS. DUNSON: Thank you, that's it. I have

1 no more questions.

2 CHAIRMAN CLARK: Mr. Horton?

3 MR. HORTON: No questions.

4 CHAIRMAN CLARK: Mr. Rindler?

5 MR. RINDLER: No questions.

6 CHAIRMAN CLARK: Ms. Weiske?

7 MS. WEISKE: No questions.

8 CHAIRMAN CLARK: Mr. Gillman?

9 MR. GILLMAN: No questions.

10 CHAIRMAN CLARK: Mr. Wahlen?

11 MR. WAHLEN: Yes, thank you.

12 **CROSS EXAMINATION**

13 BY MR. WAHLEN:

14 Q I'm Jeff Wahlen for United and Centel. I
15 have a couple of the questions. You're the General
16 Manager of the AlterNet?

17 A I perform that function, yes.

18 Q That's a subsidiary of Continental Cable?

19 A It is.

20 Q If we use the term Continental Cable today
21 for our discussions, will that cover all of the ALEC
22 entities that are operating in Florida under the
23 Continental Cablevision organization? I just don't
24 want to get hung up on names, is it okay if we just
25 use Continental for that?

1 A Continental will be fine.

2 Q Okay, good. Ms. Wilson asked you some
3 questions about when you could be in business in Lee
4 and Collier County and I think you said within 60
5 days. Is that correct?

6 A That was my answer, yes.

7 Q But you would agree with me that you
8 probably won't be doing much business down there
9 before October 1st; is that correct?

10 A That's probably true.

11 Q So you would just be getting started down in
12 Lee and Collier Counties by October 1st? Is that
13 correct?

14 A We probably wouldn't be doing a lot of
15 business before October 1st, that is correct.

16 Q Are you planning to serve anywhere else in
17 United's territory initially other than Lee and
18 Collier County?

19 A We have no immediate plans.

20 Q Do you have any immediate plans to serve in
21 Centel's territory?

22 A We do not.

23 MR. WAHLEN: I wonder if it would be helpful
24 for the record to identify Mr. Schleiden's exhibit
25 from Staff for the record because I have some

1 questions about his materials.

2 CHAIRMAN CLARK: Staff, I have two exhibits,
3 ARS-2 and ARS-3?

4 MR. EDMONDS: That's correct.

5 CHAIRMAN CLARK: Okay. Let's go ahead and
6 label, it is a composite exhibit and titled by Staff
7 ARS-2, we'll label that as Exhibit 7. And some
8 Answers to Staff Interrogatories which are labeled by
9 the Staff as ARS-3 will be labeled in this proceeding
10 as Exhibit 8.

11 (Exhibit Nos. 7 and 8 marked for
12 identification.)

13 MR. WAHLEN: Thank you.

14 Q (By Mr. Wahlen) Now, Mr. Schleiden,
15 included with your deposition transcript is a copy of
16 the BellSouth agreement; is that correct? That's
17 Exhibit 1.

18 A That's correct.

19 Q Also included therein is the proposed --
20 well, the agreement that United and Centel have
21 entered with Intermedia; is that correct, that's
22 Exhibit 2?

23 A That's correct.

24 Q And this agreement between United and Centel
25 and Intermedia was presented to Continental for

1 Continental's consideration; is that correct?

2 A That's correct.

3 Q And you rejected that agreement; is that
4 correct?

5 A That's correct.

6 Q Now, I would like to talk about that
7 agreement and also your agreement with BellSouth.
8 Under your agreement with BellSouth, you agreed to a
9 minute of use charge for interconnection of about a
10 penny a minute; is that correct?

11 A That's correct.

12 Q And that's subject to a 105% rate cap; is
13 that correct?

14 A That's correct.

15 Q And you would agree the purpose of the cap
16 is to reduce the risk of traffic being out of balance;
17 is that correct?

18 A That's correct.

19 Q So it's possible that traffic might be out
20 of balance; is that correct?

21 A That's correct.

22 Q Thank you. Now you mentioned earlier in
23 your summary that one of the advantages of a bill and
24 keep methodology would be that it's reciprocal and
25 mutual; is that correct?

1 A That's correct.

2 Q In the proposal that United sent to you
3 which you rejected, isn't it true that the
4 interconnection arrangement, the minute of use charge,
5 is both mutual and reciprocal?

6 A It is.

7 Q We've talked about this before, but isn't it
8 true that the agreement between BellSouth and
9 Continental is pretty similar to the agreement that
10 United gave to you, which is Exhibit 2 to your
11 deposition?

12 A In the stipulations that we have discussed,
13 there are some significant differences.

14 Q And those would be -- one of those would be
15 that the United agreement includes a port charge
16 option; is that one of the differences?

17 A That would be one.

18 Q And another one is that United has proposed
19 a different minute of use rate; is that another
20 difference?

21 A Structure and rate.

22 Q Right. And those are two of the big
23 differences; isn't that correct?

24 A They are.

25 Q And wouldn't you say that those are the big

1 differences between the two agreements?

2 A There are some other differences in the
3 stipulation that was forwarded to us as recently as
4 last Friday that puts technical concerns on the table.

5 Q Okay. You have mentioned a stipulation that
6 was forwarded to you last Friday?

7 A That's correct.

8 Q That's different than the one that we're
9 talking about here that's attached to your deposition
10 transcript as Exhibit 2, correct?

11 A I would assume that the stipulation that was
12 forwarded to us on Friday superseded anything else
13 that we were given.

14 Q Well, okay. Let's talk about Exhibit 2 to
15 your deposition transcript. That is the last
16 comprehensive agreement that discusses local
17 interconnection and number portability and universal
18 service that was presented to you, wasn't it?

19 A I'm sorry, would you repeat the question?

20 Q Yes. I'd like to set aside the materials
21 that were sent to you last Friday and focus on
22 Exhibit 2 to your deposition.

23 A Okay.

24 Q And I think you testified that that's
25 similar to the BellSouth agreement except for the fact

1 that there's a port charge and the interconnection
2 minute of use charges is different. Those were the
3 big differences?

4 A They -- yes.

5 Q I would like to focus on the interconnection
6 minute of use charge for a minute in Exhibit 2 of your
7 deposition. Would you agree that the minute of use
8 charge proposed in that document is about 1.9 cents a
9 minute?

10 A That's correct.

11 Q And about eight-tenths of a cent of that is
12 a line termination charge?

13 A That's correct.

14 Q And if the line termination charge is
15 ignored, the rate would be about 1.1 cents a minute?

16 A That's correct.

17 Q And that 1.1 cents a minute is similar to
18 the penny a minute you agreed to with BellSouth; isn't
19 that correct?

20 A That's correct.

21 Q In fact, there's only one-tenth of a cent
22 difference between the two rates; isn't that correct?

23 A Approximately.

24 Q And isn't it true that United and Centel
25 have proposed in this document eliminating the line

1 termination charge effective October 1st of '96?

2 A They have not forwarded that to us as part
3 of the stipulation, I don't believe.

4 Q Well, let's look at the document for a
5 minute. (Pause)

6 If you will look, sir, on Page 116 of your
7 exhibit, it's the Bates stamp at the bottom of the
8 document? The top of the page with the Paragraph C,
9 are you there?

10 A Yes.

11 Q There where it says, "Sprint-United/Centel
12 will propose to apply the 5% reduction of the line
13 termination rate and to spread the balance of the line
14 termination rate element revenues proportionately to
15 the originating and terminating carrier common line
16 elements effective October 1st." Do you see that?

17 A Yes.

18 Q Would you agree with me that that's a
19 proposal to eliminate the line termination charge from
20 the local interconnection rate?

21 A It is a proposal, it is not a guarantee.

22 Q That's correct. But if in fact that is put
23 in effect the rate you would be getting under this
24 proposal is very similar to the rate that you agreed
25 to with BellSouth; is that correct?

1 A It would be similar, I agree.

2 Q Okay. Now, are you familiar with how United
3 and Centel computed the port charge proposal in
4 Exhibit 2 to your deposition?

5 A Yes.

6 Q And would you agree with me, sir, that the
7 basis for that calculation or for the rate charge was
8 to assume 216,000 minutes of use and multiply that by
9 the minute of use rate that we have been discussing?

10 A What do you mean, "the minute of use rate
11 that we have been discussing"?

12 Q The 1.9 cents a minute?

13 A The 1.9 cents, I would agree with that, yes.

14 Q Okay. And that's how United and Centel came
15 up with the port charges --

16 A Yes.

17 Q -- in this document? Am I correct in
18 understanding that you disagree with the use of the
19 216,000 minutes of use in that calculation?

20 A I am in disagreement with that figure, yes.

21 Q You think it should be a number closer to
22 160,000; is that correct?

23 A That's correct.

24 Q And if I recall your deposition correctly
25 you were pretty confident about that number, the

1 160,000?

2 A Yes, sir.

3 Q Isn't it possible to get more than 160,000
4 minutes of use out of a DS-1 local channel through
5 multiple trunking?

6 A Through multiple trunking?

7 Q Yes, if you engineer in a manner that
8 prevents isolation?

9 A I don't know that multiple trunking has
10 anything to do with it, but you could get more than
11 160,000 minutes a month through a DS-1, yes.

12 Q Okay. Now in the proposal that Intermedia
13 signed but you rejected on Page 127 of your Exhibit
14 No. 7, would you agree with me that included in there
15 are port charge or discounts that reflect the fact
16 that trunking efficiencies are available if more than
17 one port is ordered?

18 A Yes. There are discounts, as I understand
19 it, for the first three DS-1 ports in a LATA.

20 Q Right. United has offered you a 50%
21 discount on the first port? Is that correct?

22 A On the first four?

23 Q Yes. Right there on Page 127 there, Port
24 No. 1, discount 50%; is that correct?

25 A I'm sorry, on my copy the page numbers have

1 been cut off in reproduction. What page number of the
2 stipulation?

3 Q It's Attachment A, Option A.

4 A Pardon?

5 Q It's Attachment A, Option A.

6 (Witness provided document.) (Pause)

7 A I'm sorry, what was the question again?

8 Q Isn't it true that United has offered you a
9 50% discount on the first port?

10 A Yes.

11 Q And isn't it true that United has offered
12 you a 30% discount on the second port?

13 A Yes.

14 Q Okay, I'm going to ask you to do a little
15 bit of math, so help me out. If you get a 50%
16 discount for the first port and the minute of use rate
17 used in the calculation remains constant, effectively
18 what you are doing is having to pay for half of those
19 minutes of use; isn't that correct?

20 A On the first port.

21 Q Yes. So in effect that instead of paying
22 for 216,000 minutes you would be paying for 108,000
23 minutes; is that correct?

24 A You're going on the basis that I'm agreeing
25 with the rates. I'm not necessarily agreeing with the

1 rates.

2 Q Okay. Let's set aside for a moment the fact
3 that you disagree about the rate. We're holding the
4 rate constant. If you get a 50% discount, that means
5 you're paying for 108,000 minutes for the first port;
6 is that correct?

7 A That's correct.

8 Q And you have said that a DS-1 will give you
9 a capacity of about 160,000 minutes; is that correct?

10 A Uh-huh.

11 Q So essentially, putting aside your
12 disagreement with the rate, if you get a 50% discount,
13 that entitles you to 52,000 free minutes of use if you
14 order one port; isn't that correct?

15 A I understand your logic. I do not agree
16 with your conclusion because I don't agree with the
17 rates.

18 Q Okay. Well, if the rate is correct, the
19 math works, doesn't it?

20 A The math works.

21 Q Okay.

22 CHAIRMAN CLARK: Mr. Schleiden, would you
23 please say yes or no? I mean, we need that as a
24 preface to any explanation you may give.

25 Q (By Mr. Wahlen) This is a little bit more

1 complicated but it is the same math. If you order two
2 ports -- and we'll do all these numbers subject to
3 check -- and you apply the discount, you get a 50%
4 discount on the first and a 30% discount on the
5 second. Would you agree with me, subject to check,
6 that that allows you to purchase 320 minutes of
7 capacity using your 160,000 number for the price of
8 about 259,000 minutes of use? Putting aside your
9 disagreement with the rate --

10 A Yes.

11 Q -- that's the math. Okay. And the result
12 of that, subject to check, is 61,000 free minutes of
13 use under the port charge arrangement; is that
14 correct?

15 A Yes.

16 Q Okay. Now have you ever done a long-run
17 incremental cost study for call termination?

18 A I have not.

19 Q Have you ever reviewed a cost study?

20 A Have I ever reviewed one, is that the
21 question?

22 Q Yes.

23 A Yes, I have reviewed them.

24 Q Okay. Would you agree with me that one of
25 the elements of a long-run incremental study for call

1 termination is the cost of transport?

2 MR. CROSBY: Objection. This witness has
3 not been tendered as an expert in economics.

4 MR. WAHLEN: I'm not asking about economics,
5 I'm asking about costs. He's talked about costs
6 throughout his testimony.

7 MR. CROSBY: You used the term "long-run
8 incremental cost," which has a certain meaning.

9 CHAIRMAN CLARK: I think Mr. Wahlen is
10 laying a foundation for a question and I'll allow him
11 to proceed.

12 MR. WAHLEN: Thank you.

13 Q (By Mr. Wahlen) The question is: Would you
14 agree with me that one of the elements of a long-run
15 incremental cost study for call termination is the
16 cost of transport?

17 A Would you define "transport" for me?

18 Q Well, why don't you tell me what you think
19 "transport" means and I'll ask the next question.

20 A Well, I'm not sure exactly what you are
21 driving at. But "transport" could mean one of several
22 different things. If you are talking about transport
23 of getting from the end user to the central office,
24 then I would agree. If you are talking about any
25 other transport, I may or may not agree depending on

1 the situation.

2 Q Let's talk about transport between switches.

3 A Between switches?

4 Q Yes. Would you agree with me that that
5 would be part of the call termination cost study?

6 A Not for local interconnection, no.

7 Q Not for local interconnection. What about,
8 let me just ask this. If you were going to use or
9 include transport in your line termination cost study
10 and you were going to estimate transport, would one
11 way to do that be to make an assumption about the
12 capacity of a DS-1 local channel?

13 A I'm sorry, I didn't hear the last part
14 there.

15 Q If you are going to compute a minute of use
16 cost for transport between switches, would you make an
17 assumption about the capacity of a DS-1 local channel?

18 A I'm sure that we probably would.

19 Q Okay. Now based on your previous testimony,
20 you think that the capacity of a DS-1 is 160,000
21 minutes; is that correct?

22 A That's correct.

23 Q Now, if I told you that United prepared its
24 cost studies using an assumption of 216,000 minutes
25 for transport, would you say that that's too high?

1 A I would.

2 Q So you wouldn't mind if United recomputed
3 its cost study using your estimate of 160,000 minutes
4 of use for DS-1?

5 A Would I mind it?

6 Q You don't think that's an incorrect answer?

7 A No.

8 Q Okay, thanks.

9 Now let me just ask you a question. When an
10 interexchange carrier interconnects with your local
11 telephone network, are you going to bill them for the
12 price of interconnection, the cost of interconnection?
13 Are you going to charge them an access charge?

14 A I don't think we've determined that yet.

15 Q Well, okay. Have you ruled it out?

16 A Have I ruled it out?

17 Q Right.

18 A No, I wouldn't say we'll ruled it out, no.

19 Q Well, one option would be just to let IXCs
20 interconnect with your network for free; isn't that
21 correct?

22 A That would be an option.

23 Q And you wouldn't have to pay for the billing
24 and all that stuff for access, would you?

25 A That's correct.

1 Q Is that your idea of mutual traffic
2 exchange? You interconnect, you allow someone to
3 interconnect and they don't have to pay the cost of
4 interconnection?

5 A If they wouldn't charge my customers for the
6 long distance call.

7 MR. WAHLEN: Okay. That's all my questions,
8 thank you.

9 CHAIRMAN CLARK: Staff?

10 MR. EDMONDS: Thank you.

11 Hello, Mr. Schleiden, Scott Edmonds --

12 CHAIRMAN CLARK: Let me ask you, how much
13 time do you have, how many questions?

14 MR. EDMONDS: Could take about 20 minutes
15 probably.

16 CHAIRMAN CLARK: I think we will go ahead
17 and take a lunch break until 1:30 and we'll reconvene
18 at 1:30 with cross examination by Staff.

19 We are taking a short lunch break, please
20 feel free to get your lunches and come back in and eat
21 in the hearing room.

22 (Thereupon, lunch recess was taken at
23 12:55 p.m.)

24 (Transcript continues in sequence in
25 Volume 2.)