

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 990691-TP
:
Petition of ICG Telecom :
Group, Inc. for arbitration :
of unresolved issues in :
interconnection negotiations:
with BellSouth :
Telecommunications, Inc. :



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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER SUSAN F. CLARK
Prehearing Officer

DATE: Tuesday, September 21, 1999

TIME: Commenced at 1:30 p.m.
Concluded at 2:45 p.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: KIMBERLY K. BERENS, CSR, RPR
FPSC Commission Reporter

1 **APPEARANCES:**

2 **JOSEPH A. McGLOTHLIN** and **VICKI GORDON**
3 **KAUFMAN**, McWhirter, Reeves, McGlothlin, Davidson,
4 Dekker, Kaufman, Arnold and Steen, 117 South Gadsden
5 Street, Tallahassee, Florida 32301, appearing on
6 behalf of ICG Telecom Group, Inc.

7 **EARL EDENFIELD** and **MICHAEL GOGGIN**, c/o Nancy
8 Sims, 150 South Monroe Street, Suite 400, Tallahassee,
9 Florida 32301, appearing on behalf of **BellSouth**
10 **Telecommunications, Inc.**

11 **C. LEE FORDHAM**, Florida Public Service
12 Commission, Division of Legal Services, 2540 Shumard
13 Oak Boulevard, Tallahassee, Florida 32399-0870,
14 appearing on behalf of the **Commission Staff.**

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P R O C E E D I N G S

(Hearing convened at 1:30 p.m.)

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3 **COMMISSIONER CLARK:** Would you read the
4 Notice, please.

5 **MR. FORDHAM:** Commissioner, we're here today
6 pursuant to notice of prehearing on Docket No. 990691,
7 Petition by ICG Telecom Group Inc. for arbitration of
8 unresolved issues in interconnection negotiations with
9 BellSouth Telecommunications Inc.

10 **COMMISSIONER CLARK:** Thank you. Take
11 appearances.

12 **MR. GOGGIN:** Michael Goggin for BellSouth
13 Telecommunications.

14 **MR. MCGLOTHLIN:** Joe McGlothlin and Vicki
15 Kaufman for ICG. Commissioner, I'd like to introduce
16 Bruce Holdridge who's Vice President of Government
17 Affairs for ICG.

18 **MR. EDENFIELD:** We also have Kip Edenfield
19 for BellSouth.

20 **MR. FORDHAM:** And Lee Fordham with the
21 Florida Public Service Commission.

22 **COMMISSIONER CLARK:** Mr. Edenfield, are you
23 making an appearance as an attorney?

24 **MR. EDENFIELD:** Yes, Your Honor. I am a
25 Florida licensed attorney.

1 **COMMISSIONER CLARK:** I thought I noticed you
2 signed something so I was -- I didn't catch Bruce's
3 last name.

4 **MR. MCGLOTHLIN:** Holdridge.
5 H-O-L-D-R-I-D-G-E.

6 **COMMISSIONER CLARK:** He is just here
7 representing the company? He's not --

8 **MR. MCGLOTHLIN:** Right.

9 **COMMISSIONER CLARK:** Okay. Mr. Fordham,
10 what do I do now? What's the next step?

11 **MR. FORDHAM:** Well, Commissioner, we should
12 perhaps just go through the order -- the draft
13 prehearing order in the order that it's outlined and
14 so that we're on track with the proposed procedure.

15 **COMMISSIONER CLARK:** All right. Let's go
16 ahead and go through it. Then when we get to the
17 first issue that's pursuant -- that is the subject of
18 a motion to strike, I guess --

19 **MR. FORDHAM:** Well, if we're going in the
20 order, I think the first thing perhaps is to see if
21 we're okay on the Order of Witnesses, Part 6, in the
22 draft prehearing order.

23 **COMMISSIONER CLARK:** Okay. And then when we
24 get to the first issue on -- that is subject to a
25 motion to remove, then we'll take up the motion?

1 **MR. FORDHAM:** That might be a good time to
2 take up the motions.

3 **COMMISSIONER CLARK:** And then take the
4 motion to strike testimony at the end?

5 **MR. FORDHAM:** I think that would be
6 appropriate.

7 **COMMISSIONER CLARK:** Okay. So, Mr. Fordham,
8 you recommend we start on what page? On the -- Page
9 4?

10 **MR. FORDHAM:** Page 4 of the draft order,
11 Commissioner, Part 6, Order of Witnesses.

12 **COMMISSIONER CLARK:** Okay. Is there any
13 change we have to make to the order of witnesses?

14 **MR. MCGLOTHLIN:** We don't propose a change
15 in the order of witnesses. There is a typo on Page 4,
16 Proffered By. Should be "ICG", and throughout the
17 Page 4 and Page 5.

18 **COMMISSIONER CLARK:** Okay.

19 **MR. FORDHAM:** I'm sorry. Where are you,
20 Joe?

21 **MR. MCGLOTHLIN:** Under the column Proffered
22 By, there is a transposition there. It should be
23 "ICG".

24 **MR. FORDHAM:** I see. Correct. Thank you.

25 **COMMISSIONER CLARK:** Any changes to the

1 basic positions? Hearing none, what about Issue 1? I
2 have not read the testimony, but I had a question,
3 Mr. McGlothlin, on your position. It says, "physical
4 and policy reasons." That is supposed to be physical
5 as opposed to fiscal?

6 **MR. MCGLOTHLIN:** Yes.

7 **COMMISSIONER CLARK:** Okay.

8 **MR. FORDHAM:** I'm sorry. That should be
9 fiscal as in monetary?

10 **COMMISSIONER CLARK:** No. No. It's correct
11 the way it is as I understand it.

12 Issue 2. Any changes?

13 **MR. MCGLOTHLIN:** We have no changes to the
14 positions as stated there. For the Staff's
15 information and for the Commissioner's information, we
16 continue to have ongoing discussions with BellSouth in
17 an attempt to see if there's some basis for resolution
18 of this one.

19 **COMMISSIONER CLARK:** Okay.

20 **MR. GOGGIN:** Commissioner, if I could just
21 add, I guess. The remaining disagreement seems to be
22 primarily over pricing, not over whether these
23 elements would be made available as UNEs. So, I
24 guess, you know, we, obviously, will continue to work
25 with ICG on an agreement. But our view is that it

1 need not be arbitrated as worded because we've already
2 agreed, as ICG recognizes in its position, to offer
3 those elements as UNEs.

4 **MR. MCGLOTHLIN:** There's a caveat to that.
5 I agree that one of the issues is pricing and it
6 appears that there may be some basis for resolving the
7 price in question, but the issue is articulated as it
8 is because from ICG's perspective there is an
9 availability aspect of the proposal by BellSouth to
10 offer this. And it has to do with whether we would
11 have to collocate in the central office where the
12 frame -- our relay switch resides. And until that
13 also is on the stack of resolved items, we think we'd
14 have to have this phrased as it is.

15 **COMMISSIONER CLARK:** Mr. Goggin.

16 **MR. GOGGIN:** Yes.

17 **COMMISSIONER CLARK:** Stated again what you
18 want changed.

19 **MR. GOGGIN:** I guess we would not change our
20 position. I just wanted to take note of the fact that
21 the issue as worded is, "should the following
22 packet-switching capabilities be made available as
23 UNEs." And as ICG recognizes in its answer, BellSouth
24 has made it clear that we will provide these
25 capabilities as UNEs.

1 The questions that remain have to do with
2 the pricing of the elements themselves and perhaps the
3 transport that may or may not be required depending on
4 where ICG has collocated its equipment. The pricing
5 issues seem to us to be more appropriately determined
6 in the UNE pricing dockets, and in any event aren't
7 within the issue as worded in the procedural order.
8 That being said, I think --

9 **COMMISSIONER CLARK:** Can we leave it as it
10 is at this time; the issue? I mean, what do you want
11 me to change?

12 **MR. GOGGIN:** Nothing.

13 **COMMISSIONER CLARK:** Okay. Issue 3. Let me
14 ask BellSouth. You say, "No." Your position is,
15 "First, neither loops, ports nor transport have been
16 defined by the FCC as UNEs that BellSouth must
17 provide." Is that -- are you saying, loops, ports or
18 transports related to enhanced, extended link or
19 generically?

20 **MR. GOGGIN:** I think what we are intending
21 to say is at that time that the prehearing statement
22 was filed, which is where this position comes from,
23 there was no Rule 319 which identified what UNEs ILECs
24 were required to provide.

25 **COMMISSIONER CLARK:** And why was there no --

1 **MR. GOGGIN:** Because the Supreme Court had
2 vacated Rule 319.

3 **COMMISSIONER CLARK:** Gotcha. Okay. You
4 know, it made me think, what have we been doing all
5 along.

6 **MR. GOGGIN:** It shall be added that the FCC
7 has announced an order to take the place of 319; has
8 not yet issued the order, so it's not yet clear.

9 **MR. FORDHAM:** Commissioner, that order
10 should be issued prior to the hearing and it well may
11 be that it will respond to some of the Issue 3 --

12 **COMMISSIONER CLARK:** Yeah, I guess, it
13 strikes me that maybe -- you know, you can do what you
14 want to, but it strikes me that, BellSouth, you would
15 say that because it's been overturned by the Supreme
16 Court, that provision has been overturned, there are
17 no valid definitions of UNEs until the FCC reissues
18 them. I guess that's what you're saying.

19 **MR. GOGGIN:** Yes. And perhaps we should
20 have been more clear in the prehearing statement as
21 to --

22 **COMMISSIONER CLARK:** If there's no
23 objection, I think that would help because I certainly
24 saw that and thought, well, what have we been doing
25 for the past two years or however long it's been. I

1 think -- you know, maybe just footnote because it's
2 been overturned, but we expect it out briefly.

3 **MR. FORDHAM:** Well, if it's going to be an
4 amendment to BellSouth's statement, Commissioner, I
5 would prefer they submitted it; that they gave us
6 their proposed wording rather than --

7 **COMMISSIONER CLARK:** Could you do that just
8 to clarify?

9 **MR. GOGGIN:** We'd be happy to do that and
10 we'll circulate it to the parties.

11 **COMMISSIONER CLARK:** Okay.

12 **MR. MCGLOTHLIN:** As I understand it, they're
13 going to clarify what they meant at the time that they
14 wrote this as opposed to something in light of the
15 order that we expect to come out in a few days.

16 **MR. EDENFIELD:** I don't think you're going
17 to get anything in a few days. My understanding, from
18 the most recent conversations I've had with our FCC
19 folks, is that it's going to be two weeks before it's
20 released out within the FCC and then another week
21 before it's released to the public. So you're
22 probably looking at three weeks before we'll be able
23 to see anything.

24 **COMMISSIONER CLARK:** That's fine. If you
25 would just state it that because the Supreme Court has

1 overturned that portion of their order, it hasn't been
2 finely established what is encompassed within the
3 UNEs.

4 I guess Issue 4 is our first issue on
5 liquidated damages, and I should tell you that I have
6 read the filings, the motion and the response, and I
7 would be happy to allow you some time to orally argue
8 this, and I guess I will start with you,
9 Mr. McGlothlin.

10 **MR. MCGLOTHLIN:** Commissioner, if I may
11 suggest, this is BellSouth's motion to remove.

12 **COMMISSIONER CLARK:** You are right.
13 BellSouth, you go first.

14 **MR. GOGGIN:** Okay. I'd like to save a bit
15 of time for rebuttal because I'm not entirely sure
16 what they're going to argue. But in a nutshell our
17 position is that this issue has come up repeatedly in
18 arbitrations and the Commission has repeatedly held
19 that the Act -- that the Telecommunications Act does
20 not require liquidated damages or other damage
21 provisions to be grafted on to these agreements and
22 that this Commission has correctly decided that it
23 lacks the jurisdiction under state law to award
24 damages, and therefore, it has not arbitrated this
25 issue.

1 We would also note that ICG in other forums
2 and, in fact, here, have stated in testimony that they
3 believe that this issue is not appropriate to be
4 arbitrated between two parties and they've recommended
5 that it be brought up in the context of a generic
6 docket, so we suggest that the issues be withdrawn.

7 **COMMISSIONER CLARK:** Mr. McGlothlin.

8 **MR. MCGLOTHLIN:** As a preliminary matter,
9 Commissioner, for clarity, I want to point out that
10 BellSouth in its motion mischaracterized Issues 19,
11 21, 23 and 25.

12 As I've stated on the first page of our
13 response, this group of issues can be divided into two
14 parts. There are several which present scenarios
15 under which ICG would propose the Commission require
16 the contract to contain liquidated damages. For each
17 of those scenarios there is a following issue that
18 asks, should BellSouth be required to be -- to
19 continue to be responsible. And BellSouth interpreted
20 that to mean additional penalties, but that's not what
21 was intended.

22 This is a customer relation-type of issue
23 and it goes to the point that ICG is concerned that if
24 BellSouth fails to meet a performance standard such
25 that ICG's customer is harmed, ICG will be blamed by

1 the customer unless there is a provision within the
2 contract that requires BellSouth to acknowledge
3 responsibility and that is not a penalty. That is not
4 damages. It's something far different. So only 5,
5 18, 20, 22 and 24 speak to liquidated damages.

6 **COMMISSIONER CLARK:** Let me interrupt you.
7 So what if we say they're responsible? So what if we
8 put that in the agreement? Isn't it going to boil
9 down to a factual determination and who breached the
10 contract or not?

11 **MR. MCGLOTHLIN:** There will be a factual
12 determination, but we're not asking the Commission to
13 make any type of adjudication as to who's responsible
14 in a given factual situation. But under a situation
15 where there is -- it's demonstrated --

16 **COMMISSIONER CLARK:** Let me ask it a
17 different way. What does this kind of provision get
18 you? Either they're responsible under the contract or
19 they aren't. What difference does it make if you add
20 a provision that says you're responsible for filling
21 your commitments under the contract?

22 **MR. MCGLOTHLIN:** The difference is that a
23 new entrant is largely dependent upon the performance
24 of the ILECs, in this case BellSouth, for the ability
25 to provide satisfactory service to the customer. And

1 to build on a business from scratch requires that the
2 customers be satisfied with what the customer is
3 getting. If there is an event in which the customer
4 receives poor service, the customer is going to
5 typically attribute that to its serving provider, in
6 this case ICG, unless there is the responsibility of
7 the ILEC to acknowledge responsibility where that is
8 appropriate. And so it's from the standpoint of being
9 able to build a satisfactory customer relationship
10 that we think this is essential.

11 **COMMISSIONER CLARK:** Okay. I'm sorry. Go
12 ahead. Did you have anything further?

13 **MR. MCGLOTHLIN:** A few more thoughts. First
14 of all, BellSouth relies on the fact that ICG withdrew
15 some issues in the Alabama proceeding. The
16 circumstances there are what they are and if there
17 were reasons why ICG decided to pull some issues
18 there, there is certainly no basis for arguing that we
19 have to here.

20 **COMMISSIONER CLARK:** Isn't it an admission
21 against interest?

22 **MR. MCGLOTHLIN:** No. It's recognition that
23 for whatever sufficient reasons that were present
24 under the circumstances in the Alabama case, we took a
25 course of action to modify the issues to be arbitrated

1 there. Those are not present here and we choose not
2 to withdraw are voluntarily.

3 **COMMISSIONER CLARK:** Let me ask it a
4 different way. In one form you're saying it's not
5 appropriate for a two-party -- it to be arbitrated in
6 a two-party dispute. It's more appropriate for
7 generic. And here you're saying it's appropriate for
8 this two-party arbitration.

9 **MR. MCGLOTHLIN:** I understand the basis for
10 your question now. We have to take these in turn.
11 There's the Alabama proceeding. There is a North
12 Carolina proceeding. In Alabama, ICG voluntarily
13 withdrew certain issues. In North Carolina we
14 sponsored a witness who said we think the Commission,
15 in that case the North Carolina Commission, should
16 open a generic docket.

17 We are being consistent with that in
18 testimony in this case. Our witness cites BellSouth's
19 failure to negotiate performance standards. Describes
20 the importance of them, and says that she advocates
21 that the Commission address this subject in a generic
22 proceeding. So we're being consistent there.

23 The only point is that in a situation, which
24 for reasons that are applicable there but not here, we
25 voluntarily withdrew certain issues. That's no basis

1 on which this Commission can require us to withdraw
2 them in this case.

3 And that -- you've anticipated my next
4 point. We are asking that these issues preserve for
5 the limited purpose of enabling our witness to convey
6 to the Commission her view that because of the
7 importance of the issues the Commission should open
8 generic proceedings to consider both performance
9 standards and what has been characterized as
10 liquidated damages provisions.

11 **COMMISSIONER CLARK:** Let me ask you this.
12 Why can't you just petition us to do that and put the
13 reasons in a petition?

14 **MR. MCGLOTHLIN:** That would be possible to
15 do, but we think that this is also an appropriate
16 venue because her testimony arises from the
17 frustration that grew out of unsuccessful negotiations
18 that led to the arbitration request.

19 I think the most important point I want to
20 make, Commissioner, goes to the orders cited by the
21 Commission and by BellSouth for the proposition that
22 this Commission can't award damages. And with
23 respect, I'd like to point out that in this case we're
24 not asking the Commission to determine a breach has
25 occurred or to award damages.

1 **COMMISSIONER CLARK:** Let me interrupt you.
2 Were we considering those in the other cases?

3 **MR. MCGLOTHLIN:** No. No. There was a
4 proposal that liquidated damages be incorporated and
5 the Commission gave as its reason for deleting those
6 issues, its view that they were being -- the
7 Commission was being asked to award damages and
8 that -- it is that finding that I'm taking issue with.

9 **COMMISSIONER CLARK:** Well, that may have
10 been misstated because I recall that what it was, was
11 that we could not -- we could not award damages. That
12 is a judicial function. And since we were without the
13 authority to award damages and it was outside our
14 jurisdiction, we could not then arbitrate that issue.

15 **MR. MCGLOTHLIN:** It is the second part of
16 that --

17 **COMMISSIONER CLARK:** I believe they were
18 before us in those two cases or -- Joe, let me just
19 tell you. It strikes me that this same argument has
20 come up before.

21 **MR. MCGLOTHLIN:** Similar arguments I'm sure,
22 and the Commission said in the orders cited by
23 BellSouth, we would be, in effect, awarding damages to
24 one party for a breach of contract.

25 And I want to point out that another agency,

1 faced with similar arguments, reached a very different
2 conclusion. I've asked the Commission to take
3 official recognition of a case by the New York Public
4 Service Commission, and at Page 6, that the New York
5 agency characterized AT&T's request for a liquidated
6 damage provision this way.

7 Moreover, AT&T continues in adopting a
8 schedule of liquidated damages for failure to meet
9 service quality standards. We would not in any event,
10 be making a damage award or compensation for a
11 specific adjudicated wrong.

12 And on the same page the Commission
13 concluded this way. "We agree with AT&T's two central
14 points." And further into the same paragraph --

15 **COMMISSIONER CLARK:** What are those two
16 central points?

17 **MR. MCGLOTHLIN:** Well, the first, we are
18 acting here pursuant to authority granted by Congress
19 under the Act; that is, the provision for liquidated
20 damages. And that authority permits us to award terms
21 and conditions designed to adequately enforce the
22 provisions of interconnection agreements.

23 And the second central point is this. Such
24 an award would not be a damage award for it would set
25 forth stipulated remedies for agreed upon contract

1 breaches and would not adjudicate a specific wrong.

2 And I ask you to consider that view of the
3 liquidated damages provision. And ICG regards this
4 not as a determination of damages, but as a preventive
5 measure.

6 **COMMISSIONER CLARK:** Let me ask you a
7 question. If we adopted that view in this proceeding,
8 would it overrule our decisions in at least one, and I
9 think more than one, prior arbitration proceedings?

10 **MR. MCGLOTHLIN:** Yes. This would be a very
11 different conclusion than the one you reached in the
12 AT&T, MCI order that was cited by BellSouth.

13 **COMMISSIONER CLARK:** Okay.

14 **MR. MCGLOTHLIN:** But for good reason.

15 **MR. GOGGIN:** If we could respond briefly?

16 **MR. MCGLOTHLIN:** If I may just conclude for
17 a second.

18 **MR. GOGGIN:** Oh, I'm sorry. Sorry.

19 **MR. MCGLOTHLIN:** I started to say that ICG
20 regards this as a preventive measure and our hope
21 would be that no occasion would ever rise under which
22 those provisions would be triggered because we see
23 this as overcoming what would otherwise be an
24 incentive for any ILEC to not uphold its end of the
25 agreement. And because there is no adequate remedy,

1 in terms of either visits to this Commission or to a
2 court of law any time there is failure to meet a
3 deadline, we see this as an opportunity for the
4 Commission to exercise its authority under state law
5 to prevent anticompetitive behavior by building into
6 the agreement, teeth, if you will; some remedies in
7 the event of a breach.

8 Follow-up point is this. Consider that
9 BellSouth is trying to have it both ways. They say
10 that the Commission cannot -- doesn't have
11 jurisdiction to consider provisions for liquidated
12 damages. But I've also asked you to take official
13 recognition of an excerpt from their general
14 subscriber tariffs. And you'll see sprinkled
15 throughout their tariffs are provisions for
16 limitations of liability. And while this is from the
17 general subscriber tariff, if you pick up any
18 negotiated interconnection agreement you'll also find
19 the limitation of liability in those agreements as
20 well.

21 And on the one hand, they say to the
22 Commission, we want you to approve a provision that
23 limits liability. Well, our request that you provide
24 some measures for liquidated damages is part of the
25 same subject. Both go to the scope of liability. And

1 to suggest that this Commission doesn't have
2 jurisdiction over the scope of liability is simply to
3 fly in the face of the very tariffs that they
4 submitted for approval. Those are my arguments.

5 **COMMISSIONER CLARK:** BellSouth.

6 **MR. GOGGIN:** Yes. I would like to respond
7 to the issues that he's raised in the order that he
8 brought them up.

9 First with regard to what I'll call the odd
10 numbered liquidated damages issues, I believe it's
11 what formerly was Issue 21, 23, 25 and 19 also in the
12 prehearing order. I mean in the -- excuse me. In the
13 procedural order.

14 Each of them is worded in the same way.
15 Should BellSouth continue to be responsible when, for
16 example, in Issue 21, the duration of service failure
17 exceeds certain benchmarks. Well, the service failure
18 in Issue 21 is related to the service failure for
19 which liquidated damages are proposed to be imposed
20 under Issue 20. And the words "continue to be
21 responsible" can only lead one to believe that Issue
22 21 was designed to refer back to Issue 20.

23 So we think that the -- although the
24 argument made here that there needs to be some way for
25 BellSouth to be responsible under the contract for

1 service failures, for example, really isn't what
2 issues the odd numbered issues, 21, 23, 25, are
3 dealing with. The plain wording of those issues makes
4 it clear that what they're talking about is, should
5 there be additional damages that would apply when the
6 failure referred to in the prior issue continues.

7 On the general issue of BellSouth's
8 responsibility, it is responsible for meeting the
9 obligations in its agreements, and as the plethora of
10 ISP reciprocal compensation cases makes clear, there
11 are ways for ALECs to use the procedures of the
12 Commission to ensure that ILECs abide by the
13 obligations of their contracts, even if BellSouth
14 doesn't always agree on what the scope of those
15 obligations may be.

16 Secondly, with regard to the issue of
17 whether any of these issues is appropriate for
18 two-party arbitration, while the order of the events
19 may not be clear -- and if you need additional
20 clarification on what happened in North Carolina or
21 Alabama I believe Mr. Edenfield was present at both
22 those arbitrations and could fill you in. But even in
23 this case, they've sponsored testimony that says that
24 these issues would be more appropriate for
25 consideration in a generic proceeding than they would

1 for a two-party arbitration.

2 **COMMISSIONER CLARK:** Let's me interrupt you.
3 Mr. McGlothlin, is that your position both with the
4 notion of stating that BellSouth continue to be
5 responsible and the liquidated damages? Is it the
6 testimony that both of them are more appropriate for a
7 generic proceeding?

8 **MR. MCGLOTHLIN:** We would be willing to
9 incorporate all of those issues into the request for
10 generic proceeding.

11 **COMMISSIONER CLARK:** Okay.

12 **MR. GOGGIN:** So, in other words, to the
13 extent that one would argue that the circumstances in
14 Alabama or North Carolina might have been different,
15 what is clear is that the issues in those cases were
16 virtually verbatim with the issues here and the
17 position taken by ICG was, at least in North Carolina,
18 virtually verbatim with the position that they've
19 taken in their testimony in this case.

20 Under the circumstances, it's difficult for
21 us to understand why they would wish to pursue the
22 issues here, when by their own admission, they think
23 it would be more appropriate to pursue these issues in
24 another proceeding.

25 Third was the point that they made that

1 they're not really asking the Commission to award
2 damages so that the prior precedents don't necessarily
3 apply. The rulings of the Commission that these
4 issues are not appropriate for arbitration all come
5 out of the AT&T arbitration. When these issues were,
6 in fact, arbitrated they were not excluded from the
7 case at the prehearing stage. They actually went
8 through arbitration on this issue and were removed
9 from the case later.

10 The Commission concluded that "we should
11 limit our consideration in this arbitration proceeding
12 to the items enumerated to be arbitrated in Sections
13 251 and 252 of the Act and matters necessary to
14 implement those items. A liquidated damages provision
15 does not meet that standard."

16 The Commission went on to state that "it is
17 not appropriate for us to arbitrate a liquidated
18 damages provision under state law. If we did we would
19 be, in effect, awarding damages to one party for a
20 breach of contract. We lack the authority to award
21 money damages."

22 The distinction that they attempt to draw
23 between asking for liquidated damages to be put into a
24 contract and actually awarding damages as a result of
25 a litigation is really a distinction without a

1 difference because the jurisdiction to enforce or
2 construe these agreements also rests with the
3 Commission, so imposing a liquidated damages provision
4 in a contract would be tantamount to awarding damages,
5 certainly if that issue ever came before the
6 Commission to be decided.

7 So we think that the decisions of the
8 Commission have been the correct decisions and nothing
9 about this case that we've heard so far has identified
10 this case as being any different than -- in either the
11 facts or the issues presented, than any of the other
12 cases in which the Commission has repeatedly found
13 that these issues should be excluded from the
14 arbitration.

15 In fact, the most recent order, I believe,
16 in which liquidated damages were removed from an
17 arbitration was the Media One arbitration in the
18 prehearing conference that occur on June 22, 1999.

19 Third, as to whether there needs to be some
20 sort of -- I guess this is fourth. As to whether
21 there needs to be some sort of preventive measure to
22 prevent anticompetitive behavior, there are statutes
23 that this Commission is responsible for enforcing that
24 prohibit anticompetitive behavior. There are state
25 and federal antitrust laws, and all of these remedies

1 are available to an ALEC who believes that BellSouth
2 is acting in a manner that is anticompetitive.

3 And lastly, with respect to the tariff
4 provisions that include limited liability provisions,
5 those provisions were voluntarily entered into by
6 BellSouth. BellSouth filed a tariff. The tariff was
7 approved.

8 **COMMISSIONER CLARK:** Well, let me ask you
9 this question. Who determines whether or not -- even
10 though we have approved that, is that the final say on
11 the limit of your liability?

12 **MR. GOGGIN:** Yes. Under the filed tariff
13 doctrine, if a court were faced with a claim for
14 damages that exceeded the amounts set forth in the
15 tariff, it's my understanding that under the filed
16 tariff doctrine, plaintiff would not be entitled to
17 receive those remedies. The courts generally will
18 observe the filed tariff and will not go beyond the
19 limitations and liability in the tariff.

20 **COMMISSIONER CLARK:** Even if there's gross
21 negligence?

22 **MR. GOGGIN:** In the tariff itself it says
23 that the limitations and liability don't apply if
24 gross negligence is found.

25 **COMMISSIONER CLARK:** Well, I guess my

1 question is, that that is not something -- the
2 liability is not something that we would determine.
3 The extent of your liability is something the court
4 would determine, and one of your defenses would be
5 that it's a filed rate, not that it's been approved by
6 us.

7 **MR. GOGGIN:** Exactly.

8 **COMMISSIONER CLARK:** Okay. Anything else?

9 **MR. GOGGIN:** Nope. That's all. Thank you.

10 **COMMISSIONER CLARK:** With respect to the
11 continue to be responsible, I still am sort of -- it
12 strikes me that the extent of the responsibility that
13 BellSouth may bear for not living up to the
14 requirements of the contract is going to be
15 adjudicated by a court and be a factual determination
16 that they would make. What does it add to say they'll
17 continue to be responsible? What does that get you?

18 **MR. MCGLOTHLIN:** Commissioner, I think we
19 got into this for the first time during the issue ID
20 meeting, and I think we're prepared to say that the
21 wording was not the most artful. We attempted to
22 clarify the intent for the Staff during that time.
23 I've referred to it again on Page 1 of our response,
24 second -- third paragraph. I state, "Issue Nos. 5 and
25 18 through 25 relate to BellSouth's refusal to

1 negotiate standards and consequences, as well as its
2 refusal to negotiate provisions which would require
3 BellSouth to acknowledge its responsibility for
4 customer difficulties resulting from BellSouth's
5 failure to meet performance standards."

6 It has always been -- the intent has always
7 been to have these issues relate to customer
8 relationship issues that grow out of the situation in
9 which ICG would rely on BellSouth. The customer is
10 mad at ICG and yet there is no requirement that
11 BellSouth acknowledge that the fault lies there and
12 not with ICG's service.

13 So if the problem is that, as worded, that
14 it's less than fully communicated, we can work on
15 that. We can rephrase it. But, by no means do I
16 think that BellSouth has made the case that they
17 should be removed from the case.

18 **COMMISSIONER CLARK:** Does Staff have any
19 recommendation?

20 **MR. FORDHAM:** On those odd issues that seem
21 to be follow-ups to the even issues, I share the
22 Commissioner's question that I don't know exactly what
23 that adds. On the even number issues regarding
24 liquidated damages, it's obvious that if those issues
25 were at this point not removed that would be

1 inconsistent with the precedent of this Commission on
2 a number of cases. And, Commissioner Clark, you sat
3 on the Media One case, which was just about a month
4 ago, wherein the issue was removed at prehearing, the
5 liquidated damages issues.

6 **COMMISSIONER CLARK:** All right. I'm
7 prepared to make a ruling that both issues will be
8 removed from this prehearing but that is with the
9 understanding that you can -- it's up to you whether
10 or not to file a petition to ask for it to be treated
11 generically and then the opportunity to make those
12 arguments would be made in the petition and then the
13 Commission could deal with that on a generic basis
14 because it strikes me it goes to a similar issue in --
15 with respect to a customer -- concern about the
16 customers and service provided to the customers and
17 what are the consequences of failure to provide that
18 service by BellSouth as it impacts both ICG and the
19 customers. So I will grant the motion to strike those
20 issues.

21 **MR. FORDHAM:** Commissioner, for
22 clarification, that would be Issue 4 and then Issues 8
23 through 15 on the draft prehearing order.

24 **COMMISSIONER CLARK:** Is there any dispute as
25 to those being the appropriate issues?

1 Okay. Let's go to Issue 5. Any changes?
2 Let me just ask, on the bottom of -- the last line of
3 ICG's position it says, "of for extended terms".
4 Should that be an "or"? Do I have the right copy of
5 the prehearing order. I think so.

6 **MR. MCGLOTHLIN:** I think you're correct. It
7 should be "or".

8 **COMMISSIONER CLARK:** Okay. Issue 6. Any
9 changes there?

10 **MR. MCGLOTHLIN:** None from ICG.

11 **COMMISSIONER CLARK:** Issue 7. I do have a
12 question on Issue 7. It is framed, "should BellSouth
13 be required to commit to provisioning the requisite
14 network buildout and necessary support when ICG agrees
15 to enter into a binding forecast." And then both of
16 the answers deal with agreeing to a binding forecast
17 as opposed to whether they should be required to
18 provision when ICG agrees to enter into a binding
19 forecast.

20 What is it -- here's what I interpreted it.
21 You're willing to say to them, we will bind ourselves
22 to this forecast and if you provision the facilities,
23 we will pay for it. The question becomes, if you're
24 willing to do that, are they required to provision it.
25 And I'm not sure that's what it says or the answers

1 say.

2 **MR. EDENFIELD:** On behalf of BellSouth, if
3 you'd like me to respond, Commissioner Clark.

4 **COMMISSIONER CLARK:** That would be good.

5 **MR. EDENFIELD:** The first issue is, is
6 BellSouth required. In other words, if ICG wants to
7 enter into a binding forecast is BellSouth then
8 obligated to accept and then enter into a binding
9 agreement for certain facility buildout. Once you get
10 to that point, then I think you're right on track, and
11 that is, if the parties agree to that, is BellSouth
12 then bound to comply with that agreement.

13 But I think the preliminary question is, is
14 there some obligation -- just because ICG wants to
15 enter into a binding forecast, is there some
16 obligation on BellSouth to accept that binding
17 forecast or to enter into a binding forecast if
18 BellSouth does not want to.

19 **COMMISSIONER CLARK:** All right. Then you
20 need to -- then Issue 7 needs to be restated. And it
21 should be, should BellSouth be required to enter into
22 a binding forecast and, therefore, be required to --

23 **MR. GOGGIN:** We had asked that this issue be
24 broken into two questions at the issue ID, but we
25 didn't carry the day on that.

1 **COMMISSIONER CLARK:** Okay. Mr. McGlothlin,
2 do you want to respond?

3 **MR. MCGLOTHLIN:** I believe you're correct in
4 your observation that there will be two steps; first
5 the binding forecast to which ICG would commit, and if
6 ICG so commits our position is that BellSouth would be
7 required to provision accordingly.

8 **COMMISSIONER CLARK:** Well, let me ask
9 BellSouth this. Is it your -- if we require you to
10 commit to a binding forecast, do you dispute that you
11 would then be required to commit provisioning in the
12 requisite network buildout to support that commitment.

13 **MR. EDENFIELD:** The short answer to your
14 question is, no, I don't dispute that, but there are a
15 lot of little idiosyncrasies that go with that.

16 In other words -- and this is the issue that
17 has come up during our discussions. In Atlanta, one
18 of the busiest central offices is right in downtown,
19 in Buckhead. Suppose ICG comes in and says, I want,
20 you know, 5,000 loops or make it ports in the Buckhead
21 office and we just don't have it. In other words, now
22 you've required us to enter into a binding forecast.
23 They've sent us the forecast saying I want this --

24 **COMMISSIONER CLARK:** No. No. I'm saying --

25 **MR. EDENFIELD:** -- and the facilities don't

1 exist. I don't know that it's possible for us to
2 comply and do the requisite buildout. That's one of
3 the problems that we've had is, if it's a one way
4 binding forecast, in other words, ICG can just come in
5 and basically impose it upon us, then there is no
6 guarantee that the facilities will be available, that
7 they will be available in the time perimeters, and
8 these are all the little things we've been trying to
9 work out on the side.

10 But the short answer to your question is,
11 yes, if you require us to do it, we will have to do
12 it, but there's got to be something there that if it's
13 not possible we have some recourse.

14 **COMMISSIONER CLARK:** Well, then the issue
15 strikes me as being, what are the circumstances under
16 which you will not be required to enter into a binding
17 forecast.

18 **MR. EDENFIELD:** Well, from BellSouth's
19 position the question is, is it something required by
20 the Act. And this is what we've been arguing in some
21 of the different states, and the North Carolina staff
22 has already kind of gone our way on this and said
23 there's nothing in the Act that requires you to enter
24 into a binding forecast, therefore, it's not
25 appropriate for arbitration, which is basically where

1 we are.

2 **COMMISSIONER CLARK:** Let me ask this. Is it
3 appropriate then to word the issue this way: Should
4 BellSouth be required to enter into a binding forecast
5 with respect to IGC -- ICG's traffic requirements and
6 thereby be required to commit to provisioning the
7 requisite network buildout and necessary support?

8 **MR. EDENFIELD:** I think I would -- I think
9 the order of that is fine. I think I would break it
10 into two sentences. One, is BellSouth required or
11 does the 1996 Act require BellSouth to enter into a
12 binding forecast. Period. If so, is BellSouth then
13 required to do the necessary requisite buildout --

14 **COMMISSIONER CLARK:** That's fine.

15 **MR. EDENFIELD:** -- as a separate issue that
16 has to be addressed and not just a given from one to
17 the other.

18 **COMMISSIONER CLARK:** Will that work,
19 Mr. McGlothlin?

20 **MR. MCGLOTHLIN:** We have resisted efforts to
21 phrase these issues in terms of does the 96 Act
22 require, because at some point we have to reach that
23 aspect that says the Commission should require those
24 things that are necessary to implement. And some
25 things may be explicit, other things may be implicit.

1 **COMMISSIONER CLARK:** Okay. Well, then we
2 can just say, is BellSouth required to enter into the
3 contract if -- the binding forecast. If so, are they
4 then required to commit to provisioning the requisite
5 network buildout and necessary support. And then they
6 can answer it, no, they're not required to do by the
7 1996 Act, and you can answer it, it's implicit that
8 they be required to do such thing to carry out the
9 purposes. Is that --

10 **MR. MCGLOTHLIN:** That's acceptable.

11 **COMMISSIONER CLARK:** Now, you know, I have
12 no -- I think that can be one issue, or it can be two.

13 **MR. FORDHAM:** We can make it an A and B,
14 Commissioner.

15 **COMMISSIONER CLARK:** That would be fine.
16 But I just -- there was a disconnect for me in terms
17 of what the dispute was.

18 Okay. The rest of the issues we've already
19 stricken; is that correct?

20 **MR. MCGLOTHLIN:** Correct.

21 **COMMISSIONER CLARK:** All right. Anything to
22 change on the exhibit list? Okay. Then there are no
23 further changes to the --

24 **MR. GOGGIN:** Commissioner Clark, if I can
25 just note that we were -- we got a draft of this just

1 before you called the meeting to order, so we're
2 reading through it as we're talking here. If we later
3 come up with a typo, can we submit it to the group?

4 **COMMISSIONER CLARK:** Nope.

5 **MR. EDENFIELD:** Speak now or forever hold
6 your peace kind of thing.

7 **COMMISSIONER CLARK:** No. Of course. I've
8 looked through it. The only things that -- we have
9 dealt with the motion to remove the issues. We need
10 to deal with the motion to strike the testimony. Of
11 course, there would be an opportunity for both parties
12 to look at it and see if we made typos or if there is
13 some other error that you didn't catch. That is not a
14 license to change your positions to any substantive
15 amount, and if you do, we'll have to come back and
16 talk about it.

17 **MR. MCGLOTHLIN:** Ms. Kaufman reminds me that
18 the exhibit of Karen Notsund goes to the proposal of a
19 generic docket.

20 **COMMISSIONER CLARK:** Okay. We will delete
21 that.

22 **MR. MCGLOTHLIN:** Right.

23 **MR. GOGGIN:** We will also, to the extent
24 that we have information that we've submitted that
25 relates to issues that have been withdrawn, we can go

1 ahead and --

2 **COMMISSIONER CLARK:** Yes. Mr. McGlothlin,
3 it seems that it would be appropriate to strike some
4 testimony on the basis that we've removed some issues.

5 **MR. MCGLOTHLIN:** I think all of Ms.
6 Notsund's testimony is in that category.

7 **COMMISSIONER CLARK:** Okay. So we will
8 delete her as a witness and we'll delete her exhibit.

9 **MR. MCGLOTHLIN:** There would also be a need
10 to edit Mr. Holdridge's testimony.

11 **COMMISSIONER CLARK:** All right. Can you
12 provide that -- you know, give it the other parties
13 and then we'll take it up as that -- I'm trying to
14 think. If we can reach agreement on what can be
15 stricken, why don't we add that to the prehearing
16 order that says, based on these issues being resolved,
17 the testimony has -- one set of testimony and exhibit
18 has been withdrawn and the following prefiled
19 testimony has been stricken.

20 **MR. MCGLOTHLIN:** We'll work on that.

21 **MR. EDENFIELD:** I don't know if this will be
22 a help or not, but my recollection of -- I've tried
23 this case twice already; that the testimony is laid
24 out almost by section so it should not be that
25 difficult to find and take that out. And also

1 Mr. Holdridge has a performance measurements exhibit
2 as well, just so you know Mr. McGlothlin. And I
3 believe that there is testimony if it held true for
4 Florida, which I don't remember off the top of my
5 head, that Mr. Starkey had also filed some performance
6 measurements testimony, but I could be mistaken. You
7 might want to look there as well.

8 **COMMISSIONER CLARK:** Okay.

9 **MR. FORDHAM:** Excuse me. Is all of
10 Holdridge's testimony regarding the performance
11 measures?

12 **MS. KAUFMAN:** No.

13 **MR. GOGGIN:** If you look at the beginning,
14 you know.

15 **MR. FORDHAM:** Okay.

16 **COMMISSIONER CLARK:** That leaves the motion
17 to strike some of Mr. Varner's testimony, and as I
18 understand it, I have the motion, but I don't have a
19 response; is that correct?

20 **MR. EDENFIELD:** We filed a response --

21 **MR. GOGGIN:** On Friday.

22 **COMMISSIONER CLARK:** Mr. Fordham, did you
23 give me that?

24 **MR. FORDHAM:** Commissioner --

25 **COMMISSIONER CLARK:** Yes, you did.

1 **MR. FORDHAM:** Yes. Right after --

2 **COMMISSIONER CLARK:** It was the one with the
3 stamp on it, right?

4 **MR. FORDHAM:** Yes. Correct.

5 **COMMISSIONER CLARK:** This one.

6 **MR. FORDHAM:** Correct.

7 **COMMISSIONER CLARK:** I did read it. I'm
8 sorry.

9 **MR. GOGGIN:** Short but forgettable.

10 **COMMISSIONER CLARK:** No, it wasn't. I
11 apologize. I did read it. See.

12 **MR. EDENFIELD:** Oh, no, there is
13 highlighting. I'm in trouble.

14 **MR. GOGGIN:** Kip is going to handle this
15 motion for us.

16 **COMMISSIONER CLARK:** Mr. McGlothlin.

17 **MR. MCGLOTHLIN:** Yes. This is my motion.
18 Commissioner, by way of background, during
19 negotiations ICG sought to negotiate with BellSouth a
20 provision that would include ISP traffic within the
21 reciprocal compensation mechanism. BellSouth refused
22 to agree to such a measure. As a result, when ICG
23 filed its petition it included this issue, which
24 became the first issue of the prehearing statement;
25 "Until the FCC adopts a rule with prospective

1 application, should dial-up calls to Internet Service
2 Providers be treated as if they were local calls for
3 purposes of reciprocal compensation."

4 BellSouth filed a response in which it said,
5 "No, reciprocal compensation is not applicable to
6 ISP-bound traffic."

7 Now, few things are more certain than the
8 perimeters that the 96 Act provides with respect to
9 those issues that can be arbitrated. The Act says
10 that they are limited to those that arise from the
11 petition and the response to the petition. Yet in
12 BellSouth's testimony, Mr. Varner -- Mr. Varner says
13 ICG should be required to pay BellSouth a portion of
14 the revenues it receives from ISP providers because
15 BellSouth is jointly providing exchange access service
16 to ISPs.

17 In a situation in which the FCC has dealt
18 with ISP traffic and has indicated more than once
19 the -- its view that the state Commissions have the
20 ability to include ISP traffic as local for purposes
21 of reciprocal compensation, this idea comes way from
22 left field. It really has the effect of standing the
23 regulation on its head.

24 But, beyond that -- and we've addressed --
25 we were required to address the testimony and

1 prefiled -- and rebuttal testimony because of the
2 timing of the case schedule.

3 But, our point is that we shouldn't reach
4 that point at the hearing because while we can admire
5 the radical nature of the proposal, audacity does not
6 buy BellSouth an exemption from the requirements that
7 it seek to arbitrate issues only that arise from the
8 petition or the response to the petition.

9 Now, I've had a chance to look at their
10 response and I'd like to make three quick
11 observations.

12 BellSouth would have the Commission believe
13 that Issue 1 really just raises a subject of interim
14 mechanisms and we've got one and they've got another.
15 But that's not the case. Issue 1 posed only the
16 question of whether ISP traffic should be treated as
17 local for reciprocal compensation.

18 Next, they say that we're quibbling over
19 nuances of testimony. Well, to say black is white or
20 that east is west is not a nuance. They are trying to
21 completely flip the issue and make what was a one way
22 street --

23 **COMMISSIONER CLARK:** Mr. McGlothlin, the
24 answer for me -- the point they make that in your
25 petition at Page 8, you say that Issue 1 requires the

1 Commission to fashion in this proceeding a mechanism
2 that includes ISP traffic for purposes of reciprocal
3 compensation for cost incurred in handling. That's
4 the way I see it represented. This is one mechanism
5 as opposed to continuing to identify it as local.

6 **MR. MCGLOTHLIN:** I'm sorry. I guess I
7 missed part of that question, Commissioner.

8 **COMMISSIONER CLARK:** All right. I'm looking
9 at Page 2. Answer the question where your petition
10 allegedly says that Issue 1 requires the Commission to
11 fashion in this proceeding a mechanism that includes
12 ISP traffic for purposes of reciprocal compensation
13 for cost incurred in handling the calls.

14 **MR. MCGLOTHLIN:** Well, that's true as far as
15 it goes. We asked the Commission to conclude that ISP
16 traffic should be treated as local for purposes of
17 reciprocal compensation.

18 **COMMISSIONER CLARK:** And, I guess, why is it
19 not appropriate for them to say it shouldn't be
20 treated as local and this is how it should be treated?

21 **MR. MCGLOTHLIN:** Because the issue as
22 framed, arising from negotiations, stops at the point,
23 is it local for purposes of reciprocal compensation or
24 not. Had they wished to make the case that ICG has to
25 pay them money because this is jointly provided

1 exchange access, that should have been in the response
2 or in a petition that they had the ability to file
3 under the Act as well.

4 **COMMISSIONER CLARK:** Okay. And this isn't
5 just saying -- this isn't just a rationale for their
6 view that it should not be local traffic?

7 **MR. MCGLOTHLIN:** No. It goes far beyond
8 that. They're trying to make a completely different
9 proposition out of it.

10 **COMMISSIONER CLARK:** Okay.

11 **MR. MCGLOTHLIN:** So the petition and the
12 response did not create an opportunity for either
13 party to propose mechanisms that go in different
14 directions. It only asks the question, is it going to
15 be local for purposes of reciprocal compensation or
16 not. And again, that's not a nuance.

17 And the final observation is this. We've
18 said in our pleading that the parties -- that this
19 proposition did not arise during negotiations, and
20 Mr. Holdridge is here and if necessary he can speak to
21 this. And categorically BellSouth did not raise this
22 during the negotiations that occurred at any point
23 prior to the filing of a petition. And we'll stand by
24 that, but that's actually neither here nor there
25 because the framework of the Act says that you find

1 your issues in the petition and the response.

2 **COMMISSIONER CLARK:** Mr. Goggin or
3 Mr. Edenfield. Who is going to argue this?

4 **MR. EDENFIELD:** Mr. Edenfield.

5 **COMMISSIONER CLARK:** Okay.

6 **MR. EDENFIELD:** Commissioner Clark, what ICG
7 is trying to do in short is frame an issue in such a
8 way that only they get to file testimony concerning
9 it. And I think you picked up on the key, and that
10 is, on footnote 1 on Page 3 of ICG's motion to strike
11 they talk about what the Commission has been asked to
12 do in responding Issue 1; is to develop the mechanism
13 by which reciprocal compensation will or will not be
14 paid going forward. And I guess you have to back up a
15 little bit and look at this in terms of, the
16 Commission to date has looked at interpretations of
17 existing interconnection agreements to determine what
18 the parties' obligations are as concerns reciprocal
19 compensation.

20 What you're looking at here is the same
21 thing that you looked at in Media One, and that is, in
22 the context of negotiating a new agreement where it's
23 obvious what the intent of the parties are, and that
24 is, obviously, on the opposite ends of the spectrum,
25 what intercarrier compensation mechanism is the

1 Commission going to put in place pending the FCC's
2 determination of its plan. Without getting into the
3 merits of jurisdiction and this, that and the other,
4 that is what they've asked you to do.

5 **COMMISSIONER CLARK:** Let me ask you this.
6 Suppose we agree with you that your mechanism is the
7 right way to do it. Do we have the authority to
8 impose it?

9 **MR. EDENFIELD:** I think on an interim basis,
10 yes.

11 **COMMISSIONER CLARK:** It's not something that
12 is interstate access?

13 **MR. EDENFIELD:** Sure. It's interstate
14 access, but then you get back to this jurisdictional
15 argument of, the FCC in its February 26th order, the
16 ISP order, apparently has granted to state commissions
17 the authority to put into place an interim
18 intercarrier compensation mechanism --

19 **COMMISSIONER CLARK:** Putting aside whether
20 they can grant that us that authority, I suppose.

21 **MR. EDENFIELD:** Right. And that's the part
22 that I said I'm putting aside. I'm not sure one
23 federal agency has the authority to grant power to a
24 state agency or vice versa. But putting that aside
25 for a moment, apparently the FCC has left, in the

1 interim, authority for the states to put into place
2 some type of intercarrier compensation mechanism until
3 they act, whenever that maybe.

4 **COMMISSIONER CLARK:** Let me ask a question.
5 Who responds to Mr. Varner's testimony?

6 **MR. EDENFIELD:** Mr. -- well, actually
7 everyone, since Mr. Varner is our only witness. I'm
8 sorry. We do have Ms. Caldwell. But basically Mr.
9 Varner touches on all the issues.

10 **COMMISSIONER CLARK:** Who responds --

11 **MR. MCGLOTHLIN:** Our witness is Mr. Starkey.

12 **COMMISSIONER CLARK:** Does he respond to
13 anything else?

14 **MR. MCGLOTHLIN:** Yes.

15 **COMMISSIONER CLARK:** So they're going to be
16 here anyway?

17 **MR. MCGLOTHLIN:** Yes.

18 **COMMISSIONER CLARK:** I'm inclined to leave
19 this motion to strike pending. And we'll make the
20 note that we'll take it up at the beginning of the
21 proceeding. Because I have -- while I've read the
22 motions, I did not look at the testimony and, you
23 know, it may be good information. I'm just not sure
24 that we could act on it. So if we can't act on it,
25 why would we take the information? It will give me

1 more time to think about it and be more -- be prepared
2 at least at the beginning, and then we will have three
3 Commissioners there; is that right?

4 **MR. MCGLOTHLIN:** Yes.

5 **COMMISSIONER CLARK:** And maybe collectively
6 we can reach the right decision on it. I see no harm
7 in leaving it pending and probably we should indicate
8 the motion to strike is pending and it would be
9 appropriate to give the parties 3 to 5 minutes to
10 argue it because I don't see it being a longer
11 argument than that.

12 **MR. FORDHAM:** Take it up as a preliminary
13 matter at the hearing?

14 **COMMISSIONER CLARK:** Yes. Correct. Unless,
15 of course, you resolve it ahead of time. Anything
16 else we need to take up?

17 **MR. MCGLOTHLIN:** We would like a chance to
18 make a short opening statement.

19 **COMMISSIONER CLARK:** Okay. BellSouth.

20 **MR. EDENFIELD:** That's agreeable to
21 BellSouth.

22 **COMMISSIONER CLARK:** All right. How long?

23 **MR. EDENFIELD:** No more than an hour each.

24 **COMMISSIONER CLARK:** Well, if that's the
25 case, we can decide this case right now.

1 **MR. MCGLOTHLIN:** Seven minutes.

2 **COMMISSIONER CLARK:** I think that would be
3 good and that way perhaps the total is --

4 **MR. GOGGIN:** Seven minutes net of the three
5 to five that we have on the motion.

6 **COMMISSIONER CLARK:** Not more than ten
7 minutes collectively. Is that the right word? In
8 total.

9 **MR. MCGLOTHLIN:** Three to five, that is
10 seven -- it's 10 to 12.

11 **COMMISSIONER CLARK:** Okay. The shorter the
12 better. But let's indicate that they've requested the
13 opportunity to make a short statement and to argue the
14 motions to strike.

15 **MR. FORDHAM:** And you've granted seven
16 minutes for opening statements.

17 **COMMISSIONER CLARK:** Well, let's put it at
18 five.

19 **MR. FORDHAM:** Okay.

20 **COMMISSIONER CLARK:** Five for both.

21 **MR. FORDHAM:** Five each.

22 **COMMISSIONER CLARK:** Right. Five for each
23 party, five for each motion or five for each issue,
24 the presentation and the motion. Okay.

25 **MR. MCGLOTHLIN:** All right.

1 **COMMISSIONER CLARK:** I think you can do
2 that.

3 **MR. GOGGIN:** If we use one minute on the
4 motion can we have nine minutes?

5 **COMMISSIONER CLARK:** Well, take that up with
6 Commissioner Deason who will be chairing the hearing.
7 Anything else we need to take up? And this hearing is
8 scheduled for when?

9 **MR. GOGGIN:** October 7th and 8th.

10 **COMMISSIONER CLARK:** Okay. Good. We'll see
11 you then.

12 **MR. FORDHAM:** Commissioner, a mechanical
13 question here. We had for the first time on the draft
14 prehearing order renumbered the issues as they have
15 been removed for whatever reason and I suppose I
16 should ask whether that's the Commissioner's pleasure
17 to continue to do that, and as we remove these issues
18 today, renumber accordingly.

19 **COMMISSIONER CLARK:** Yes. Renumber them as
20 they're removed so we would have, I don't know how
21 many issues. Five maybe?

22 **MR. FORDHAM:** We'll boil down to six issues.

23 **COMMISSIONER CLARK:** Okay. Let me be clear.
24 With respect to the last issue, will you have it
25 rephrased and then have the parties' positions -- you

1 should submit that no later than close of business
2 tomorrow.

3 **MR. MCGLOTHLIN:** Which issue are we speaking
4 about?

5 **MR. FORDHAM:** We're going to break that
6 into, as I understand it, an A and B component. In
7 essence, two questions on the one issue.

8 **MR. MCGLOTHLIN:** We can respond to that
9 quickly, yes.

10 **MR. FORDHAM:** We'll do a real quick
11 turnaround on that.

12 **COMMISSIONER CLARK:** Let me put it this way.
13 Given where the hearing is, I don't think there's any
14 need to rush you all, but I don't want to rush the
15 Staff either. Would Friday be fine for that?

16 **MR. FORDHAM:** I would hope it would be
17 because all of next week I will be gone and the
18 following Monday, and my first day back after Friday
19 will be the day of the hearing.

20 **COMMISSIONER CLARK:** Well, if there's no
21 objection to having it by the close of business
22 tomorrow, that would be helpful.

23 **MR. MCGLOTHLIN:** I think we can do that.

24 **COMMISSIONER CLARK:** What else did we need
25 done? And at the same point, the close of business

1 tomorrow, if you've noticed any other errors in the
2 prehearing order you'll let us know.

3 **MR. FORDHAM:** May I ask, were these not
4 circulated to the parties, the draft prehearing order?

5 **MS. KAUFMAN:** No, they were not.

6 **MR. MCGLOTHLIN:** We didn't see it.

7 **MR. EDENFIELD:** We were all in transit so it
8 could have made it to our offices.

9 **MR. FORDHAM:** I regret that. I had asked at
10 the time whether they were and it was represented to
11 me they had been distributed to you.

12 **MR. EDENFIELD:** I can say I did not, but I.
13 left early this morning so it could be sitting on my chair.

14 **MR. FORDHAM:** It should have been earlier.
15 We'll make certain that you get, of course, the
16 prehearing order as it's completed.

17 **MR. EDENFIELD:** There is one other of the
18 issues; our position that we are supposed to try to
19 conform and that dealt with the UNES and the fact that
20 it was the 319 order.

21 **COMMISSIONER CLARK:** Close of business
22 tomorrow, too. I think there is nothing further and
23 this prehearing is adjourned.

24 (Thereupon, the hearing concluded at
25 2:45 p.m.)

1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)

4 I, KIMBERLY K. BERENS, CSR, RPR, Official
5 Commission Reporter,

6 DO HEREBY CERTIFY that the Prehearing
7 Conference in Docket No. 990691-TP was heard by the
8 Prehearing Officer at the time and place herein
9 stated; it is further

10 CERTIFIED that I stenographically reported
11 the said proceedings; that the same has been
12 transcribed by me; and that this transcript,
13 consisting of 51 pages, constitutes a true
14 transcription of my notes of said proceedings.

15 DATED this 23rd day of September, 1999.

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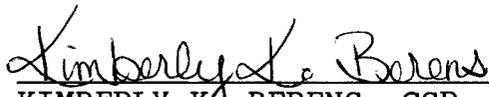
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KIMBERLY K. BERENS, CSR, RPR
Florida Public Service Commission
Official Commission Reporter

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