

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 971478-TL  
:  
Complaint of WorldCom :  
Technologies, Inc. against :  
BellSouth Telecommunications, :  
Inc. for breach of terms of :  
Florida partial interconnection: agreement under Sections 251 :  
and 252 of the :  
Telecommunications Act of 1996, :  
and request for relief. :

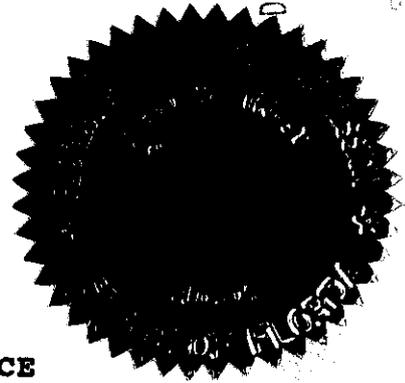
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Complaint of Teleport : DOCKET NO. 980184-TP  
Communications Group Inc./TCG :  
South Florida against BellSouth: Telecommunications, Inc. for :  
breach of terms of inter- :  
connection agreement under :  
Section 252 of the :  
Telecommunications Act of :  
1996, and request for relief. :

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Complaint of Intermedia : DOCKET NO. 980495-TP  
Communications Inc. against :  
BellSouth Telecommunications, :  
Inc. for breach of terms of :  
Florida partial interconnection: agreement under Sections 251 :  
and 252 of the :  
Telecommunications Act of 1966, :  
and request for relief. :

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Complaint by MCI Metro Access : DOCKET NO. 980499-TP  
Transmission Services, Inc. :  
against BellSouth :  
Telecommunications, Inc. for :  
breach of approved :  
interconnection agreement by :  
failure to pay compensation for: certain local traffic. :  
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PROCEEDINGS: PRE-PREHEARING CONFERENCE

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3 BEFORE: COMMISSIONER J. TERRY DEASON  
Prehearing Officer  
4  
5 DATE: Monday, April 13, 1998  
6 TIME: Commenced at 2:00 p.m.  
Concluded at 3:50 p.m.  
7 PLACE: Betty Easley Conference Center  
Room 152  
8 4075 Esplanade Way  
Tallahassee, Florida  
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10 REPORTED BY: H. RUTHE POTAMI, CSR, RPR  
Official Commission Reporter  
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1 **APPEARANCES:**

2 **KENNETH A. HOFFMAN and JOHN R. ELLIS,**  
3 Rutledge, Ecenia, Underwood, Purnell and Hoffman, P.  
4 O. Box 511, 215 South Monroe Street, Suite 420,  
5 Tallahassee, Florida 32302-0551, appearing on behalf  
6 of **Teleport Communications Group and TCG South**  
7 **Florida.**

8 **FLOYD R. SELF, Messer, Caparello & Self, 215**  
9 South Monroe Street, Post Office Box 1876,  
10 Tallahassee, Florida 32302-1876, appearing on behalf  
11 of **WorldCom, Inc..**

12 **DONNA CANZANO, Wiggins & Villacorta, P. A.,**  
13 Post Office Drawer 1657, 2145 Delta Boulevard,  
14 Tallahassee, Florida 32302, appearing on behalf of  
15 **Intermedia Communications.**

16 **EDWARD L. RANKIN, III, BellSouth**  
17 Telecommunications, Inc., 4300 Southern Bell Center,  
18 675 West Peachtree Street, Northeast, Atlanta, Georgia  
19 30375-0001, appearing telephonically on behalf of  
20 **BellSouth Telecommunications, Inc.**

21 **RICHARD D. MELSON, Hopping Green Sams &**  
22 Smith, P.A., Post Office Box 6526, Tallahassee,  
23 Florida 32314, appearing on behalf of **MCI Metro Access**  
24 **Transmission Services, Inc.**

25

1 **APPEARANCES CONTINUED:**

2                   **CHARLIE PELLEGRINI and MARTHA BROWN, Florida**  
3 **Public Service Commission, Division of Legal Services,**  
4 **2540 Shumard Oak Boulevard, Tallahassee, Florida**  
5 **32399-0870, appearing on behalf of the Commission**  
6 **Staff.**

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1 firm Wiggins & Villacorta at our new address of 2145  
2 Delta Boulevard, Tallahassee, Florida. We're  
3 appearing on behalf of Intermedia Communications.

4           **MR. MELSON:** Good afternoon. Richard Melson  
5 of the law firm Hopping Green Sams & Smith, P.A., Post  
6 Office Box 6526, Tallahassee, appearing on behalf of  
7 MCI Metro Access Transmission Services, Inc.

8           **MR. PELLEGRINI:** Charles Pellegrini  
9 appearing on behalf of Commission Staff, 2540 Shumard  
10 Oak Boulevard, Tallahassee.

11           **COMMISSIONER DEASON:** Do we have someone by  
12 telephone connection?

13           **MR. PELLEGRINI:** Yes.

14           **MR. RANKIN:** Commissioner Deason, my name is  
15 Ed Rankin. I'm appearing on behalf of BellSouth. I'm  
16 at 675 West Peachtree Street Northeast, Atlanta,  
17 Georgia, 30375. And I appreciate the Commission's  
18 indulgence in allowing me to appear by telephone this  
19 afternoon. Delta was not ready when I was.

20           **COMMISSIONER DEASON:** I understand. That's  
21 perfectly fine. Are you able to hear everyone  
22 adequately?

23           **MR. RANKIN:** So far I have been able to,  
24 yes.

25           **COMMISSIONER DEASON:** Okay. If there's any

1 problem, just let us know.

2 MR. RANKIN: Okay. Will do.

3 COMMISSIONER DEASON: Are there any  
4 preliminary matters?

5 MR. PELLEGRINI: No preliminary matters,  
6 Commissioner Deason.

7 COMMISSIONER DEASON: Any of the parties  
8 have any preliminary matters? (No response.)

9 Okay. Mr. Rankin, any preliminary matters?

10 MR. RANKIN: No, none that I can think of.

11 COMMISSIONER DEASON: Okay. Thank you.

12 It's my understanding that we're here to discuss the  
13 issues which will be addressed in these dockets, and  
14 that there have been some initial discussions, but  
15 there has been no resolution concerning the final  
16 issues that would be incorporated into the prehearing  
17 order.

18 So with that, I'm going to let Staff take  
19 just a moment and explain the issues which they feel  
20 are appropriate, and then we will go through and hear  
21 from the various parties concerning the additional  
22 issues which I understand BellSouth wishes to have  
23 incorporated, and it's also my understanding that TCG  
24 and Intermedia wish to have some additional issues, if  
25 there are additional issues allowed at the request of

1 BellSouth.

2           So, Staff, I'm going to allow you to  
3 indicate the four issues which you've indicated are  
4 appropriate and why you feel those issues are  
5 appropriate.

6           **MR. PELLEGRINI:** Thank you, Commissioner  
7 Deason. Let me begin by saying that on April 3rd,  
8 1998, with the anticipation that these proceedings  
9 would be consolidated for purposes of hearing, Staff  
10 met with the parties to establish the issues to be  
11 decided in this proceeding.

12           At that time Staff proposed a single issue  
13 stated as follows in each of the proceedings as the  
14 appropriate statement of the issues: "Under their  
15 interconnection agreement are WorldCom, Teleport,  
16 MCI, Intermedia, and BellSouth required to compensate  
17 each other for transport and termination of traffic to  
18 Internet service providers. If so, what action, if  
19 any, should be taken?"

20           Staff believed that its proposed statement  
21 of the issue for these proceedings was consistent with  
22 the vote of the Commission at the March 10, 1998,  
23 agenda conference directing that WorldCom's complaint  
24 be set for hearing, and consistent with the guidance  
25 you provided to Staff on March 26, 1998, for the

1 conduct of these proceedings.

2 First: It expresses the essence of each of  
3 the complaints that the competing carriers have lodged  
4 against BellSouth.

5 Second: It limits the matters to be decided  
6 by the Commission to whether the interconnection  
7 agreements of these carriers and BellSouth require the  
8 parties to the agreements to compensate each other for  
9 transport and termination of traffic to ISPs.

10 Third: It contemplates the participation in  
11 these proceedings of only the signatory parties.

12 Fourth: It accommodates any and all  
13 reasonable evidence and argument, subject only to the  
14 Commission's determination of relevancy and  
15 credibility.

16 And, finally: It does not require the  
17 Commission in these proceedings to make a generic  
18 determination relative to the jurisdictional nature of  
19 the traffic in question.

20 That's the issue that the Staff proposes,  
21 Commissioner Deason, and the reasons for it. I think  
22 at a later time we would like the opportunity to  
23 address the issues which BellSouth proposes, the  
24 additional issues which BellSouth proposes.

25 COMMISSIONER DEASON: What was the first

1 item that you listed in your list of reasons why you  
2 think these issues are appropriate?

3           **MR. PELLEGRINI:** The first was that the  
4 statement of the issue expresses the essence of each  
5 of the complaints that the competing carriers have  
6 lodged against BellSouth.

7           **UNIDENTIFIED TELEPHONE SPEAKER:** Excuse me.  
8 Hello. This is the operator.

9           (Unrelated telephone interruption.)

10           **COMMISSIONER DEASON:** Mr. Rankin, are you  
11 still with us?

12           **MR. RANKIN:** Yes, I'm here.

13           **COMMISSIONER DEASON:** Okay. Fine. I was  
14 worried that we may have lost you.

15           Did you hear Staff's description of their  
16 issues and the reasons they feel those issues are  
17 appropriate, Mr. Rankin?

18           **MR. RANKIN:** Yes, I did.

19           **COMMISSIONER DEASON:** Okay. I think now  
20 would be appropriate for you to describe the  
21 additional issues you feel are appropriate and to  
22 explain to us why you feel that they are necessary for  
23 inclusion.

24           **MR. RANKIN:** I'll be happy to. Also, I  
25 believe some of the parties may raise an issue of

1 whether there is a need for a hearing at all, and I'll  
2 reserve some time to address that, I guess, at the  
3 end.

4           **COMMISSIONER DEASON:** Yes. I think that  
5 once we get a better feel of what the issues are going  
6 to be, I think that's something then that we can  
7 discuss. We also may need to discuss some scheduling  
8 matters as far as dates and things depending upon the  
9 outcome of the issues and whether there's going to be  
10 an evidentiary hearing.

11           **MR. RANKIN:** Okay. That's fine. I'll go  
12 on, then, with a discussion of the issues.

13           We believe we submitted issues that either  
14 tracked the evidence that the Commission has  
15 explicitly stated it would like to consider or tracked  
16 the analysis of the Staff in its recommendation in  
17 this case.

18           With the exception of the issue concerning  
19 public policy, several of the parties do not object to  
20 having the Commission hearing testimony on the issues  
21 submitted by BellSouth, but simply state that the  
22 issues themselves have been subsumed by the Staff's  
23 one broad issue.

24           Since that's the case, we see no reason why  
25 the Commission should not separately consider the few

1 extra issues that BellSouth proposes. We don't think  
2 it will be at all burdensome for the parties, and we  
3 believe it will allow the parties to specifically  
4 address issues that the Commission has indicated it  
5 would like to consider.

6 Our first issue is, quote, "Describe the  
7 type of traffic in dispute," end quote. We believe  
8 this clearly is a factual issue, whether disputed or  
9 not, that requires testimony that the Commission has a  
10 clear technical understanding of the nature of this  
11 traffic.

12 Understanding, for example, how a call from  
13 a Tallahassee end user traverses various  
14 telecommunications networks and ends up as an e-mail  
15 message in an overseas hotel, for example, is critical  
16 to the basic dispute between the parties. The parties  
17 other than BellSouth have viewed this as a local call  
18 and offer technical reasons why the forwarding of such  
19 a call from an ISP switch should not be considered in  
20 determining the jurisdiction of a call. We think it  
21 would enlighten the Commission to hear testimony  
22 focused on this particular issue.

23 Issue 1A is --

24 COMMISSIONER DEASON: Let's address Issue 1,  
25 then, for just a moment.

1           **MR. RANKIN:** Okay.

2           **COMMISSIONER DEASON:** First of all, I'm a  
3 little concerned with the wording of the issue. It  
4 says "Describe the type of traffic in dispute." That  
5 is not an issue.

6           An issue is something that presents a  
7 question to the Commission and the Commission to make  
8 a decision on. There's no decision to be made here.  
9 So what is at dispute?

10           **MR. RANKIN:** I guess it would be what is  
11 the --

12           **COMMISSIONER DEASON:** What is the issue? I  
13 mean, you say you want to provide some factual  
14 information on the character of this traffic. That's  
15 all well and good, but why is there the need for a  
16 specific issue concerning that, and is really anything  
17 at issue concerning the nature of this traffic?

18           **MR. RANKIN:** Well, there are some technical  
19 reasons that the intervenors or other parties have  
20 offered as to why a call that originates in, say,  
21 Tallahassee and hits an ISP switch should be  
22 considered to be a local call; that is, once the call  
23 is forwarded by the ISP, something different happens  
24 on the telephone network that takes the call out of  
25 the local call -- or keeps the call from being an

1 interstate call or keeps it from being anything other  
2 than a local call.

3 We just think it would be necessary for the  
4 Commission to take testimony and address that specific  
5 issue and if -- we can word it in the form of a  
6 question if you like.

7 COMMISSIONER DEASON: What would you suggest  
8 would be the wording of a question?

9 MR. RANKIN: Well, instead of just saying  
10 "describe," you could say "What is the nature of the  
11 traffic in dispute?" Or it's really getting more  
12 toward the physical handling of the call more than  
13 anything else as opposed to a jurisdictional question.  
14 So if you wanted, to change it to "What is the  
15 technical nature of the traffic in dispute?"

16 COMMISSIONER DEASON: Okay. I'm going to  
17 take each of these issues one at a time. And does  
18 that conclude your remarks, then, concerning proposed  
19 Issue 1?

20 MR. RANKIN: Yes.

21 COMMISSIONER DEASON: I'm going to then  
22 allow the parties to address that.

23 MR. ELLIS: Commissioner, there's no dispute  
24 that once the call leaves the --

25 COMMISSIONER DEASON: You're Mr. Ellis,

1 correct?

2           **MR. ELLIS:** That's correct. There's no  
3 dispute that once the call leaves the switch it could  
4 go anywhere, but that's not an issue that's in dispute  
5 in this proceeding.

6           **COMMISSIONER DEASON:** Mr. Self?

7           **MR. SELF:** Thank you, Commissioner. This  
8 issue is unnecessary.

9           **COMMISSIONER DEASON:** You may want to  
10 identify yourself for Mr. Rankin's benefit. He may  
11 know your voices, and then again he may not.

12           **MR. SELF:** Thank you. I'm Floyd Self for  
13 WorldCom.

14           The issue, the first issue that BellSouth  
15 wants in is inherent in Issue 1. I mean, the nature  
16 of the traffic that's in dispute is what's set forth  
17 in the complaint. It's the traffic that BellSouth is  
18 not compensating the parties on.

19           To the extent that the issue needs to be  
20 addressed at all, it's subsumed within the Staff's  
21 first issue. Otherwise if necessary, we can certainly  
22 stipulate how these kind of calls -- but I don't think  
23 there's any dispute among anybody as to what calls are  
24 not being compensated by BellSouth and, therefore,  
25 this is unnecessary.

1           **MS. CANZANO:** I'm Donna Canzano representing  
2 Intermedia, and we agree with the comments made by  
3 WorldCom.

4           **MR. MELSON:** Rick Melson representing MCI.  
5 We also agree with WorldCom.

6           **COMMISSIONER DEASON:** Staff?

7           **MR. PELLEGRINI:** I think WorldCom stated the  
8 point extremely well. The physical transmission path  
9 of these calls is not in question, and the parties, at  
10 least the competing carriers, have indicated a desire  
11 to stipulate to this issue if necessary.

12           **COMMISSIONER DEASON:** Okay. Mr. Rankin, any  
13 concluding remarks on Issue 1?

14           **MR. RANKIN:** No, I don't believe so.

15           **COMMISSIONER DEASON:** Okay. You may address  
16 Issue 1A.

17           **MR. RANKIN:** Okay. That is phrased as "What  
18 is the jurisdictional nature of such traffic?"

19                   In its March 31st order the Commission  
20 stated that resolving the dispute involved, quote,  
21 "determining the state of the law concerning the  
22 jurisdictional nature of ISP traffic at the time the  
23 parties executed their agreement;" end quote.

24                   We believe this issue tracks the issue as  
25 the Commission described it in its order. Although it

1 may not necessarily involve disputed issues of fact,  
2 the parties have characterized the same FCC orders in  
3 different ways, and framing this as an issue allows  
4 the Commission to address this point head on in its  
5 final order; and that's the basis for framing the  
6 issue that way.

7           **COMMISSIONER DEASON:** Well, is there not a  
8 Public Service Commission order already out which  
9 addresses the jurisdictional nature of this traffic?

10           **MR. RANKIN:** There was one, I believe, in --  
11 if it's the one that you mentioned, it goes to 1989.  
12 There is an order. For reasons I guess Ms. White  
13 argued in her appearance back in early March, we  
14 certainly don't think that decision is on point on  
15 this issue.

16           It did not address the issue of reciprocal  
17 compensation. It did not address the specific  
18 interpretation of contract language which is before  
19 the Commission in this case.

20           **COMMISSIONER DEASON:** Well, then if the key  
21 is the contract language and how that should be  
22 interpreted, what is the necessity of the  
23 jurisdictional nature of the traffic?

24           **MR. RANKIN:** Well, I guess -- it's the  
25 result of interpreting the language is going to lead

1 to the answer to that question, "What is the  
2 jurisdictional nature of the traffic?"

3 We would submit that once you examine all  
4 the circumstances surrounding the formulation of this  
5 contract, what the parties agreed to, that the  
6 jurisdictional nature of the traffic will become clear  
7 and it cannot be local traffic.

8 COMMISSIONER DEASON: Is this a factual  
9 issue, or is this a policy issue, or is this a legal  
10 issue?

11 MR. RANKIN: Well, let's say it's a policy  
12 issue. I'd say it's probably more in the nature of a  
13 legal issue. I think several of these issues that  
14 we've submitted really are more in the nature of  
15 allowing the Commission to make direct findings on  
16 specific issues, just mainly to make the record as  
17 clear as it possibly can be.

18 And we've already agreed that the Staff's  
19 general, overall issue is fine. We just think it's  
20 more appropriate to have a little more specificity as  
21 to what the parties will be filing testimony on and  
22 what will be addressed in the hearing.

23 COMMISSIONER DEASON: Mr. Ellis?

24 MR. ELLIS: Thank you. We would agree with  
25 Mr. Rankin that it's a legal issue and the statement

1 of it as a separate issue is unnecessary.

2 **COMMISSIONER DEASON:** Mr. Self?

3 **MR. SELF:** Yes, Commissioner. This issue is  
4 simply not relevant, and it's unnecessary to the  
5 resolution of the issues in this proceeding. The  
6 jurisdictional question was decided in Order No. 21815  
7 that was decided some eight years ago, and that's  
8 really the extent of the jurisdictional question.

9 **COMMISSIONER DEASON:** Do you think that  
10 order is binding upon the language in the contracts?

11 **MR. SELF:** Yes, sir, I do. If you look at  
12 the contracts, at least with respect to the WorldCom  
13 contract, and if you look at the definition of local  
14 traffic, you'll see that it refers to seven-digit  
15 dialing and other calls which have been treated as  
16 local traffic. I'm not quoting, but that's  
17 approximately the language.

18 The parties are expected to know what legal  
19 decisions have been rendered with respect to what's  
20 local traffic and the policy in other decisions that  
21 the Commission has made over time with respect to the  
22 definition of local traffic.

23 Clearly in Order No. 21815, which was  
24 decided September 5th in 1989, the Commission  
25 addressed the jurisdictional nature of this traffic

1 and found it to be local traffic; and, in fact, that  
2 was a decision that even BellSouth supported at the  
3 time. So, therefore, like I said, I believe the issue  
4 has already been decided.

5 To the extent that it's -- that discussion  
6 is relevant at all, it's not a policy issue. This is  
7 not a proceeding to decide what should be the policy  
8 with respect to this traffic. Rather it is "What was  
9 the agreement of the parties at the time that they  
10 entered into it?" As such, then it would be have to  
11 be a legal issue.

12 And I think to the extent that the question  
13 of jurisdiction has to be addressed at all that it's  
14 clearly subsumed within the phrasing of the first  
15 question. The jurisdiction may well -- the  
16 jurisdictional question may well be the position that  
17 BellSouth wishes to take in resolving -- or in  
18 advocating its position on Issue 1.

19 **COMMISSIONER DEASON:** Mr. Rankin, let me ask  
20 you a question. Do you think there is an issue as to  
21 the jurisdictional nature of the traffic, that that is  
22 the prior order issued by the Commission is somehow  
23 now irrelevant or not binding?

24 **MR. RANKIN:** Yeah. I think the core of the  
25 dispute is what is the nature, the jurisdictional

1 nature, of the traffic. And certainly the other side  
2 will -- and BellSouth will argue the effect and the  
3 legal import, I guess, of that order in different ways  
4 when it comes time to do that.

5 We think it's best to argue that and let the  
6 Commission ask questions of people in a hearing as  
7 opposed to just deciding this summarily. So we do  
8 think it's a key issue.

9 COMMISSIONER DEASON: Do you feel like that  
10 the Staff Issues 1 through 4 somehow limit the  
11 exploration of the jurisdictional nature of the  
12 traffic?

13 MR. RANKIN: No, we do not think that.

14 COMMISSIONER DEASON: Okay. Ms. Canzano?

15 MS. CANZANO: Generally Intermedia agrees  
16 with the comments made by WorldCom again.

17 COMMISSIONER DEASON: Mr. Melson?

18 MR. MELSON: Nothing to add.

19 COMMISSIONER DEASON: Staff?

20 MR. PELLEGRINI: As I said earlier, Staff  
21 believes that its statement of the issue is  
22 accommodative.

23 One of the elements of contract construction  
24 would be a determination of what the state of the law  
25 was at the time of contract formation. That, it seems

1 to us, is a legal matter that can be addressed  
2 adequately by briefing; but essentially Staff's  
3 position, as relative to that issue, is that it can be  
4 adequately addressed within Staff's statement of the  
5 issue.

6           **COMMISSIONER DEASON:** Okay. Issue 2,  
7 Mr. Rankin?

8           **MR. RANKIN:** Sure. And that reads, "In  
9 their interconnection agreement did WorldCom and  
10 BellSouth mutually intend to treat this type of  
11 traffic as local traffic for purposes of reciprocal  
12 compensation?"

13           **COMMISSIONER DEASON:** Is this issue  
14 basically the same for 3, 4 and 5?

15           **MR. RANKIN:** That's correct, with the  
16 different ALEC names; that's right.

17           This issue, of course, we think captures the  
18 heart of the dispute, and it's consistent with the  
19 Staff's own analysis of this matter as reflected in  
20 their recommendation.

21           BellSouth's fundamental contention here is  
22 that WorldCom has incorrectly interpreted the language  
23 of its contract with BellSouth to mean something 180  
24 degrees from the meaning ascribed to it by BellSouth.

25           Specifically WorldCom says that in

1 determining whether reciprocal compensation is due for  
2 traffic -- excuse me. Hold on. Let me start that  
3 sentence over. In determining whether reciprocal  
4 compensation is due for traffic -- excuse me; hold on.  
5 (Pause)

6 Let me start that sentence over. In  
7 determining whether reciprocal compensation is due for  
8 traffic that terminates within the local exchange, the  
9 only possible meaning one can ascribe to the word,  
10 quote, "terminate," is physical termination of local  
11 interconnection facilities, now into a, say, an ISP  
12 switch.

13 Alternatively, BellSouth offers an  
14 interpretation of the word "terminate" that is  
15 consistent with the FCC's end-to-end analysis of a  
16 call for determining a call's jurisdiction.

17 Under BellSouth's interpretation of  
18 "terminate," if a caller in Tallahassee reaches a web  
19 site of a computer overseas through a call to his ISP,  
20 that call cannot be considered a local call. In its  
21 recommendation the Staff stated that if language in a  
22 contract is susceptible to different constructions,  
23 quote, "the circumstances surrounding the parties at  
24 the time the contract was made should be considered in  
25 ascertaining their intention;" end quote.

1           What was the conduct of the parties at the  
2 time the contract was negotiated, and how does that  
3 contract bear on the parties' intentions? This is  
4 obviously a question of fact that the Commission  
5 specifically needs to take evidence on.

6           We understand that we -- that the Staff's  
7 broad issue would capture this type of issue, but we  
8 think it's important enough to warrant being a  
9 separate issue.

10           **COMMISSIONER DEASON:** Go ahead and address  
11 Issue 2A as well.

12           **MR. RANKIN:** Sure. And that issue is really  
13 a corollary to Issue 2 and is factual in nature. If  
14 the Commission finds that there was, in fact, no  
15 meeting of the minds on the issue of whether traffic  
16 bound for the Internet, in fact, terminates in the  
17 local exchange, then is there any language in the  
18 contract that would require the parties to pay  
19 reciprocal compensation for that traffic?" And that's  
20 a straightforward issue that we think should be  
21 addressed separately as well.

22           **COMMISSIONER DEASON:** Mr. Ellis?

23           **MR. ELLIS:** Thank you, Commissioner. As  
24 stated by Staff a moment ago and by the Commission in  
25 its order issued on March 31st in WorldCom's

1 complaint, this is a dispute between the parties that  
2 would be resolved by determining the state of the law  
3 concerning the jurisdictional nature of ISP traffic at  
4 the time the parties executed their agreement and by  
5 applying principles of contract construction.

6           These are legal issues that do not require  
7 an evidentiary hearing. A similar issue was presented  
8 to this Commission in a case --

9           **COMMISSIONER DEASON:** Let me interrupt you.  
10 Intent is a legal issue?

11           **MR. ELLIS:** Intent is irrelevant, because  
12 the law concerning the jurisdictional nature of the  
13 traffic at the time the contract was entered may be  
14 determined as a matter of law and without any evidence  
15 being required.

16           **COMMISSIONER DEASON:** But is it relevant as  
17 to interpretation of a contract as to what the  
18 parties' intentions were when they entered into that  
19 contract?

20           **MR. ELLIS:** Intent and evidence of intent  
21 might be admissible if the contract itself were  
22 ambiguous or unclear. This contract is not.

23           A similar situation was presented in a case  
24 before this Commission involving a cogen facility, and  
25 that was, "In re Standard offer contract for the

1 purchase of firm capacity and energy form a qualifying  
2 facility between Panda-Kathleen, L.P. and Florida  
3 Power Corporation."

4           And in that case this Commission determined  
5 that evidence of intent or oral discussions between  
6 the parties concerning whether the contract was to be  
7 for a term of 20 or 30 years was irrelevant, because  
8 the contract incorporated a Commission rule and tariff  
9 that limited the term of the contract to 20 years; and  
10 for that reason found the offered evidence of intent  
11 and oral negotiations -- oral discussions concerning  
12 the formation of the contract to be irrelevant. And  
13 that decision was affirmed by the First District Court  
14 of Appeal in Panda-Kathleen v. Clark, a 1997 decision.

15           The same situation applies here. The  
16 after-the-fact evidence of intent that Bell would  
17 present is irrelevant to the resolution of this  
18 dispute which can be determined by a resort to the  
19 state of the law at the time the contract was entered  
20 and principles of contract construction.

21           **COMMISSIONER DEASON:** Mr. Self?

22           **MR. SELF:** Thank you, Commissioner.

23 BellSouth's Issue 2 and 2A go to the heart of what  
24 type of proceeding this Commission will conduct in the  
25 course of resolving the issues that have been set

1 forth for hearing.

2           If you accept these two issues, then in  
3 essence the Commission is committing itself to a  
4 formal evidentiary proceeding. However, we believe at  
5 this time that that type of procedure is unnecessary,  
6 that all that we need is an informal proceeding to  
7 address simply legal issues.

8           Our position on this arises out of the case  
9 law in terms of how you are to deal with contract  
10 disputes. It's well settled Florida law that the  
11 language used in a contract is the best evidence of  
12 the intent and meaning of the parties and that, in  
13 fact, that the proper course to do is to first  
14 determine whether the contract itself is ambiguous.

15           If the contract is ambiguous, you may then  
16 permit the introduction of extrinsic evidence, which  
17 would be fact based evidence. However, if you make  
18 the determination first that this is a legal -- I'm  
19 sorry -- that the contract itself is not ambiguous,  
20 you don't need to reach and, in fact, you're  
21 prohibited from reaching into any extrinsic evidence  
22 as to the types of discussions, other memoranda and  
23 other documents that may be associated with the  
24 contract.

25           This is particularly important in a dispute

1 such as this one where the contract -- at least the  
2 WorldCom contract -- has, in fact, a merger clause at  
3 Section 37.6 of the partial Florida interconnection  
4 agreement which specifically provides that the written  
5 contract itself is the only document that evidences  
6 the agreement of the parties; that, in fact, it  
7 supersedes all oral and other contemporaneous oral  
8 negotiations, proposals and written documents with  
9 respect to the subject matter of the contract.

10           Therefore, while I don't want to jump ahead  
11 in terms of what type of proceeding you should have,  
12 it's important to understand that with respect to the  
13 inclusion of this issue, the issue of intent is indeed  
14 inherent in the first issue that the Staff has  
15 proposed, but the proper process to follow is to  
16 determine first whether the agreement itself is  
17 ambiguous. If the agreement is not ambiguous, you  
18 don't need to go any further.

19           **COMMISSIONER DEASON:** How do we make that  
20 determination?

21           **MR. SELF:** Well, what we would propose that  
22 you do is simply have an informal procedure under  
23 120.57(2) and permit the parties to brief and then  
24 have an oral argument before the Commission.

25           If, as a result of that, you determine that

1 the language in the contract is not ambiguous, you can  
2 make a decision at that point. If you determine that  
3 the contract language is ambiguous, then you would  
4 proceed to an evidentiary proceeding.

5           **COMMISSIONER DEASON:** What type of  
6 proceeding again do you recommend for purposes of  
7 determining whether the contract is or is not  
8 ambiguous?

9           **MR. SELF:** We would propose first a briefing  
10 and oral argument type proceeding, an informal  
11 proceeding, because obviously our position is, is the  
12 contract itself is not ambiguous, that it's crystal  
13 clear what it means, especially when you look at  
14 what's -- the definitions that are contained within  
15 the agreement. And then at the conclusion of that, if  
16 you found, indeed, that the contract was not  
17 ambiguous, then you could render a decision.

18           If you found that it was ambiguous, then  
19 under the cases, you can get into the extrinsic  
20 evidence or the fact type issues that Mr. Rankin was  
21 discussing.

22           **COMMISSIONER DEASON:** Mr. Rankin, is it your  
23 position that the contracts are ambiguous on this  
24 point?

25           **MR. RANKIN:** Absolutely, and I think it goes

1 to the heart of the dispute, Commissioner Deason. And  
2 I have some remarks I'd like to make concerning the  
3 type of hearing that you're maybe contemplating. I  
4 don't know when the appropriate time for that is. We  
5 strayed a little bit from the issue list here.

6           **COMMISSIONER DEASON:** Yes. We'll get to  
7 that shortly.

8           **MR. RANKIN:** That's fine. I will say just  
9 in the context of this issue, though, that intent  
10 certainly is relevant.

11           **COMMISSIONER DEASON:** Do you agree that it's  
12 relevant only if it's determined that the contract is  
13 ambiguous?

14           **MR. RANKIN:** Yeah, I agree that -- but, of  
15 course, our position is that it is ambiguous. So the  
16 presence of a merger clause does not in any way  
17 preclude the Commission from examining extrinsic  
18 evidence if it determines that this language or that  
19 terminology used in the language is susceptible to  
20 different interpretations or different meanings.

21           And I think that's where we're coming from  
22 particularly when you look at the language concerning  
23 what did the parties mean by the word "terminate". I  
24 think that's -- the word "terminate" or "termination"  
25 I think are the words where the parties went down

1 different paths.

2 COMMISSIONER DEASON: Okay. Ms. Canzano?

3 MS. CANZANO: Intermedia objects to the  
4 inclusion of BellSouth's proposed issues basically for  
5 the reasons set forth by TCG and WorldCom.

6 Also, if the Commission decides to examine a  
7 different type of proceeding, we agree and support the  
8 procedure set forth by WorldCom.

9 COMMISSIONER DEASON: Mr. Melson?

10 MR. MELSON: Commissioner, I agree that if  
11 the contract is not ambiguous, then there's no need  
12 for an evidentiary hearing, and I believe BellSouth  
13 even concedes that. They simply believe the contract  
14 is ambiguous.

15 I think it is a more appropriate  
16 administrative approach for the Commission to decide  
17 that purely legal issue of ambiguous or not in a legal  
18 proceeding, something akin to the briefing and oral  
19 argument, and not get bogged down with testimony of  
20 intent unless and until you've determined that the  
21 contract is ambiguous and that type of evidence is  
22 required.

23 COMMISSIONER DEASON: Staff?

24 MR. PELLEGRINI: I think the first question,  
25 the first consideration, is one of ambiguity; is the

1 contract language ambiguous. If it is, then there is  
2 a process by which that ambiguity can be resolved.

3 I think BellSouth steps off on the wrong  
4 foot. They raise an intent issue, but as Teleport  
5 argued, I think extremely well in its memorandum,  
6 there are many other considerations that come into  
7 play if it's decided in the first place that there's  
8 an ambiguity in the contract language.

9 For example: The law in effect at the time  
10 of the contract formation. Was there trade custom or  
11 usage? What types of traffic were expressly excluded,  
12 if any, under the agreement? What did the parties do  
13 or omit to do after the contract was made?  
14 Considerations of that kind which are standard  
15 considerations in resolving contract language which is  
16 in the first place determined to be ambiguous.

17 In any event, Staff again says that these  
18 considerations can be accommodated under its statement  
19 of the issues. There's no intent, no effort on the  
20 part of Staff to preclude any consideration that  
21 BellSouth would want to make.

22 **COMMISSIONER DEASON:** Staff, what is your  
23 position concerning the suggestion -- and, Mr. Rankin,  
24 I'm going to let you address this, too, in just a  
25 moment.

1           Staff, what is your position concerning the  
2 recommendation from various parties that the threshold  
3 question of contract ambiguity needs to be determined  
4 and that can be determined in an informal proceeding  
5 process, i.e., briefing and oral argument?

6           **MR. PELLEGRINI:** We agree. We think that's  
7 the appropriate way to address that question. First,  
8 the ambiguity question can be addressed, and then  
9 depending on which side one is, the further  
10 considerations which I enumerated can be addressed as  
11 well.

12           **COMMISSIONER DEASON:** Then do you agree that  
13 that question needs to be answered before there is  
14 evidence taken on intent and that evidence on intent  
15 is necessary only if it is determined that the  
16 contract is ambiguous?

17           **MR. PELLEGRINI:** (Pause) Oh, I'm sorry.

18           **COMMISSIONER DEASON:** My question is, do you  
19 agree that the question of intent is relevant only if  
20 it's first determined that the contract is, in fact,  
21 ambiguous?

22           **MR. PELLEGRINI:** Yes. That's the proper  
23 order of things. The first question is, is the  
24 contract language clear on its face. If it's not and  
25 if it's ambiguous, then a second step is necessary,

1 and that is to consider the intent of the parties at  
2 the time of contract formation, custom and trade  
3 usage, a number of elements which are important in the  
4 interpretation of the contract language, which again  
5 has first been determined to be ambiguous.

6           So, yes, there's a definite order of  
7 consideration here that ought to be followed by legal  
8 briefing.

9           **COMMISSIONER DEASON:** Mr. Rankin?

10           **MR. RANKIN:** I can address it here, and then  
11 I have a few other remarks to make about the type of  
12 hearing once we're through with the issues list.

13           Mainly, my remark at this point was simply  
14 to remind you that I think this is just an attempt to  
15 get a second bite at the proverbial apple. The Staff  
16 and the parties already came to you in early March  
17 essentially saying, hey, this is a clear slam dunk;  
18 this is a legal issue decided on the pleadings. And  
19 the Commission decided not to do that.

20           So I think the Commission has decided that  
21 there is to be a hearing, not legal briefing. The  
22 parties had an opportunity to file a petition, file an  
23 answer in which the legal authority was laid out.  
24 Staff came to you with the recommendation that said  
25 essentially there are no facts in dispute, you can go

1 on and make a decision.

2 And I think you and the fellow Commissioners  
3 decided that wasn't appropriate, decided that there  
4 needed to be a hearing to examine all the  
5 ramifications of a decision; and that's the road I  
6 think we need to go down.

7 COMMISSIONER DEASON: Okay. Mr. Rankin, you  
8 may address Issue 6.

9 MR. RANKIN: Okay. That's "Is the payment  
10 of reciprocal compensation for this type traffic in  
11 the public interest?"

12 While this does not necessarily involve a  
13 factual question, we submitted it because WorldCom  
14 itself raised public policy concerns in its petition.  
15 In Section 3 of its complaint or petition beginning I  
16 believe it's on Page 8, WorldCom states, quote,  
17 "BellSouth's position violates the law and public  
18 policy;" end quote.

19 Then from paragraphs 40 through 46 they make  
20 a bunch of policy arguments. WorldCom basically says  
21 the position BellSouth takes on this issue is  
22 anticompetitive. There are some very compelling  
23 public policy reasons aside from legal reasons why  
24 this kind of traffic that we're discussing should not  
25 be subject to reciprocal comp; and Ms. White outlined

1 those for you during the agenda session.

2           And I won't repeat them here, only to say  
3 that in sum, BellSouth contends that subjecting ISP  
4 traffic to reciprocal compensation would retard, not  
5 stimulate, the development of local competition in  
6 Florida, especially facilities-based competition.

7           We would like to present those arguments in  
8 a formal setting so the Commission would have a full  
9 understanding of the impact of a decision in this  
10 case.

11           **COMMISSIONER DEASON:** Mr. Rankin, let me ask  
12 you, do you agree that the essence of the issue before  
13 the Commission is contract interpretation?

14           **MR. RANKIN:** Yes.

15           **COMMISSIONER DEASON:** Then how is a question  
16 of what's in the public interest, how is that relevant  
17 to contract interpretation?

18           **MR. RANKIN:** Again, I go back to it's a  
19 counter to what WorldCom said in its petition. I  
20 mean, WorldCom attempted to go beyond just the nature  
21 of a contract dispute and argue that this issue -- or  
22 the position BellSouth takes is anticompetitive, and  
23 that for public policy reasons -- or rather that  
24 position violates public policy.

25           And we have an answer to that, and we'd

1 like -- if they're going to raise that type of issue  
2 before the Commission, then certainly we should be  
3 allowed to assert our public policy grounds while our  
4 legal position is correct.

5           **COMMISSIONER DEASON:** What issue has allowed  
6 them to raise that? What issue other than your issue  
7 addresses public policy concerns?

8           **MR. RANKIN:** The language in their petition  
9 raised that issue, and that language is found from  
10 paragraphs 40 to 46 in their petition, which is mainly  
11 policy arguments about this is what's going to happen  
12 if you decide that BellSouth's position is correct.  
13 And we're simply stating that in the context of a  
14 hearing we'd like an opportunity to say the same thing  
15 from the flip side.

16           **COMMISSIONER DEASON:** So that's what we're  
17 doing here today is trying to determine the issues and  
18 determining what information is going to be determined  
19 to be relevant in this proceeding, and if there's no  
20 issue concerning public policy, no party is going to  
21 be allowed to present information on that issue. Do  
22 you agree with that?

23           **MR. RANKIN:** That would be acceptable. I  
24 think we're just mainly looking at it from a fairness  
25 issue. If they were going to be allowed to argue

1 public policy, then we certainly should be allowed to  
2 do it as well. But if the Commission is going to  
3 preclude any parties -- or all parties from arguing a  
4 public policy point, then we'd be on even ground.

5 MR. SELF: Commissioner Deason, I can accept  
6 that limitation that you raised, to not address public  
7 policy questions.

8 COMMISSIONER DEASON: That the issues would  
9 be limited to contract interpretation?

10 MR. SELF: Yes, sir.

11 COMMISSIONER DEASON: Any party object to  
12 that limitation? (No response.)

13 Mr. Rankin, all the parties are shaking  
14 their heads no, there's no objection.

15 Staff, is there any objection?

16 MR. PELLEGRINI: None whatsoever.

17 COMMISSIONER DEASON: Okay. I think we do  
18 have an agreement, then, that there's no need for  
19 Issue 6, and that's with the precise understanding  
20 that we're here interpreting contracts, and that we're  
21 not here to set public policy, and that if there is an  
22 attempt to present testimony concerning public policy,  
23 that that testimony would not be admissible.

24 MR. RANKIN: Okay.

25 COMMISSIONER DEASON: And now everyone is

1 shaking their head yes.

2 MR. RANKIN: Thank you.

3 COMMISSIONER DEASON: Okay. TCG, Issue 1.  
4 Mr. Ellis?

5 MR. ELLIS: We only offer this issue in the  
6 event that additional issues are proposed or accepted  
7 by any other parties.

8 I might add that in the memorandum we  
9 submitted in opposition to BellSouth's statement of  
10 proposed issues, you could phrase several subissues  
11 that are included or maybe addressed within Staff's  
12 proposed issue; and we would contend that that  
13 statement of the issue is sufficient.

14 COMMISSIONER DEASON: Well, let me ask you  
15 this: What specific issue suggested by BellSouth  
16 requires you to suggest that your Issue 1 be included?

17 MR. ELLIS: I think either of their first  
18 two issues addressing the jurisdictional nature of the  
19 traffic.

20 Other commissions have considered this  
21 matter specifically within the context of these  
22 agreements and consistently reached the conclusion  
23 that ISP traffic is local traffic within the meaning  
24 of reciprocal compensation terms.

25 COMMISSIONER DEASON: And a further

1 question: Regardless of what issues BellSouth is  
2 allowed to include or exclude, how is this a relevant  
3 issue in the sense that this is something that the  
4 Commission needs to make a finding on?

5           It seems to me that what other state  
6 commissions do or do not do is something that could be  
7 included in some type of a briefing, but it is not a  
8 factual matter which really binds this Commission to  
9 make a determination one way or another.

10           **MR. ELLIS:** We would agree it's not a  
11 factual matter, it's a legal issue; and we contend  
12 that the entire dispute is able to be resolved on  
13 those terms.

14           **COMMISSIONER DEASON:** And you agree, then,  
15 that what other state commissions have done, that if  
16 it reaches that point that we go to hearing, that you  
17 can include that in your brief?

18           **MR. ELLIS:** Yes, sir.

19           **COMMISSIONER DEASON:** Okay. Mr. Rankin, do  
20 you need to add anything on Issue 1, TCG Issue 1?

21           **MR. RANKIN:** I would just refer back to  
22 Ms. White's letter of I believe it was April 8th, that  
23 BellSouth doesn't necessarily object to the Commission  
24 considering the decisions of other states, but we  
25 think that the issue as it's phrased, it would be

1 better worded as "How have other state commissions  
2 resolved this issue?"

3           **COMMISSIONER DEASON:** My version says "How  
4 have other states resolved the issue?" And you're  
5 saying that it should be limited?

6           **MR. RANKIN:** If it stopped there, that's  
7 fine, yeah.

8           **COMMISSIONER DEASON:** Any other parties need  
9 to address TCG Issue 1? Staff?

10           **MR. PELLEGRINI:** I would only say,  
11 Commissioner Deason, that to the extent that the  
12 parties could demonstrate that interconnection  
13 agreements in other states are alike or similar to  
14 their interconnection agreements with BellSouth in  
15 Florida, evidence of other state commission's rulings  
16 would be admissible. But, again, it is an argument,  
17 or a line of argument, that I think can be made within  
18 Staff's statement of the issue.

19           **COMMISSIONER DEASON:** Ms. Canzano, your  
20 Issue 1.

21           **MS. CANZANO:** Commissioner Deason,  
22 Intermedia raised these issues in response to  
23 BellSouth's proposed Issues 5 and 5A. We only want to  
24 include these issues if and only if you determine that  
25 it is necessary to have Issues 4 and 5A.

1                   **COMMISSIONER DEASON:** Okay. And explain to  
2 me why these issues are necessary if Issue 5 and 5A  
3 are included?

4                   **MS. CANZANO:** We believe this is necessary  
5 because it would provide the Commission to look beyond  
6 just the issues presented by BellSouth as to how that  
7 traffic is transported and terminated to ISPs and how  
8 is it identified and measured, and whether there was  
9 anything in place at the time the agreement was  
10 executed to measure such traffic. This would go to  
11 evidence that you will need to determine if 5 and 5A  
12 are included.

13                   **COMMISSIONER DEASON:** So you think this is  
14 relevant information as to the intent of the parties  
15 when they entered into their contract?

16                   **MS. CANZANO:** I think it also goes as to a  
17 determination as to what was going on at the time the  
18 contracts were entered into.

19                   **COMMISSIONER DEASON:** So what was going on  
20 at the time the contracts were entered into to  
21 determine the parties' intent when they signed those  
22 contracts?

23                   **MS. CANZANO:** Yes. But remember we only  
24 reach those issues if, and only if, the Commission  
25 determines that the language of the contract is

1 ambiguous in the first place.

2 I still want to be clear that we believe  
3 this is solely a legal issue and that we do not need  
4 to address these other issues at this time.

5 COMMISSIONER DEASON: Okay. Mr. Rankin?

6 MR. RANKIN: We have no objection to the  
7 Intermedia issues.

8 COMMISSIONER DEASON: Okay. Staff? I'm  
9 sorry. Any other party need to address Intermedia  
10 Issues 1 and 2? (No response.)

11 Okay. Staff?

12 MR. PELLEGRINI: Well, the Intermedia  
13 issues, as Ms. Canzano has characterized them, are  
14 really responsive to the issues that BellSouth  
15 proposes. I suppose if one comes in, the other ought  
16 to as well, but I don't think separately -- I hate to  
17 sound like a broken record, but again I think the way  
18 Staff has stated the issue, this again is an argument  
19 that can be made if Intermedia thinks it's necessary.

20 But it seems to go beyond the core question  
21 which is "What is it that the interconnection  
22 agreements require the parties to do relative to this  
23 kind of traffic?" And that's primarily Staff's  
24 concern, that the Commission's focus is limited to  
25 that consideration and to no considerations that go

1 beyond that consideration.

2           **MS. CANZANO:** May I respond to that briefly?  
3 I agree with Mr. Pellegrini that we just believe there  
4 should only be Staff Issue No. 1. But only if, and  
5 only if, you include BellSouth's proposed Issues 5 and  
6 5A, would we seek to include Issues 1 and 2. But if  
7 we had our preference, we would not have 5 and 5A. So  
8 we are in accord with Staff.

9           **COMMISSIONER DEASON:** Any other matters to  
10 be addressed? Let me explain to the parties --  
11 Mr. Rankin, I indicated to you that I was going to  
12 give you an opportunity to address the nature of the  
13 proceeding.

14           **MR. RANKIN:** Yes.

15           **COMMISSIONER DEASON:** I'm going to allow you  
16 the opportunity to do that.

17           **MR. RANKIN:** Great. Thank you. I'll just  
18 take a few minutes to address that. I appreciate  
19 that.

20           On its face, WorldCom's petition  
21 acknowledges that this is a breach of contract action.  
22 BellSouth agrees. In paragraph 9 of its petition  
23 WorldCom, quote, "requests that the Commission  
24 initiate a formal proceeding in this matter;" end  
25 quote. Again, BellSouth agrees that a formal hearing

1 be convened, and we have tendered issues to help the  
2 Commission resolve this case in an orderly manner and  
3 in a manner that comports with due process.

4           The Florida Court of Appeals has found that  
5 a request for a formal hearing necessarily requires  
6 the holding of a hearing. In a case entitled Village\_  
7 Saloon v. Division of Alcoholic Beverages and Tobacco,  
8 and the case cite there is 463 So.2d 278, the court  
9 stated, quote, "Fundamental to due process is the  
10 right to a fair hearing. The provisions of  
11 Section 127.57 implement that right to the mechanism  
12 of formal proceedings or informal proceedings.  
13 Section 120.57(1) governs formal proceedings and  
14 necessarily requires the holding of a hearing;" end  
15 quote.

16           The court also found in this decision that  
17 where there are no disputed issues of fact a party is  
18 still entitled to a hearing under the informal  
19 procedures of 120.57(2). The Court stated, and I  
20 quote, "While a party has an absolute right to a  
21 formal hearing under 127.57(1), when material facts  
22 are in dispute, the absence of disputed issues of  
23 material fact which authorizes informal proceedings  
24 under Section 120.57(2) does not ipso facto eliminate  
25 the right to a hearing;" end quote.

1           Regardless of whether you concluded today  
2 that there was no possible way for there to be a  
3 disputed issue of material fact in this case -- and we  
4 think that would be incorrect -- BellSouth would still  
5 be entitled under subparagraph 2 to present oral or  
6 written evidence under an informal hearing procedure.

7           It seems to us like the best use of the  
8 Commission's and the parties' time at this point would  
9 be to proceed with a formal hearing contemplated by  
10 the Commission to begin with.

11           In its recommendation, the Staff sought to  
12 have the Commission decide this case merely on the  
13 basis of a complaint and answer, as I mentioned  
14 earlier; no discovery, no hearing. The Commission  
15 wisely rejected this approach at its agenda on March 9  
16 and unanimously voted to take this dispute to hearing.  
17 Your March 31st order reflects this fact.

18           On Page 7 you found, quote, "We find that  
19 the issues that WorldCom's complaint presents to us  
20 should be set directly for hearing;" end quote. You  
21 recognized in that order that what you had before you  
22 was, quote, "a complaint arising from a disputed  
23 interpretation of a provision in the interconnection  
24 agreement of WorldCom and BellSouth;" end quote.

25           You further specifically contemplated an

1 evidentiary hearing when you stated that, quote, "We  
2 will not impose prior restraints on the admissibility  
3 of evidence;" end quote.

4           So we're not dealing with a blank slate  
5 here. The Commission has already rejected the idea  
6 that this matter be disposed of summarily as proposed  
7 by the Staff. You obviously voted to hold a hearing  
8 to hear testimony, not to sit in the hearing room and  
9 read briefs written by lawyers.

10           I think deciding now not to have a hearing  
11 as contemplated by the Commission raises some due  
12 process concerns of its own. We believe that such a  
13 hearing can easily be completed in the day that I  
14 believe has been allotted for it, and we contemplate  
15 at this time we would only call one or, at the most,  
16 perhaps two witnesses.

17           And also in convening a hearing to address  
18 this issue you would not be breaking new ground. We  
19 are aware of at least seven states that actually  
20 considered testimony submitted on this issue. There  
21 may be more than that. I just haven't been able to  
22 confirm it prior to this call.

23           I do know that in the five U.S. West states,  
24 the issue was part of those interconnection agreement  
25 arbitrations. In Texas and Michigan the same dispute

1 was referred to a hearing. So if there are simply no  
2 compelling reasons why the parties here should not be  
3 given an opportunity to address these issues in front  
4 of the Commission, this will give the Commission the  
5 opportunity to ask questions of the parties and to  
6 really explore all the ramifications of the decision  
7 in your case.

8           And at the March 9 agenda at the time when  
9 you did not approve the Staff's recommendation to  
10 summarily resolve this case, Commissioner Deason, you  
11 stated, quote, "It seems to me that this is an  
12 extremely vital issue that we need to address. I  
13 think it certainly has some important ramifications,  
14 at least in my opinion. I think we need to take this  
15 matter to hearing," end quote.

16           I believe you were correct then, and the  
17 rest of the Commission agreed with you. Pursuant to  
18 the March 31 order, BellSouth is ready to proceed to  
19 have this matter heard as soon as possible. And that  
20 completes my remarks.

21           **COMMISSIONER DEASON:** Thank you. I want to  
22 open it up for parties to address the question of the  
23 nature of the proceeding to the extent it's not  
24 already been addressed. Mr. Ellis?

25           **MR. HOFFMAN:** Commissioner Deason, may I

1 jump in briefly for Teleport?

2 COMMISSIONER DEASON: Sure.

3 MR. HOFFMAN: Mr. Rankin, this is Ken  
4 Hoffman. Let me briefly respond to the hearing issue,  
5 Commissioner Deason.

6 As you recall when the WorldCom matter went  
7 to agenda in early March after some substantial  
8 argument by Ms. White and by Mr. Self, I think the  
9 Commission, and particularly you, concluded that no  
10 matter which way the Commission went with this thing,  
11 somebody was going to protest it.

12 And so with that, the Commission decided to  
13 schedule the matter for hearing, and that's what's  
14 reflected in the order that Mr. Rankin is referring  
15 to.

16 This order does not reflect whether or not  
17 the hearing itself should be a formal hearing with  
18 evidence or an informal hearing, because there's a  
19 lack of disputed issues of material fact; and,  
20 therefore, it would be sufficient to just brief the  
21 legal issues. And I'll just leave it with that on the  
22 hearing issue.

23 I would, Commissioner Deason, with your  
24 permission like to briefly go back and talk about the  
25 intent issue just to make sure that you understand

1 what Teleport's position is on this.

2 COMMISSIONER DEASON: Yes, please do so.

3 MR. HOFFMAN: What we're saying -- it's  
4 consistent with what Mr. Self and the others have said  
5 and with what Staff has said -- is that it certainly  
6 is fine, Commissioner Deason, to begin with the  
7 question of whether or not the contract is ambiguous.  
8 But from there, in our opinion, the next issue you  
9 look at is whether the resolution of the ambiguity is  
10 one of a question of law.

11 If it's a question of fact, then you start  
12 getting into all of the things that we talked about in  
13 our memorandum including intent, including standard in  
14 the industry, including what did the parties do or not  
15 do.

16 But our position is, even though the  
17 contract may be ambiguous, we resolve that through a  
18 question of law; and we cited you the Panda case,  
19 which is a Supreme Court case. And in the Panda case  
20 Panda said Florida Power Corporation has engaged in  
21 such-and-such type of conduct and it led us to believe  
22 that we were going to get paid in this standard offer  
23 contract for 125 megawatts over 30 years. And Florida  
24 Power Corporation said, no, you're only going to get  
25 paid -- you're supposed to get paid for

1 74.9 megawatts, which is under the 75 megawatts in the  
2 rule, for 20 years.

3           And the Commission in its order said, we  
4 don't care what you all said outside the contract. We  
5 don't care, Panda, if you think you were led to  
6 believe certain things by Florida Power Corporation.  
7 There is no estoppel. Estoppel is irrelevant because  
8 our rules were incorporated in that contract, and  
9 you've got to follow our rules.

10           In this case with these interconnection  
11 agreements it's not that easy. There are no  
12 Commission rules incorporated in these contracts, but  
13 there are Florida Public Service Commission  
14 orders. There are Federal Communications Commission  
15 orders. Those are all question of law.

16           BellSouth may disagree with Teleport, with  
17 WorldCom and the others about how the legal issues  
18 should be resolved, but it's still a legal issue, just  
19 as in Panda it was a legal issue; and intent and the  
20 conduct of the parties was irrelevant.

21           Thanks.

22           **COMMISSIONER DEASON:** Mr. Rankin, do you  
23 care to respond?

24           **MR. RANKIN:** Yes. I disagree that the  
25 intent and the conduct of the parties is relevant --

1 irrelevant, rather, in this case, because there  
2 clearly is ambiguity in the interconnection agreement.  
3 I don't know whether the Panda case involved ambiguous  
4 rules or not or whether the rules were crystal clear.

5 All I know is that the dispute that's before  
6 this Commission, there's definitely a dispute, a  
7 factual dispute, regarding interpretation of language  
8 and what the parties intended at the time they  
9 negotiated this agreement. So I don't know what  
10 relevance the Panda case has to our -- to the matters  
11 at hand.

12 COMMISSIONER DEASON: Mr. Self?

13 MR. SELF: Thank you, Commissioner. I agree  
14 with everything that Mr. Hoffman said, and would  
15 simply add one additional point.

16 One of the things you learn in law school  
17 about contracts is the phrase "the four corners of the  
18 contract." That's what the first level of the  
19 analysis here that Mr. Hoffman discussed.

20 You have to first determine whether or not  
21 the contract is clear. If it's clear within the four  
22 corners of document itself, that ends the inquiry; and  
23 as Mr. Hoffman said, that's the legal question that  
24 needs to be resolved.

25 Only after you've determined whether or not

1 the contract -- or not, affects whether you have the  
2 second step of the process. If you determine that the  
3 four corners of the contract are not clear with  
4 respect to the dispute, then you get involved, as I  
5 discussed earlier, the extrinsic evidence or the  
6 factual evidence about what went into making the  
7 intent of the parties as reflected in the language.

8           That two-step process is necessary because  
9 in the course of deciding whether or not the contract  
10 is ambiguous, you will identify the types of factual  
11 questions that really need to be answered in the  
12 second step of the process.

13           You may decide that the word "terminate" is  
14 quite clear and that you don't need any extrinsic or  
15 any fact evidence at all with respect to what the word  
16 "terminate" means; rather, you may decide that the  
17 phrase "traditionally" is really what needs to be  
18 addressed in terms of factual evidence.

19           So I think the two-step process is very  
20 critical so that if you do decide that it's ambiguous,  
21 when you get to the second step you'll know what types  
22 of factual questions require answering by the  
23 Commission. Thank you.

24           **COMMISSIONER DEASON:** Ms. Canzano?

25           **MS. CANZANO:** Intermedia agrees with what

1 was said by Mr. Self and Mr. Hoffman. And the only  
2 thing I could add to that is just I think by  
3 bifurcating this process, you don't run the danger of  
4 looking beyond the four corners at the intent when you  
5 may not need to. Thank you.

6 COMMISSIONER DEASON: Mr. Melson?

7 MR. MELSON: Nothing to add.

8 COMMISSIONER DEASON: Staff?

9 MR. PELLEGRINI: The first legal requirement  
10 for an informal --

11 MR. RANKIN: I can't hear the Staff. I'm  
12 sorry.

13 MR. PELLEGRINI: The first requirement for a  
14 120.57(2) hearing is that there be no disputed  
15 material issues of fact, and if we don't have a  
16 stipulation to that effect, then we can't legally  
17 proceed to an informal or subpart 2 hearing; and that  
18 leaves us to proceed with an evidentiary hearing.

19 COMMISSIONER DEASON: But when I asked you  
20 earlier, you did indicate, if I'm not mistaken, that  
21 you agreed that before a question of intent becomes  
22 relevant, there has to be a determination that the  
23 contract is, in fact, ambiguous.

24 MR. PELLEGRINI: Yes.

25 COMMISSIONER DEASON: Do you think the

1 contract is ambiguous?

2           **MR. PELLEGRINI:** We do not think the  
3 contract is ambiguous, but of course there's  
4 disagreement on this point. It's BellSouth's  
5 contention that the contract is ambiguous. And that's  
6 the first agreement that would have to be reached,  
7 that there is no dispute concerning the clarity of the  
8 contract language or no dispute regarding any other  
9 material issue of fact; and it seems that we don't  
10 have that here at the present time at least.

11           **MR. MELSON:** Chairman Deason, could I  
12 respond?

13           **COMMISSIONER DEASON:** Yes.

14           **MR. MELSON:** The question of ambiguity in  
15 the first instance is a legal issue. There's no need  
16 to stipulate as to whether the contract is or is not  
17 ambiguous. Obviously the parties disagree on that,  
18 but their disagreement is a matter of law. Only if as  
19 a matter of law you find it ambiguous do then any  
20 factual issues arise that you might be able to  
21 stipulate to or might not be able to stipulate to.

22           **COMMISSIONER DEASON:** Any other  
23 concluding -- yes, Ms. Brown.

24           **MS. BROWN:** Commissioner Deason, I just  
25 wanted to add some information with respect to the

1 Panda case, since it's been brought up.

2           That hearing was done all in one formal  
3 evidentiary proceeding. There's there was no two-step  
4 process that took place there. All of the issues  
5 about ambiguity and intent of the parties were  
6 addressed within one formal proceeding, and then the  
7 Commission in its determination made its determination  
8 step by step, as the parties have indicated is usually  
9 done in contract interpretation. I just wanted to add  
10 that information.

11           **COMMISSIONER DEASON:** Okay. Any other  
12 concluding remarks? Let me put the parties on notice  
13 of my intent.

14           My intent is to make a ruling today here at  
15 the bench so the parties will know how we're going to  
16 proceed. I know that there are some proposed dates  
17 out that would require the filing of testimony Friday,  
18 so I think it's imperative that whatever I decide, it  
19 be done quickly so the parties will know how to  
20 proceed.

21           I'm going to take a recess. We will  
22 reconvene at 3:30 and I will announce my decision.

23           (Brief recess.)

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25           **COMMISSIONER DEASON:** We will reconvene the

1 pre-prehearing conference. Mr. Rankin, are you with  
2 us?

3 MR. RANKIN: Yes, I am.

4 COMMISSIONER DEASON: Very well. First of  
5 all, let me apologize. The discussions that I had  
6 with Staff took a little bit longer than I  
7 anticipated, but I think it's still important that  
8 this matter get resolved today and all the parties be  
9 aware of the ruling so that they can plan accordingly,  
10 since there are some dates which are fast approaching  
11 concerning the filing of testimony and things of that  
12 nature.

13 Let me get right to the point. Let me say  
14 that I find that there is some merit to the argument  
15 that there needs to be a determination of whether the  
16 contracts which have been consolidated for hearing  
17 purposes, whether these contracts are or are not  
18 ambiguous.

19 I think that is a threshold question which  
20 has to be addressed, but I think that is something  
21 that the Commission will have to address when it  
22 considers the evidence in this case. It will be a  
23 threshold question for the Commission.

24 However, I am not going to bifurcate this  
25 proceeding and have a determination of whether the

1 contracts are or are not ambiguous. We're going to  
2 proceed to an evidentiary hearing in this matter.

3 As far as the issues to be addressed, I  
4 agree with the four issues which Staff has prepared,  
5 each one being a broad issue for each specific  
6 contract dispute. Let me say that this hearing is on  
7 the question of contract interpretation and the  
8 contract disputes.

9 We are not undertaking generic policy issues  
10 and that within the broad issues which have been  
11 defined by Staff, that I will allow the parties to  
12 address other matters, not the least of which is  
13 whether the contracts are or are not ambiguous.

14 Now, if the parties wish to do that through  
15 testimony or if they wish to do that through some type  
16 of a briefing process, that's entirely at the  
17 discretion of the parties. I'm not going to dictate  
18 to parties how they present their case.

19 However, in addition to the question of  
20 ambiguity of the contract, I'm going to allow within  
21 Staff's broad issues for factual information  
22 concerning the technical nature of the traffic also  
23 information concerning the jurisdictional nature of  
24 the traffic within the context of the specific  
25 contracts.

1           Also, I'm going to allow information  
2 concerning the intent of the parties at the time the  
3 contracts were signed and any facts which the parties  
4 feel are relevant supporting the parties' position on  
5 their intent.

6           I also will allow information concerning  
7 other elements of contract interpretation which  
8 Mr. Hoffman addressed earlier in his argument.

9           In coming to this conclusion, I had to weigh  
10 several competing factors, one of which -- perhaps the  
11 most important -- is how to get this matter  
12 expeditiously behind us so that we can go on. I fear  
13 that if we bifurcated it, it could possibly add  
14 another layer and add time to the final disposition.

15           I realize that by going forward and  
16 including all of these matters, that we may be adding  
17 some workload in the sense of having testimony filed  
18 and having cross-examination prepared on some matters  
19 which may be determined to be irrelevant, depending on  
20 how the Commission determines or rules on the  
21 ambiguity of the contracts.

22           However, I think this is the most  
23 expeditious way to go forward. It is my intent to  
24 abide by the filing dates that have been distributed  
25 to parties with one exception, and that is that the

1 prehearing conference, if we can schedule it, will be  
2 on the 4th of May as opposed to the 5th of May. The  
3 parties will be given notice of that quickly, though.

4 It is my intent to abide by the dates for  
5 prefiled direct and prefiled rebuttal testimony, but  
6 before we conclude today, if there are any hardships  
7 associated with those dates, I'll entertain  
8 suggestions to modify those.

9 That is the ruling, and with that I will  
10 hear from parties concerning not my ruling, but  
11 concerning the scheduling in light of my ruling.  
12 Mr. Ellis?

13 MR. ELLIS: On behalf of Teleport, those  
14 dates are acceptable.

15 COMMISSIONER DEASON: Mr. Self?

16 MR. SELF: Commissioner Deason, I just want  
17 to make sure. Your ruling is that the Staff's four  
18 issues are the issues for the proceeding --

19 COMMISSIONER DEASON: Those are the only  
20 issues, but those issues are going to be broadly  
21 interpreted, as I indicated.

22 MR. SELF: I understand that. Thank you.

23 COMMISSIONER DEASON: Ms. Canzano?

24 MS. CANZANO: We're fine with the dates.

25 COMMISSIONER DEASON: Mr. Melson?

1           MR. MELSON: The same.

2           COMMISSIONER DEASON: Is there anything else  
3 that needs to come before the prehearing officer?  
4 Mr. Rankin, are you still with us?

5           MR. RANKIN: Yes, I am. We have no problem  
6 with the dates.

7           COMMISSIONER DEASON: All right. Thank you  
8 all for your patience. This pre-prehearing is  
9 adjourned.

10           (Thereupon, the hearing concluded at  
11 3:50 p.m.)

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