

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Request for arbitration concerning complaint of
MCImetro Access Transmission Services LLC for enforcement of
interconnection agreement with BellSouth Telecommunications,
Inc. (Deferred from the 3/30/99 Commission Conference.)

DOCKET NO. 981121-TP

COPY

BEFORE: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JULIA A. JOHNSON
COMMISSIONER E. LEON JACOBS

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 24

DATE: May 4, 1999

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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STAFF RECOMMENDATION

Issue 1: Does the combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreate an existing BellSouth retail service known as Megalink? If not, what action, if any, should the Commission take?

Primary Recommendation: Yes. The combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport recreates an existing BellSouth retail service known as Megalink. Staff recommends that the Commission order BellSouth and MCI to negotiate a price for this combination.

Alternative Recommendation: No. The combination of unbundled network elements consisting of 4-wire DS1 loops and DS1 dedicated transport does not recreate an existing BellSouth retail service known as Megalink, and MCI should be able to order these UNEs as a combination. Staff recommends that the Commission order BellSouth to refund the difference in price between this UNE combination and the T-1 Circuits that MCI has been ordering since November 1997.

Issue 2: Should this docket be closed?

Recommendation: Yes, this docket should be closed.

P R O C E E D I N G S

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CHAIRMAN GARCIA: Item Number 24.

MS. SIMMONS: Commissioners, Item Number 24 deals with a case involving BellSouth and MCImetro. And basically it deals with whether or not a particular combination of unbundled network elements, specifically a 4-wire DS1 loop and DS1 dedicated transport, whether that recreates an existing BellSouth retail service call Megalink.

And I would like to mention that we have both a primary and alternative. Really there are two different bases on which you can reach a conclusion. The primary is based on an interpretation that a network element combination recreates an existing BellSouth retail service if the combination of the retail service are functionally equivalent. That is the primary.

The alternative is based on an interpretation that a network element combination recreates a BellSouth retail service if the combination and the intended application are equivalent to BellSouth's retail service.

CHAIRMAN GARCIA: Who is defending primary?

MS. SIMMONS: We are basically all here to try to support both views. Both do have some merits and --

1 CHAIRMAN GARCIA: Nobody wanted to take the
2 impossible task? Good, Walter is going to take it.

3 MR. D'HAESELEER: (Inaudible, microphone not on.)

4 CHAIRMAN GARCIA: It sort of -- I understand what
5 staff is trying to do, and I just don't understand how
6 we can do it with a straight face. And it worries me,
7 and perhaps it's my own ignorance and perhaps you can
8 clarify it for me. But it worries me that recreating
9 an existing service almost -- you know, it brings back
10 questions of what isn't recreated in the end. I mean,
11 doesn't the recombination of elements, some yours,
12 some theirs, always to some degree recreate some
13 existing service and won't we end up in an argument
14 where everything becomes resale. And so that is sort
15 of where I fell, and maybe you can help me.

16 MR. D'HAESELEER: You could take that approach.
17 Mine was really very simplistic, and I wasn't
18 concerned about who was going to make money, who was
19 going to lose money. I did notice that this had
20 nothing to do with resale or residential service.
21 What I focused on was this notion of functional
22 equivalent.

23 Now, we have been through I don't know how many
24 proceedings, and that's always one of the buzz words,
25 functionally equivalent. And, therefore, to me since

1 both parties agreed that it was functionally
2 equivalent, that to me meant, well, you need to
3 negotiate a rate for that service. It's really very
4 basic.

5 CHAIRMAN GARCIA: But explain to me how we would
6 do that, let's say, with a basic residential -- single
7 line, residential line with no additional features.
8 And, let's say, MCI provides, I don't know, a switch.
9 It rebuys certain -- I don't know what would be
10 included in reselling or rebundling certain other
11 services. But wouldn't that be an existing service
12 that is functionally equivalent and, therefore, not
13 subject to -- will be subject to the way you interpret
14 it?

15 MR. D'HAESELEER: Yes, there could be a number of
16 situations where by combining UNEs that you would have
17 something that is functionally equivalent to an
18 existing service. You know, I haven't really sat down
19 and analyzed all that and the situations where it
20 would be. You know, my problem with this is just
21 very, very basic.

22 COMMISSIONER CLARK: Well, Walter, how do you
23 respond to what I think the alternative staff says is
24 that then what could happen is simply by having
25 BellSouth and other ILECs would have the ability to

1 avoid its bundling and on network -- having to provide
2 UNEs by simply always having services that equal the
3 network elements. I mean, in this case they are not
4 selling Megalink to the end user customer, they are
5 inserting their switch and selling a different service
6 to them. They are using piece parts of a service that
7 is equivalent to Megalink, but it's not the same
8 service they are selling to their customers.

9 MR. D'HAESELEER: Well, then I could take the
10 other option and say, well, there will never be under
11 these interpretations, then, an equivalent service.

12 COMMISSIONER CLARK: Sure there will be. If you
13 used BellSouth's switch to do that, it would be
14 equivalent. It's just like what Joe says, that
15 BellSouth was arguing that it's the same thing as
16 electric service because you plug it into the wall.
17 Well, if you don't have the service coming from the
18 other end providing the electricity into the house,
19 you don't have electric service.

20 And that was sort of to me a good analogy for
21 what they were arguing. You had to put something else
22 with it. MCI has to put something else with it to
23 provide an end product to their end user.

24 CHAIRMAN GARCIA: Right. It's not rebundling of
25 all the same things to imitate precisely. Buying

1 separate parts from BellSouth and rebundling those
2 separate parts without any part of their own to
3 produce the service, then I would understand the
4 argument.

5 But I can see BellSouth saying any time the phone
6 rings you are recreating some service we offer. We
7 will figure it out, but trust me, we offer it in some
8 piece part some way. When the phone rings you are
9 recreating our service, thereby we end up at this
10 definition. And I just wanted to see if I was missing
11 something, because what worries me about this is if we
12 were to take that interpretation, first of all, we
13 don't -- we then do not encourage the companies to put
14 in their own equipment, their own switches, because in
15 the end it all ends up being resale. No matter how
16 you piece part it, BellSouth has the equipment and is
17 providing it, so it's functionally -- what isn't
18 functionally equivalent?

19 What service -- I want to try to understand the
20 definition. If I have basic service, and the phone
21 rings, all right, and MCI offers the same thing using
22 all BellSouth parts except for one, they use one of
23 theirs. Would that be then functionally equivalent
24 and, therefore, that has to be resale?

25 MR. D'HAESELEER: No. Because my look of it was

1 that MCI were buying these unbundled network elements,
2 putting them together, most of the time I guess they
3 would have some of their facilities of their own and
4 they wouldn't have to bundle a complete service.

5 COMMISSIONER CLARK: Then it's not resale.

6 MR. D'HAESELEER: No.

7 COMMISSIONER JOHNSON: How do you decide what is
8 functionally equivalent, too? Because this has been
9 in end-to-end T-1, I mean, how do you decide once you
10 have determined --

11 MR. D'HAESELEER: They perform the same function.
12 You know, do they have to be identical? I don't think
13 so. But for providing the service, the mere fact that
14 functionally it did the same things or maybe some
15 nuances that may be different, but -- and both of
16 them, I think both parties would agree that
17 functionally it was equivalent and that's what I
18 zeroed in on.

19 COMMISSIONER JOHNSON: Is it functionally
20 equivalent to an end-to-end T-1 service?

21 MR. D'HAESELEER: I think in combination, it was
22 a combination of two things. It was the --

23 COMMISSIONER JOHNSON: Because it's like
24 functionally equivalent to several different tariff
25 offerings, so how do you decide which?

1 MS. SIMMONS: Right. Let me mention something,
2 too, and maybe I'm kind of somewhere in between here
3 actually in terms of my point of view. I personally
4 don't think the ultimate service that MCI offers is
5 that critical. But I do think when MCI is purchasing
6 in the way of UNES and how they are going to be using
7 those, there intended application, I think to me is
8 very critical. And MCI wants to use this in a way
9 that is counter to what the Megalink tariff
10 prescribes.

11 COMMISSIONER CLARK: It is switched service as
12 opposed to private line, is that what you're saying?

13 MS. SIMMONS: Say again, please?

14 COMMISSIONER CLARK: It's a switched service as
15 opposed to private line.

16 MS. SIMMONS: Well, I guess what I would say is
17 MCI metro is going to connect this combination to a
18 switch. And the mere fact that they are doing that
19 appears to me to be counter to the conditions in the
20 Megalink tariff.

21 COMMISSIONER CLARK: I guess you are trying to
22 draw a fine distinction so that we are not looking at
23 the end service that is provided by MCI.

24 MS. SIMMONS: That is my belief, yes.

25 COMMISSIONER CLARK: You are concerned that if we

1 do that we would have situations where UNEs are
2 combined and really it is a rebundling and it is
3 resale.

4 MS. SIMMONS: It could be.

5 COMMISSIONER CLARK: Are you suggesting that
6 because they are combining it with their switch,
7 regardless of how they ultimately offer it --

8 MS. SIMMONS: Yes.

9 COMMISSIONER CLARK: -- the addition of the
10 switch takes it out of being a simple resale of an
11 existing service because they add an element.

12 MS. SIMMONS: Right. Well, to me the key thing
13 is the application is not consistent with the
14 restrictions in the Megalink tariff.

15 COMMISSIONER CLARK: Well, let me just -- the
16 Megalink tariff doesn't -- has the restriction that it
17 be private line, is that what you are saying?

18 MS. SIMMONS: Yes. So I guess what I'm trying to
19 say is if --

20 COMMISSIONER CLARK: And there are no
21 restrictions in -- and they don't intend to use it as
22 a private line?

23 MS. SIMMONS: That is correct. Let me say
24 something in the reverse that may help. It seems to
25 me if the combo together with the intended application

1 was consistent with the Megalink tariff, then I would
2 argue it is Megalink. But the intended application is
3 not in keeping with the Megalink tariff.

4 COMMISSIONER CLARK: I think what you are saying
5 is that you are not relying on the intended
6 application as being dispositive. But you would look
7 at what they are combining and use that as sort of
8 further evidence that it's not a resold service
9 because of how they intend to use it. But that isn't
10 in and of itself the reason for your decision.

11 MS. SIMMONS: We are getting into such nuances
12 I'm struggling a little bit.

13 COMMISSIONER CLARK: I think what you are
14 concerned with here is the notion of you don't want us
15 to look at the end service to determine, that MCI is
16 offering to determine whether or not it's resale.

17 MS. SIMMONS: That's correct.

18 COMMISSIONER CLARK: Because they could simply
19 call it something else.

20 MS. SIMMONS: That's correct.

21 COMMISSIONER CLARK: And you are concerned about
22 that. But what you are saying is you can look at that
23 as corroborative evidence of your conclusion that it's
24 not simply resale of an existing service because in
25 this case they did introduce the switch.

1 MS. SIMMONS: Yes. And attaching the service to
2 a switch would be counter to the conditions in the
3 Megalink tariff, yes.

4 COMMISSIONER CLARK: Got you.

5 MR. D'HAESELEER: And we are talking about
6 combining two elements. And, you know, they need to
7 do something with those two elements. By themselves
8 they can't do a whole lot.

9 COMMISSIONER JACOBS: That ties me directly into
10 the point made by Chairman Garcia. You can't do
11 anything without those two, and if you narrow the
12 definition down to something as straightforward as
13 these two, who would come in and offer UNES without
14 duplicating something that BellSouth offers, I mean,
15 it occurs to me that this will be one of the most
16 narrowest configurations that you could come up with
17 as a CLEC that you would want to buy UNES for. Is
18 that a fair statement?

19 MR. D'HAESELEER: This has to do, I think, with
20 commercial large customers.

21 COMMISSIONER JACOBS: I understand. But wouldn't
22 this be -- I mean, normally wouldn't this be about the
23 narrowest configuration that a CLEC would want to pick
24 up on?

25 MS. SIMMONS: I'm not sure we have any basis for

1 judging, I'm sorry.

2 CHAIRMAN GARCIA: But I remember when we had Mr.
3 Varner here, who said that if they use our loop, it's
4 resale. If they use our loop, it's resale. So, in
5 essence, everything was resale. Because if you use
6 our loop, it's resale. It doesn't matter what you add
7 on the front, what you add on the back, what you put
8 in the middle, if our loop is involved, it's called
9 resale.

10 COMMISSIONER CLARK: The fact that you have to
11 add something to get anything --

12 CHAIRMAN GARCIA: Exactly. But he called it --
13 and that is the problem that I have with primary, is
14 that it almost drives us back to Mr. Varner's
15 position, which I think was difficult for Mr. Varner
16 to even argue when he sat there. Which is if it uses
17 us -- it almost said if you use any part of our
18 system, it's resale. Because, I mean, you can have a
19 loop, you don't have phone service. You've got a
20 loop, but you don't have phone service. And Mr.
21 Varner said if you've got a loop, you are reselling.
22 It's resale, and you've got to pay for it. It doesn't
23 matter what you add on the front end, back end,
24 middle, in between, on the side. And so the problem I
25 have with this one is it sort of ends up there. And I

1 understand -- I sort of understand where you are
2 trying to take us, but I need you to distill it a
3 little bit, because maybe that is what I'm missing.
4 And it could be Walter's technical prowess that is
5 overwhelming my simple understanding. So if you could
6 walk me through this and what it is that you are
7 trying -- what distinction you are trying to make,
8 because I didn't understand the distinction you made
9 to Susan. Is it because this service offers more than
10 Megalink, it isn't duplicating Megalink and,
11 therefore, the functional equivalent, while you
12 understand that as a concept, it doesn't apply here?

13 MS. SIMMONS: Let me try this. What I was trying
14 to say is I don't think the ultimate service that
15 MCImetro offers is the critical point. To me it is
16 MCImetro is taking these UNEs and the question is how
17 are they applying them. And is the application
18 consistent with the conditions in the Megalink tariff.
19 That's what it is turning on.

20 CHAIRMAN GARCIA: Tell me what you are protecting
21 on Megalink. Megalink is a service only offered by
22 BellSouth, it's sort of a trademarked name of a
23 service that they offer, right?

24 MS. SIMMONS: Yes. And it is a private line type
25 service.

1 CHAIRMAN GARCIA: And you are saying if they take
2 a series -- because BellSouth thought up this series
3 of combinations, is that what you're saying, and MCI
4 takes some of BellSouth's stuff, some of their own
5 stuff, and offers something -- let's say they offered
6 the exact same thing, using some BellSouth stuff, some
7 of theirs. Let's move away from the private line
8 concept. And they offered the exact same thing. Some
9 of their stuff, some of BellSouth's stuff. In that
10 case you would think that this is resale, is that what
11 you are saying?

12 MS. SIMMONS: No. I'm trying to figure out if
13 there is a way I can distinguish this better.

14 COMMISSIONER DEASON: Just for a second, let me
15 see if I understand what you are saying. And I'm
16 going to look at it from a different perspective. If
17 MCI -- if the economics of this were such that MCI
18 wanted to purchase this as Megalink and apply a resale
19 rate to that, they would be -- for their intended
20 purpose that they wanted to use it, they would be
21 prohibited from the tariff, BellSouth's own tariff,
22 from doing that because there are restrictions in the
23 tariff which says you can only use Megalink for these
24 type services, which are basically private line.

25 So, from that perspective, MCI would not even be

1 allowed to purchase Megalink as a resale and use it
2 for the application they want to use it.

3 MS. SIMMONS: I would agree with one caveat, and
4 that is it's possible that in your scenario that MCI
5 might be able to somehow argue that the resale
6 conditions are unreasonable. But if they could not
7 make that argument, then what you just said is exactly
8 the case.

9 COMMISSIONER DEASON: So if that is true, how
10 could it be reselling something if they couldn't --
11 they couldn't resell it according to the terms of the
12 tariff.

13 MS. SIMMONS: Right. What they want to do is
14 counter to the tariff, the Megalink tariff, yes.

15 COMMISSIONER DEASON: It may be functionally
16 equivalent, but the tariff prohibits them to subscribe
17 to that service on a resale basis and apply it the way
18 MCI wants to apply it, or to provide the end use --
19 you keep saying that the end use service is not
20 relevant, but to me it is. What MCI wants to do with
21 these unbundled elements, how they want to configure
22 them to provide service is contrary to the tariff, the
23 Megalink service.

24 MS. SIMMONS: The end use service that MCI offers
25 is helpful in terms of understanding the intended

1 application. And I would argue the intended
2 application is counter to the tariff. I do think it
3 is important, you know, there is no question all the
4 parties agree that this combo is functionally
5 equivalent to Megalink. The question is should there
6 be more considerations beyond that, that is really the
7 question.

8 COMMISSIONER JOHNSON: But they also state that
9 it is functionally equivalent to some other tariff
10 services, also. So which one do you select and which
11 row would you go down.

12 I have a question with respect to the contract
13 that we are interpreting here. What is the effective
14 date or how many more years will we would be dealing
15 with trying to interpret this standard that we stated
16 that the parties intended? And I say that for several
17 reasons, because I think we do -- to the extent that
18 we have determined, and we did under our contract
19 determination order, that the parties intended that
20 when unbundled elements constitute a retail service
21 that they should negotiate the price. That was our
22 determination with respect to one of their provisions.

23 My concern is we need to provide some guidance if
24 this is going to be an issue for the next several
25 years as to what was or was not intended, Sally. So

1 the dialogue you had with Commission Deason was very
2 important, too, because we have got to give the
3 parties some parameters. Or I think we need to, so
4 that we won't end up in this instance in every case in
5 dealing with the secondary issue if we get there to
6 refunds, what should have been paid and those kinds of
7 things. We need to add some certainty to the process.
8 And that it is if this contract is the contract under
9 which the parties are still operating and if it will
10 be operable next year and the year after.

11 MS. SIMMONS: I'm looking here, and it does have
12 an effective date of July 1, 1998. I'm trying to see
13 if I can find the expiration date.

14 COMMISSIONER JOHNSON: So it's to govern the
15 conduct of the parties for the next several years
16 going forward?

17 MS. SIMMONS: Yes, I apologize.

18 MS. BEDELL: I believe it is a three-year
19 duration.

20 COMMISSIONER JOHNSON: Then I think at a minimum
21 we need to be really clear as to what test we are
22 going to apply. I know Walter wanted us to apply a
23 functional equivalency test. And, Sally, you are
24 articulating something a little different. But we do
25 need to have some standards.

1 CHAIRMAN GARCIA: Is there a standard in the
2 alternative?

3 MS. BEDELL: I don't know that I would call it a
4 standard, but -- and I hate to take this big right
5 turn from where we have been, but in terms of looking
6 forward, I think that it's important for us to also
7 look at the changes in the law related to the Supreme
8 Court decision, which Ms. Brown is prepared to speak
9 on if you all would like to -- the decision was made
10 very close to the time that we had the hearing. And I
11 think that the recommendation probably doesn't provide
12 you with complete information on the possible effects
13 of the Supreme Court decision, and how we might be
14 looking at this going down the road.

15 So if you all would like to take that brief
16 detour and put this other layer on here, which I think
17 is important to your decision, because we have to
18 remain consistent with the Supreme Court decision. I
19 think it may be useful.

20 COMMISSIONER JOHNSON: I think there is two
21 issues, however. The case that we were deciding
22 turned on the provisions of the contract. So that
23 even if the law stated -- which I'm sure Ms. Brown
24 will discuss -- that CLECs can recombine elements in
25 any way, even if they recreate a retail service and

1 they still get the sum of the unbundled network
2 prices, even if the law says that, what we turned our
3 decision on was so the law says that but the parties
4 negotiated something else. And the parties
5 themselves, as we interpreted the contract, we are
6 saying that the parties intended for if there is a
7 reconfiguration, and that reconfiguration leads to a
8 retail service, then they have to negotiate the price.
9 So I think the law is relevant, but not dispositive in
10 this case. MS. BEDELL: I think you could --

11 MS. BROWN: Well, I agree with that. I think you
12 all have tried from the very beginning going through
13 this issue to stick to the terms of what the contract
14 said.

15 If I can just bring you back to some of that
16 discussion in the combinations docket 1140 when you
17 were originally trying to interpret these provisions
18 of that contract, staff had brought a recommendation
19 to you that the parties had intended that MCI would be
20 able to purchase UNE combinations at the simple sum of
21 the UNE prices. And you didn't agree with that.

22 Commissioner Clark said something like she felt
23 she was in a parallel universe, because from the very
24 beginning the parties had been arguing over this very
25 issue. Can you purchase UNE combinations and in doing

1 so recreate a retail service and thus undermine the
2 resale provisions of the act and the Commission's
3 prices that you set. So what you eventually said was,
4 well, the parties couldn't have intended this, they
5 have been arguing about it from day one.

6 So, we are going to say that what the contract
7 says is they intended to purchase -- that MCI would be
8 able to purchase combinations of network elements that
9 did not recreate a service at the simple sum of the
10 UNE prices, but when it came down to purchasing UNES
11 that did recreate a service, they had to go back and,
12 number one, negotiate what that was, what UNES would
13 recreate a retail service, and, number two, what would
14 the price be.

15 So, in fact, you have not taken yourself an
16 actual step in determining that you have a policy
17 against this, although it's sort of underlying a lot
18 of what you have been thinking. You have been worried
19 about this from the very beginning. Purchasing UNE
20 combinations to recreate a retail service that
21 undercuts the resale provisions. You have been
22 worried about it. But you have never actually said
23 it's bad or it's wrong. You have just used it in the
24 back of your mind in interpreting the contract. So
25 that's where we are on that.

1 Where you go from the future in interpreting
2 again the implementation of this contract, as
3 Commissioner Johnson was talking about, keep in mind
4 that the law has changed a little in recent days, and
5 this question of whether you can combine UNEs to
6 recreate a retail service of an ILEC is pretty much,
7 at least from my own opinion looking at it, a dead
8 issue.

9 The FCC has said you can do it. It said it from
10 the very beginning, and you acknowledged that in your
11 original arbitration order. And you then told the FCC
12 you were concerned about that, because it would
13 violate the joint marketing provisions of the act,
14 that it would undercut the retail prices.

15 Nonetheless, you went along with what the FCC had
16 said at that point. Then the FCC's rules were stayed,
17 the Eighth Circuit then rejected a lot of those rules.
18 So all of this was going on while you were trying to
19 cope with these provisions and deal with this. Now
20 the Supreme Court has really basically reaffirmed the
21 FCC rules as well as the rationale in implementing
22 those rules.

23 And with respect to UNE combinations, the FCC's
24 rationale has always been that it doesn't matter.
25 That the risks are different between purchasing UNE

1 combos and resale of retail services. That if there
2 is an arbitrage problem, the Supreme Court recognized
3 this specifically in its recent order, created because
4 of the universal service subsidies, that is going to
5 go away. And the risks of putting the ILEC in the
6 position of being able to sandbag the use of UNEs by
7 throwing up these obstacles in the way, you have to
8 take them apart, it's going to recreate, was
9 overriding in the FCC's determination that they should
10 be provided as combinations and at the simple sum of
11 the prices.

12 So, that to me is where the law stands now. And
13 that was not clear at the time this contract was
14 entered into at the time you arbitrated these matters,
15 and at the time you were dealing with some of these
16 things, so I think you need to keep that in mind when
17 you are interpreting these provisions of the contract
18 going forward, as well. But also keep in mind the
19 current state of the law.

20 And my suggestion, practically speaking, I guess,
21 would be to try to interpret this retail service
22 exception to the general UNE combinations rule. I
23 hate to even put it in those terms, it doesn't rise to
24 that, but that's what I'm trying to get at, as
25 narrowly as you can. Sorry for that long speech.

1 COMMISSIONER CLARK: I can move alternate staff
2 on Item 24.

3 CHAIRMAN GARCIA: There is a motion. Is there a
4 second?

5 COMMISSIONER DEASON: Second.

6 CHAIRMAN GARCIA: All those in favor signify by
7 saying aye.

8 (Unanimous affirmative vote.)

9 CHAIRMAN GARCIA: Opposed. Very good. Show
10 alternate approved on 24.

11 Julia, did ask you that they sort of craft this
12 very specifically because of the implications on the
13 contract, and would you like us to walk it by the
14 Commissioners?

15 COMMISSIONER JOHNSON: Yes. And I think the
16 dialogue between Commissioner Deason and Sally kind of
17 captured -- the one thing you were saying that
18 Commissioner Deason had some concerns with it first
19 was that you kind of ignore the application, and the
20 dialog that you all had with respect to, no, the end
21 use application may be very, very important. I think
22 he is right. And so I didn't take good enough notes
23 with respect to the criteria that you were laying out,
24 but I think that was a proper analysis. It may need
25 to come back before us all, but I think --

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COMMISSIONER CLARK: Well, I think what they --
if you look on their conclusion, I think that is
exactly what should be in it, is that the notion that
you shouldn't just look at the functionality, you have
to look and see if the intended use is consistent with
the tariff. And in this case it was not.
Functionality alone is not a determining factor.

MS. BEDELL: We will bring the order by. We will
circulate it before we issue it.

CHAIRMAN GARCIA: Great. Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 24 are a true and correct record of the proceedings.

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

DATED THIS 19th day of May, 1999.

Jane Faurot

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