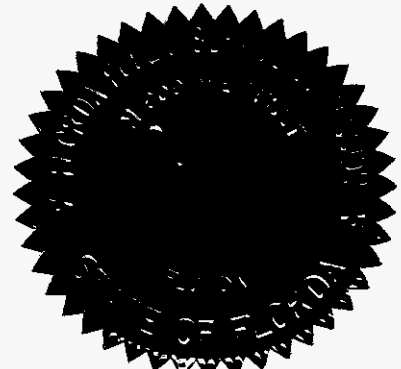


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 990750-TP  
:  
Petition by ITC^DeltaCom :  
Communications, Inc. d/b/a :  
ITC^DeltaCom for arbitration :  
of certain unresolved issues :  
in interconnection negotiations: :  
between ITC^DeltaCom and :  
BellSouth Telecommunications, :  
Inc. :  
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PROCEEDINGS: PREHEARING CONFERENCE  
  
BEFORE: COMMISSIONER E. LEON JACOBS, JR.  
Prehearing Officer  
  
DATE: Monday, October 11, 1999  
  
TIME: Commenced at 9:35 a.m.  
Concluded at 12:43 p.m.  
  
PLACE: Betty Easley Conference Center  
Room 152  
4075 Esplanade Way  
Tallahassee, Florida  
  
REPORTED BY: JOY KELLY, CSR, RPR  
Chief, Bureau of Reporting  
KIMBERLY K. BERENS, CSR, RPR  
FPSC Commission Reporter

DOCUMENT NUMBER - DATE  
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1 **APPEARANCES:**

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3 Tucker, P.A., 106 East College Avenue, Suite 900, P.  
4 O. Box 1794, Tallahassee, Florida 32301; and **DAVID**  
5 **ADELMAN**, Sutherland, Asbill & Brennan, LLP, 999  
6 Peachtree Street, Atlanta, Georgia 30309-3996,  
7 appearing on behalf of **ITC^DeltaCom Communications,**  
8 **Inc., d/b/a ITC^DeltaCom.**

9           **MICHAEL GOGGIN** and **THOMAS B. ALEXANDER,**  
10 BellSouth Telecommunications, Inc., c/o Nancy Sims,  
11 150 South Monroe Street, Suite 400, Tallahassee,  
12 Florida 32301, appearing on behalf of **BellSouth**  
13 **Telecommunications, Inc.**

14           **DIANA CALDWELL**, Florida Public Service  
15 Commission, Division of Legal Services, 2540 Shumard  
16 Oak Boulevard, Tallahassee, Florida 32399-0870,  
17 appearing on behalf of the **Commission Staff.**

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## P R O C E E D I N G S

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

**COMMISSIONER JACOBS:** Why don't we start with counsel reading the Notice.

**MS. CALDWELL:** Pursuant to Notice this time and place were set for hearing in Docket No. 990750-TP, petition by ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom, for arbitration of certain unresolved issues in interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc.

**COMMISSIONER JACOBS:** Take appearances.

**MR. GOGGIN:** This is Michael Goggin. I'm with BellSouth Telecommunications. With me here this morning is Mr. Tom Alexander, also of BellSouth Telecommunications.

**MR. ADELMAN:** David Adelman with the law firm Sutherland Asbill & Brennan on behalf of ITC^DeltaCom. With me today is Hailey Riddle, who's also from our firm.

**MR. BERTRON:** And Andy Bertron with Huey, Gilday and Tucker on behalf of ITC^DeltaCom.

**COMMISSIONER JACOBS:** Very good. I understand we have some preliminary matters that we need to deal with.

1 MS. CALDWELL: Excuse me. Diana Caldwell --

2 COMMISSIONER JACOBS: I'm sorry.

3 MS. CALDWELL: -- Florida Public Service  
4 Commission, on behalf of the Staff.

5 COMMISSIONER JACOBS: That was by no means  
6 intended to take you for granted.

7 MS. CALDWELL: I understand.

8 COMMISSIONER JACOBS: Okay. We have -- as I  
9 understand it, we have four motions that are pending.  
10 And those are -- those are a motion by ITC^DeltaCom  
11 for confidentiality; the motion by ITC^DeltaCom to  
12 compel; BellSouth's motion to remove issues from  
13 arbitration; and ITC^DeltaCom's motion to extend  
14 filing date. Why don't we start with the easy one  
15 first.

16 I'm going to go ahead and the grant the  
17 motion for extension of filing date.

18 The motion for confidentiality we discussed  
19 and I think on the advice of counsel we're going to go  
20 ahead and defer that until the beginning of hearing,  
21 unless that poses a problem for any of the parties.

22 MR. ADELMAN: No objection.

23 MR. GOGGIN: Commissioner, I don't think  
24 that it poses a problem for any of the parties so long  
25 as everyone agrees to treat the information as

1 confidential.

2           **COMMISSIONER JACOBS:** Okay. Is that  
3 agreeable?

4           **MR. ADELMAN:** Yes.

5           **COMMISSIONER JACOBS:** Great. Now, the  
6 motion to compel, that's still outstanding? Is that  
7 still a controversy?

8           **MR. ADELMAN:** Your Honor, I believe we may  
9 have worked that out just a few minutes ago.

10           **MR. ALEXANDER:** Yes. Let me address that  
11 briefly, if I may. Tom Alexander for BellSouth.

12           As Your Honor may be aware, we have had  
13 proceedings now -- these are going on basically in  
14 eight other states, and recently we had the Motions to  
15 Compel argued in the state of Louisiana, and BellSouth  
16 was compelled to produce this study in Louisiana.  
17 BellSouth, likewise, had a Motion to Compel against  
18 DeltaCom, and a number of requests were required to be  
19 produced by DeltaCom in that proceeding. And I  
20 believe at this point it's fair to say the parties  
21 have agreed to basically follow that same process and  
22 we will produce an ADSL study here for use in Florida  
23 and they are going to check -- I don't have a firm  
24 commitment, but I guess I have a loose commitment from  
25 Mr. Adelman that they will do likewise with what we

1 are seeking through our to-be-filed Motion to Compel  
2 here in Florida.

3           **MR. ADELMAN:** And, Your Honor, just to be  
4 clear that the key is that their motion is a  
5 to-be-filed motion which is the reason I really can't  
6 give a definite commitment. I'll assume that the  
7 BellSouth to-be-filed motion is going to be identical  
8 to that which they filed in Louisiana. And I will  
9 endeavor to check with my client sometime after this  
10 prehearing conference to determine whether we would  
11 comply with such a motion if it were made in Florida.

12           **COMMISSIONER JACOBS:** Okay. So I'll take  
13 that as -- I'll leave it at your discretion to  
14 withdraw it.

15           **MR. ADELMAN:** Well, I don't even know if it  
16 needs to be withdrawn. They have voluntarily -- will  
17 voluntarily provide the information. If, for  
18 administrative convenience, it's appropriate for us to  
19 formally withdraw, we're glad to do that once the  
20 information has been provided.

21           **MR. ALEXANDER:** Well, I think perhaps the  
22 motion to compel, I guess we will agree to produce it  
23 under this Motion to Compel here in Florida. And to  
24 answer Mr. Adelman's question, we will file today, if  
25 necessary, a Motion to Compel. It may not be

1 identical to what was filed in Louisiana, but very  
2 similar.

3           **COMMISSIONER JACOBS:** Okay.

4           **MR. ALEXANDER:** We were hoping to get a  
5 response back today because we have discovery  
6 depositions beginning this afternoon in this case.

7           **COMMISSIONER JACOBS:** Sounds like we're well  
8 on the way to working that out.

9           **MR. ADELMAN:** Yes.

10          **MR. ALEXANDER:** Yes, Your Honor.

11          **COMMISSIONER JACOBS:** Great. So I'll let  
12 Staff resolve that and if you need me to get back  
13 involved in it, I will.

14          **MR. ALEXANDER:** Thank you.

15          **COMMISSIONER JACOBS:** That takes us to the  
16 Motion to Remove Issues from Arbitration. What I'd  
17 like to do is go ahead and hear argument on this  
18 motion and then we'll -- we'll hear a recommendation  
19 from Staff and we'll probably rule on it -- we will  
20 rule on it today. It's BellSouth's motion. Would you  
21 like to -- do we want to have a time limit?

22          **MS. CALDWELL:** I think that we had agreed  
23 on -- was it five, ten minutes per side? I think ten  
24 minutes per side that they could present oral  
25 arguments on the motions to withdraw issues. We will

1 have a separate timing for Issue No. 50 and I think it  
2 was about four to five minutes per side on that one.

3 **COMMISSIONER JACOBS:** Okay. So, they argue  
4 first on the main body and then specifically on Issue  
5 50 -- on the issue?

6 **MR. ALEXANDER:** If I could include in the  
7 Issue 50 the question of the expansion of another  
8 issue that it relates to RSAG and their filing  
9 testimony of a witness that had MSAG referenced in it.  
10 I just -- we'll split our motion in the middle on  
11 those two lines.

12 **COMMISSIONER JACOBS:** Okay. Excuse me just  
13 a moment. (Brief pause.) Proceed.

14 **MR. GOGGIN:** Commissioner, this is Michael  
15 Goggin from BellSouth. I'm going to speak to the  
16 issue regarding the appropriateness of arbitrating  
17 liquidated damages or penalties, and Mr. Alexander is  
18 going to speak for us on the issue of whether certain  
19 issues that weren't specifically listed in the face of  
20 our arbitration petition can, nevertheless, be  
21 arbitrated.

22 We think the issue is pretty clear with  
23 regard to liquidated damages and penalties. Tentative  
24 Issues 1, 2, 14, 16, 20 (b), 41, 46 and 49 concern  
25 demands by ITC that certain performance guarantees or



1 liquidated damages or penalties be assessed in the  
2 event that BellSouth fails to meet certain benchmarks.

3           **COMMISSIONER JACOBS:** Do you have 47 in  
4 there? Was that one?

5           **MR. GOGGIN:** Yes.

6           **COMMISSIONER JACOBS:** Okay.

7           **MR. GOGGIN:** I may have misspoke.

8           **MR. ALEXANDER:** It does not appear in the  
9 motion.

10           **MR. GOGGIN:** It does, actually.

11           **COMMISSIONER JACOBS:** It's -- on the second  
12 page, it does.

13           **MR. ALEXANDER:** I'm sorry. It's not on the  
14 first page. Mr. Goggin is correct.

15           **MR. GOGGIN:** Even if the first page of the  
16 motion is not.

17           Our position is that there's a clear chain  
18 of precedent here going back to 1996 and one of the  
19 first arbitrations under the Act. That, as the  
20 Commission has found repeatedly, there is nothing in  
21 Section 251 or 252 that would create an obligation on  
22 the part of an ILEC to offer performance guarantees or  
23 liquidated damages or anything of the sort.

24           Moreover, under state law, there is some  
25 question as to whether this Commission has the

1 jurisdiction to impose liquidated damages as a remedy  
2 and, therefore, the Commission has consistently found  
3 in arbitration after arbitration that liquidated  
4 damages, performance guarantees, penalties, whatever  
5 you choose to call them, are simply not appropriate  
6 for arbitration.

7           There is no argument in DeltaCom's response  
8 to our motion that points to any factual or legal  
9 difference between the provisions that they are  
10 proposing and the provisions that have been repeatedly  
11 ruled as inappropriate for arbitration in past cases.  
12 As a result, we contend that these issues should be  
13 removed from the arbitration. And I'd like to reserve  
14 a couple minutes for rebuttal. Thank you.

15           **COMMISSIONER JACOBS:** Okay.

16           **MR. ADELMAN:** Good morning, Commissioner.  
17 David Adelman for ITC^DeltaCom.

18           I was heartened to hear BellSouth looked  
19 first to the Federal Act with regard to the issue of  
20 performance guarantees, and I think it would be useful  
21 for you to have some context for this issue to  
22 understand exactly what the issue is before you're  
23 asked to make what I think is a very severe and very  
24 dramatic ruling.

25           And precisely what that ruling is, what

1 BellSouth is asking you to do, is not to assign less  
2 weight to our arguments, not to find that you don't  
3 like the opinions of the experts that we present to  
4 the Commission, but rather as a matter of law,  
5 de jure, to find today that ITC^DeltaCom is precluded  
6 from even bringing these issues before you; precluded  
7 from even presenting the evidence which has been  
8 prefiled in both direct and rebuttal testimony;  
9 precluded as a matter of law from even having those  
10 issues subject to consideration. Here's what the  
11 issue is. It's very simple.

12           An interconnection agreement is a contract  
13 that governs the relationship between ITC^DeltaCom and  
14 BellSouth and the Act tells us that the contract  
15 requires that BellSouth perform certain functions on a  
16 nondiscriminatory basis and with regard to the various  
17 services or functions that BellSouth is required to  
18 provide. There's different standards within the Act  
19 but the governing principle is that they have to  
20 perform under their interconnection agreement.

21           ITC^DeltaCom has been operating in Florida  
22 for two years pursuant to an agreement which was  
23 approved by this Commission as compliant with Section  
24 252. As a matter of fact, BellSouth filed the  
25 interconnection agreement that controlled in the first

1 two years.

2 ITC^DeltaCom's experience with BellSouth  
3 with regard to performance has been dismal. They have  
4 failed to perform on many occasions. So when  
5 ITC^DeltaCom went to renegotiate, that is to say,  
6 renew its interconnection agreement for Florida, it  
7 sought to include various performance guarantees. And  
8 these are as simple as money-back guarantees.

9 They say, "BellSouth, if you don't perform,  
10 meaning if you're technician does not show up on the  
11 scheduled date to make a cutover, then ITC^DeltaCom  
12 shouldn't have to pay the nonrecurring charge  
13 associated with that technician being present." It's  
14 a very simple performance guarantee that says you  
15 don't have to pay where BellSouth doesn't perform.  
16 It's not unlike guarantees which are included in  
17 BellSouth's tariffs today. There are various other  
18 types of things, but with regard to tariffs which have  
19 been approved by regulators, BellSouth has said,  
20 "Where we don't perform, your satisfaction is  
21 guaranteed. You get a waiver of the nonrecurring  
22 charge."

23 **COMMISSIONER JACOBS:** Do you have an example  
24 of a tariff?

25 **MR. ADELMAN:** Yes, I do, Your Honor. If you

1 would look to the direct testimony of ITC^DeltaCom  
2 Witness Rozycki, and I believe it's Rozycki Exhibit 3.  
3 I'd have to check that cite. We have provided  
4 examples of tariffs for Centrex, Multiserve and other  
5 services where BellSouth has voluntarily offered what  
6 they call, I believe, satisfaction guarantees. And we  
7 had the testimony of a BellSouth witness just like  
8 week in another jurisdiction where that fact was  
9 undisputed. And when questioned, interestingly, that  
10 witness said, "Well, the reason we offer those  
11 guarantees in those cases is because those services  
12 are subject to competition and if we didn't offer a  
13 guarantee our competitors would offer a guarantee and  
14 we wouldn't get the business."

15 Well, to us, that says it all. What you  
16 should be doing in these arbitrations is, as best you  
17 can, when dealing with a monopoly, is try to proxy  
18 your policies for competition. And we believe that  
19 such a proxy requires that where the monopolist fails  
20 to perform, fails to provide service, that, indeed, no  
21 nonrecurring charge should be assessed against  
22 ITC^DeltaCom.

23 And you may disagree ultimately with our  
24 policies and the opinions of our expert, but what's  
25 really at issue here today is, very simply, whether we

1 can even present evidence in support of the  
2 proposition that nonrecurring charges should not be  
3 charged or should be waived where there's a failure to  
4 perform. And then there are other levels, what we  
5 call Tier 2 and Tier 3 penalties, which, frankly, were  
6 developed in part from recommendations of the staffs  
7 in the state of Texas and California, which are  
8 included in Interconnection Agreements which have been  
9 filed and approved in other states.

10 I don't want to get too much into the merits  
11 of our proposal, but suffice it to say we certainly  
12 think it's appropriate for arbitration.

13 Now, back to Mr. Goggin's initial source on  
14 this. He went to the Federal Act. And I think the  
15 Federal Act is very clear. Section 252(b)(4)(c)  
16 imposes on this Commission a duty and obligation to  
17 arbitrate unresolved issues where they're properly  
18 pled; where the petition was filed between the 135th  
19 and 160th day after the voluntary negotiation was  
20 commenced.

21 It's kind of a peculiar feeling as a state  
22 regulator, I'm sure, to have Congress, the federal  
23 government, set forth the framework and define what  
24 your duties and obligations are. And that is why I  
25 think the Staff here, and perhaps the Commission as

1 well, is struggling with this. For 100 years you've  
2 looked at state law, decisions of the Florida Supreme  
3 Court, to define what your duties and obligations and  
4 thus the scope of your authority is.

5 Well, in this case, the Federal  
6 Telecommunications Act in 1996 was something very  
7 peculiar. Congress gave you a duty, conferred  
8 authority upon you to handle these type of  
9 proceedings. If the Act had never passed, you  
10 wouldn't even have jurisdiction to consider any of the  
11 issues here.

12 But Congress in 1996 said the state  
13 Commissions, you now have this special duty. We  
14 confer upon you this special jurisdiction and it  
15 includes the obligation to arbitrate unresolved  
16 issues; that is, to at least consider our argument on  
17 these policies.

18 Now, BellSouth, as a backup position, refers  
19 to state law. And he refers to this as a chain of  
20 precedent. Well, we looked at that chain of decisions  
21 and most importantly we went to the very source of the  
22 Commission's decisions with regard to this issue.  
23 That is, a Southern Bell versus Mobile case, the 1974  
24 case.

25 Now, I encourage you to look at the case,

1 not just the chain of Commission decisions. And what  
2 you'll find is that in 1974 a complaint, a lawsuit,  
3 was brought before this Commission. And what it  
4 alleged was that there were bad acts, there was a  
5 failure or a breach or a tort which occurred between  
6 Mobile and Southern Bell. And Southern Bell argued  
7 that this Commission is without authority to award  
8 specific damages which relate to a past act. That's  
9 very different from what we're asking for here. And  
10 the Florida Supreme Court was very clear and it said,  
11 the Public Service Commission's jurisdiction relates  
12 to prospective activities, prospective behavior, which  
13 is exactly what we're asking to you determine today.  
14 A policy which will relate to future or prospective  
15 activities. And just to be clear, here's what we're  
16 asking.

17           We're asking that BellSouth in this contract  
18 be provided -- and be careful, there's some double  
19 negatives here, but this is the way I prefer to say  
20 it -- a disincentive to fail to perform or an  
21 incentive to perform.

22           ITC^DeltaCom doesn't want payment of any of  
23 these monies or anything like that. We just want  
24 there to be a strong incentive for BellSouth to  
25 perform. That is to say, if you don't meet the



1 scheduled appointment for a cutover, we don't pay the  
2 nonrecurring charge.

3           **COMMISSIONER JACOBS:** How do you distinguish  
4 that from liquidated damages, or is it liquidated  
5 damages?

6           **MR. ADELMAN:** I don't believe it is  
7 liquidated damages. I think it's different inasmuch  
8 as it is a waiver in this first tier of penalty of  
9 charges where there's no performance. We shouldn't  
10 have to pay where they don't perform.

11           Now, with regard to other types of  
12 penalties, there's an important distinction that's  
13 been lost here, and that is, ITC^DeltaCom does not  
14 want to be paid these Tier 2 or Tier 3 penalties.

15           Rather, what we have stated in the testimony  
16 that we prefiled to this Commission is that to the  
17 extent they repeatedly do not perform, that these Tier  
18 2 and Tier 3 guarantees be paid to the state, and  
19 that's different from liquidated damages or different  
20 from remedies that you see typically in the courts.  
21 It's more akin to fines and penalties such as the ones  
22 that this Commission presumably imposes when companies  
23 engage in, for example, slamming. The --

24           **COMMISSIONER JACOBS:** So now, are you aware  
25 of the precedent that has been established at this

1 Commission where we avoid entertaining the question of  
2 damages, and I guess you would distinguish this  
3 instance from those cases also by the fact that the --  
4 that the fee is being paid back into the state?

5 **MR. ADELMAN:** That is one way that I would  
6 distinguish this.

7 The other important legal distinction that I  
8 would make is that in those cases they rely on the  
9 Southern Bell case, the 1974 case, where the question  
10 related to a past activity. And what we're asking you  
11 to do is establish a prospective policy which will  
12 govern with regard to future actions.

13 And please understand that this whole  
14 discussion of state law, I believe, is what I call an  
15 "even if" argument because your authority, the  
16 authority that was conferred upon you, comes from the  
17 Federal Telecommunications Act. So that you need not  
18 even look at state law. This is special. That 1974  
19 case predates the Federal Act by 22 years and the  
20 Federal Act gave you authority to consider really  
21 every issue.

22 **COMMISSIONER JACOBS:** So you don't see any  
23 restrictions on the Federal Act from entertaining an  
24 issue having to do with damages?

25 **MR. ADELMAN:** I do not, no, sir. And I

1 believe that's consistent with what has been done in  
2 other states, and indeed, it is your obligation.

3           **COMMISSIONER JACOBS:** Okay. Mr. Goggin, you  
4 have time remaining, I believe.

5           **MR. GOGGIN:** Yes, I'd like to make a few  
6 points in rebuttal, if I may, Commissioner.

7           First and foremost, with regard to the  
8 federal law argument that Mr. Adelman made, it  
9 should -- he pointed out that 252(b)(4)(c) includes  
10 the duty that this Commission has to arbitrate  
11 Interconnection Agreements. He did not, however,  
12 highlight the fact that Section 252(c) says a State  
13 Commission shall ensure in arbitrating agreements  
14 under 252(b) that the resolution meets the  
15 requirements of 251. He did not point to anything in  
16 Section 251 that would anticipate such an obligation  
17 being placed on ILECs.

18           In short, we believe that the Commission  
19 reading of the federal law is correct and should  
20 remain the same.

21           He also mentioned the tariff that BellSouth  
22 has filed. Well, BellSouth has voluntarily agreed to  
23 certain performance guarantees in its tariffs, but  
24 it's voluntarily. There is nothing that DeltaCom has  
25 proposed also in the way of performance guarantees

1 that would apply to DeltaCom. They are strictly one  
2 way.

3 If DeltaCom fails to show up at an  
4 appointment, for example, there would be no penalty  
5 for them. BellSouth failing to show up for an  
6 appointment could mean as much as \$100,000 a day under  
7 their proposal. To call these an incentive rather  
8 than liquidated damages is mere semantics.

9 **COMMISSIONER JACOBS:** Help me to understand  
10 what these -- the SQMs are, the service quality  
11 measurements. What are those?

12 **MR. GOGGIN:** The service quality  
13 measurements are performance standards. They are a  
14 manner in which BellSouth makes it possible for its  
15 customers, its wholesale customers, to measure the  
16 performance that BellSouth is giving them by looking  
17 to see what performance we're giving to customers  
18 generally.

19 **COMMISSIONER JACOBS:** I assume that that's  
20 done for a competitive offering so that a customer can  
21 measure your performance under these standards, and if  
22 dissatisfied, they would have the option of simply  
23 going to another customer, or is it the case that they  
24 would seek some kind of recourse for failing to meet  
25 those standards?

1           **MR. GOGGIN:** We believe that adequate  
2 remedies for a violation of an Interconnection  
3 Agreement are available in the courts or before this  
4 Commission. We do not think that a provision in the  
5 contract that requires liquidated damages is  
6 necessary. So I'm not sure I answered your question  
7 directly.

8           **COMMISSIONER JACOBS:** Sounds like SQMs don't  
9 allow that. They don't allow --

10          **MR. GOGGIN:** Not in and of themselves, no.

11          **COMMISSIONER JACOBS:** Okay. There are  
12 liquidated damages in other contracts, you agree?  
13 That there are instances where liquidated damages have  
14 been agreed to by the parties. And that's not an  
15 issue here because you guys won't agree on that.

16          **MR. GOGGIN:** Right.

17          **COMMISSIONER JACOBS:** How do you respond to  
18 the -- I guess, your contention is that 251 does serve  
19 as a restriction on the Commission's authority to  
20 entertain any kind of -- well, let's not call it  
21 damages, but any kind of a fine or penalty?

22          **MR. GOGGIN:** 251 spells out the obligations  
23 that we have under the Act to offer certain things  
24 like unbundled network elements, for example.

25                   Under Section 252 this Commission has both

1 the duty and the authority to arbitrate agreements  
2 that we are duty bound to negotiate with our wholesale  
3 customers. But those arbitrations are limited by what  
4 Section 251 spells out as our obligations. And since  
5 this is not spelled out as an obligation in 251, we  
6 contend that the Commission has correctly determined  
7 over and over that it's not an issue that's  
8 appropriate for arbitration.

9           **COMMISSIONER JACOBS:** You'd agree, though,  
10 that a very strong underpinning of the Act is that  
11 there be -- there be effective coordination between  
12 the ILEC and an ALEC in an Interconnection Agreement,  
13 wouldn't you?

14           **MR. GOGGIN:** Yes, we do. And that's, in  
15 part, why we have the SQMs, the service quality  
16 measurements, is to afford a certain degree of  
17 transparency.

18           The Act requires that we treat all ALECs in  
19 a nondiscriminatory manner and that we provide them  
20 with service comparable to the service that we provide  
21 our own retail customers where that analogy is  
22 appropriate. And the SQMs provide a transparent means  
23 for everyone involved to make sure that we are  
24 upholding those nondiscrimination obligations.

25           If I can go on --

1                   **COMMISSIONER JACOBS:** Sorry. Complete.

2                   **MR. GOGGIN:** I would also point out that the  
3 statement that this Commission would not be involved  
4 in Interconnection Agreements absent the Federal Act  
5 is, of course, not entirely correct. This state had a  
6 Telecommunications Act of its own in 1995 which would  
7 have brought the same sort of agreement before the  
8 Commission under state law.

9                   And I think that the argument that was made  
10 regarding the Southern Bell case is really a red  
11 herring that's meant to throw people off the track.

12                   What the Court did find in that case is  
13 where there is a past act, this Commission lacks  
14 jurisdiction to award damages. The case said nothing  
15 about a situation where one company has proposed  
16 liquidated damages as a prospective damages award, if  
17 you will. The Commission -- that issue just did not  
18 come up before the Court or the Commission.

19                   That issue did come up in the arbitration in  
20 1996 and we believe this Commission properly found in  
21 that case that it was beyond this Commission's  
22 jurisdiction to award damages whether those damages  
23 are prospective or retrospective.

24                   And we think that that line of Commission  
25 precedent, interpreting the statute that this

1 Commission is primarily responsible for interpreting,  
2 is correct.

3           **COMMISSIONER JACOBS:** I lost track of time.  
4 We'll say you have another minute or two.

5           **MR. GOGGIN:** I think that's it for now.

6           **MR. ADELMAN:** I'll take a minute.

7           **COMMISSIONER JACOBS:** Just a minute.

8           **MR. ADELMAN:** Thank you. Two things that  
9 were interesting about BellSouth's rebuttal argument.  
10 He argued that he believes there are adequate remedies  
11 before this Commission where there is a, breach so  
12 presumably BellSouth, I guess, wants to have it both  
13 ways. You can't have some sort of remedial structure  
14 in the contract, but if something goes wrong you can  
15 come to the Commission.

16           And I submit to you that either the  
17 Commission has jurisdiction or not. And if the  
18 Commission has jurisdiction to consider remedies or  
19 complaints after the breach, which I believe is the  
20 implication, then the Commission has adequate  
21 jurisdiction to consider an issue for arbitration  
22 here.

23           Also, an interesting admission -- excuse me.

24           **COMMISSIONER JACOBS:** Finish. I have a  
25 question.



1           **MR. ADELMAN:** An interesting admission that  
2 BellSouth has made here is that the 1974 case, which  
3 this Commission has cited in every one of these chain  
4 of precedents, and which BellSouth cited extensively  
5 in its motion, he said -- he admitted was a case of  
6 different facts. He said, I believe, that the Court  
7 never even addressed the issue of prospective policies  
8 or prospective guarantees, and I agree.

9           And really that's our point. And that is,  
10 the Court has not limited this Commission's  
11 jurisdiction and it did not do so in 1974.

12           **COMMISSIONER JACOBS:** Staff, would you have  
13 a recommendation or would you like to have an argument  
14 after that?

15           **MS. CALDWELL:** I think I'd just like to make  
16 a few points, and the first being that these issues  
17 fall into two categories that the Commission has  
18 passed -- had decisions on. The first one is  
19 jurisdictional areas where the Commission believes  
20 that any type of -- or the Commission has held that  
21 questions of liquidated damages or -- tend -- we do  
22 not have the jurisdiction based on these previous  
23 cases to decide questions of liquidated damages.

24           The second area that these issues fall into  
25 is that they would be without -- they are outside the

1 scope of the arbitration under 251 and 252, and  
2 that -- and Staff believes that these issues fall  
3 within those two categories.

4           It's not that these companies don't have  
5 another -- other means to get before the Commission in  
6 that the issues that fall outside the scope of an  
7 arbitration may be taken up in more generic dockets  
8 that are not an arbitration proceeding.

9           So that there are a few of these issues in  
10 here that can -- and I think some of them are even  
11 already being looked at under current generic dockets.

12           I don't believe that the Commission has the  
13 ability just because the Act is saying to this  
14 Commission you go out and you resolve all these  
15 issues. I think it's been the position of this  
16 Commission, unless we have authority -- state  
17 authority, that we cannot arbitrate those issues or we  
18 cannot decide issues that are not within our state  
19 authority.

20           **COMMISSIONER JACOBS:** This is a very  
21 interesting discussion and I think it's framed very  
22 much by the posture in which the Commission approaches  
23 these proceedings. We are the arbiter. And in that  
24 regard, the objective is to seek a negotiated  
25 agreement amongst the parties.

1           Now, in this instance, the parties are  
2 actually really asking the Commission to form, or if  
3 not reform, an agreement, or at least one of the  
4 parties is.

5           On the one hand, I understand the legal  
6 arguments. And I think my understanding of the  
7 precedents is that the issue -- as to the issue of  
8 whether or not this Commission would actually require  
9 as an arbiter a liquidated damages proceeding -- a  
10 liquidated damages provision, I think has been  
11 addressed.

12           I'm concerned, however, that to the extent  
13 that a party, particularly an ALEC, experiences  
14 difficulties in seeking execution of the provisions of  
15 an Interconnection Agreement, they find themselves in  
16 a pretty difficult posture, pretty much coming here,  
17 looking for an arbitration -- I'm sorry -- a dispute  
18 or a complaint proceeding in each instance, which in  
19 my mind is a very ineffective way of going about that.

20           I would like for the Commission, when we  
21 entertain this case, to look at the legal issue, and  
22 I'd like the parties to look at it, as to what extent  
23 our jurisdiction over the Interconnection Agreement  
24 allows this Commission to reenter, either in a show  
25 cause proceeding or whatever fashion, to look at a

1 pattern of disputes, i.e., look at collectively the  
2 performance under that Interconnection Agreement and  
3 as to whether or not it meets with what the Commission  
4 determines to be reasonable standards. That way we  
5 aren't looking at liquidated damages.

6           And I understand this issue has come up in a  
7 minor fashion before and the Commission has chosen, I  
8 believe, not to look at an expedited process. That,  
9 in my mind, was looking at an additional process.

10           In this instance, what I'm asking is, does  
11 the Commission jurisdiction of -- does it retain  
12 jurisdiction over the interconnection order that it  
13 approved -- I'm sorry -- the order approving the  
14 Interconnection Agreement -- I'll get it straight in a  
15 minute -- such that it should expect and require  
16 certain adherence to the Commission's order approving  
17 that Interconnection Agreement.

18           And here's the underlying rationale. To the  
19 extent that -- and this is just a hypothetical. This  
20 is not as to any part of it. But to the extent that  
21 there's a virtual collapse of that agreement, does the  
22 Commission have jurisdiction to look at -- under this  
23 order approving that agreement, does it have authority  
24 to go back and look at the parties' performance, the  
25 parties' actions under that agreement?

1           That's probably very -- that's stretching it  
2 pretty far, but I'd like to understand that -- the  
3 answer to that question. I understand the arguments  
4 that would appear on both sides from the parties as to  
5 what would be our jurisdiction over that -- over that  
6 Interconnection Agreement once it is approved. But I  
7 really want to emphasize here -- and I think the  
8 arguments made about 252 are very appropriate. That  
9 we weren't given -- the State Commissions weren't  
10 given jurisdictions here just to come in and  
11 rubber-stamp language and documents. I think we were  
12 given a role here, and the role was to ensure proper  
13 coordination in the execution of these Interconnection  
14 Agreements. And if it appears that there is extreme  
15 difficulty in that occurring, I can't see how we can  
16 effectively carry out our obligations under 252 or 251  
17 actually.

18           That is the rationale with which I approach  
19 this. If we're here to serve a legitimate role in  
20 approving these Interconnection Agreements, then what  
21 are we doing if we stamp the paper and the paper never  
22 works?

23           Excuse me. Did you want to -- do you have a  
24 comment, Mr. Goggin?

25           **MR. GOGGIN:** If I may. I just needed my

1 microphone. I don't know whether -- it sounds from  
2 what you said like you may not want to hear any  
3 additional argument.

4 **COMMISSIONER JACOBS:** No. I'll give you  
5 time to give that some thought. I know -- I'm not  
6 going to spring it on you today. I propose that we  
7 give that -- we can either brief it or we can hear  
8 arguments it at the hearing. Either way. I'll check  
9 with the presiding officer.

10 **MR. GOGGIN:** I was going to suggest that we  
11 could actually speak to it today if you'd like.

12 **COMMISSIONER JACOBS:** Is that agreeable?

13 **MR. ADELMAN:** Sure. I don't know what he's  
14 going to -- precisely what he's going to speak to  
15 because you've asked the parties for a lot.

16 **COMMISSIONER JACOBS:** That is true and I'm  
17 not going to rule on it today. If you want to address  
18 the issue briefly, I would be happy to hear that, but  
19 I'm not going to resolve that -- because I think  
20 that's really the issue that should be briefed and  
21 then we'll get a recommendation back formally from  
22 Staff. So I'm not going to rule on it today. But if  
23 you want to address it very briefly, I'd be happy to  
24 hear it.

25 **MR. GOGGIN:** To put it very briefly, the

1 Commission clearly does have jurisdiction to hear  
2 disputes regarding breaches of interconnection  
3 agreements. BellSouth, as you know, has been on the  
4 receiving end of a number of such complaints and in  
5 many cases the Commission has issued orders providing  
6 remedies to ALECs where the Commission has found that  
7 BellSouth has not complied with its agreement.

8           In addition, there are a number of generic  
9 dockets going on in the Commission right now with  
10 regard to UNES, collocation, OSS, where the Commission  
11 may eventually adopt standards or rules that apply to  
12 all ALECs, and, of course, the Commission also has the  
13 power to issue orders for violations of its rules.

14           So, the short answer to your question is,  
15 the Commission does have a role. The Commission is  
16 exercising its role, and as the party who is often on  
17 the receiving end of the Commission's exercise of  
18 jurisdiction, we can ensure you that it is quite  
19 effective.

20           **COMMISSIONER JACOBS:** I understand that  
21 there's a little hitch there that I think I'm throwing  
22 in. That is, normally if a party violates a  
23 Commission rule, we can come in and Show Cause Order.  
24 We can do a variety of things to address that issue.  
25 I'm asking, does that authority apply here? Does that

1 authority for the Commission to come in and on its own  
2 motion institute a proceeding?

3           Now, I don't think that -- I'm pretty clear  
4 in my mind that we couldn't do that on a particular  
5 incident. I think we're going to have to have the  
6 standards there. We're going to have the precedent  
7 set such that we can understand the measurement. But  
8 if, on the whole, the agreement is falling apart and a  
9 party is -- let's just go ahead and put it into plain  
10 terms. An ALEC would argue that it's being wholly  
11 prevented from operating effectively in the market, I  
12 think that brings the whole document into play, and I  
13 think on our authority under -- to ensure competition  
14 and ensure -- and to see the approval of these  
15 documents comes into play.

16           As to any individual incidents or in these  
17 particular circumstances we probably would have to  
18 look at how -- who did what, when, where, and how. I  
19 don't doubt that at all.

20           But where the agreement in its substance is  
21 falling apart, I think it works a particularly  
22 egregious wrong for us to go through a repeated series  
23 of arb -- of disputes to come to that conclusion. An  
24 absolutely ineffective way of seeing this process  
25 work.



1           For us to come back and say all of these  
2 things; we'll look at OSS generally; we'll look at  
3 RSAG generally; we'll look at UNEs generally, and then  
4 we'll come back and this party is out here hanging on  
5 the vine basically dying. I would hate for that to  
6 occur. I don't think it advances the intentions of  
7 the act for us to do that.

8           Of course, we have to do that, but if a  
9 party is out there and their whole business plan is  
10 going out the window, then I wonder, how we can say we  
11 advance the interests of the Act in doing so.

12           So, what I'm asking here is -- I want to be  
13 very clear. Is does that -- does our jurisdiction to  
14 look at violations of Commission orders or Commission  
15 rules, can it be invoked in the instance for a broader  
16 review of an unbun -- of an interconnection agreement  
17 where one party essentially argues that there's a  
18 failure -- there's a breach? It's essentially just an  
19 overall breach of the arbitration agreement.

20           And with that I'm going to grant BellSouth's  
21 motions in this case as to Issue 1.

22           As to Issue 2. As to issue -- let's see,  
23 there was one I had a question on. Let me make sure  
24 that's not it.

25           Issue 14. And there was another issue like

1 this, but I can't recall. I think it was 46 where the  
2 issue is whether somebody should pay another's cost.  
3 Is it 16? That was further back than that. How is  
4 that handled now? What happens now?

5 **MR. ADELMAN:** Commissioner, I'm not sure.  
6 I'm going to make an inquiry to see what the current  
7 agreement states.

8 Many of the issues, which are the subject of  
9 arbitration were included in the agreement which was  
10 previously approved by this Commission that governs  
11 the relationship between the parties over the past two  
12 years. I don't know if this is one of them or not.

13 And there are two issue. Issues 14 and 16  
14 which I guess you're referring to jointly; is that  
15 correct?

16 **COMMISSIONER JACOBS:** Yes. I'm sorry. It  
17 was 46. 46 I view as similar, very similar. Although  
18 it's probably a bit more askance.

19 **MR. ADELMAN:** With regard to 46, I know that  
20 the existing agreement the one that was previously  
21 approved by the Commission does include what we call a  
22 "loser pays" provision. So you have previously  
23 approved an agreement that has that. That's how it's  
24 done today.

25 **COMMISSIONER JACOBS:** Okay. Any comment?

1           **MR. ALEXANDER:** I was just going to add this  
2 because it's in a prior agreement. The parties  
3 entered into that agreement without arbitration. It  
4 was a negotiated agreement. And obviously the parties  
5 are renegotiating and BellSouth's position is that it  
6 does not choose to voluntarily include that going  
7 forward or we wouldn't be here in arbitration. Just  
8 because it's in a prior agreement, whether it's with  
9 the carrier or another carrier, does not mean that  
10 going forward BellSouth has to agree to do that again.

11           **MR. ADELMAN:** And Commissioner, to be clear,  
12 my argument is not that you're somehow bound to  
13 approve a provision just because it was previously  
14 approved. I don't mean to imply as much.

15           **COMMISSIONER JACOBS:** I understand. I'm  
16 going to grant the motion as to both of these, only  
17 because of the process that will be required. It  
18 would be extensive and it would basically come down to  
19 a proof of damages. So I'm going to grant it as to  
20 14, 16.

21           20(b). Now, in this instance, would there  
22 be any dispute as to the delay or the reasons for the  
23 delay? Or how is that handled?

24           **MR. ADELMAN:** Commissioner, to be clear,  
25 what we would like is a provision in the contract that

1 says where it is clear that the delay is caused by  
2 BellSouth. That is to say, where there's no dispute  
3 whether BellSouth caused the delay that the  
4 nonrecurring charges should be waived.

5           We are not intending to in any way include a  
6 provision in the contract which would require that  
7 where ITC^DeltaCom, or ITC^DeltaCom's customer  
8 contributed to a delay or a missed cutover date, would  
9 there be a waiver of the NRC. It's only in cases  
10 where BellSouth is clearly at fault. And that goes  
11 for all of the performance guarantees for which we  
12 seek a contract provision.

13           **COMMISSIONER JACOBS:** Why do you see this as  
14 a penalty? What I hear him saying is if you're not  
15 providing service, you don't get to receive the  
16 proceeds for not providing those services.

17           **MR. GOGGIN:** As a practical matter, this is  
18 no different than a liquidated damages fee.  
19 Presumably, if we allegedly failed to hit a cutover  
20 date on time, or that it was allegedly our fault, and  
21 this provision were in, an we disagreed as between the  
22 two parties as to whose fault it was, it would still  
23 end up coming before this Commission for some  
24 resolution as to who was at fault. And then there  
25 would be an award of a sum, or a discount, or some

1 other form of damages to them if, in fact, they  
2 proved, as a factual matter it were our fault. On the  
3 other hand, if we proved that the delay was their  
4 responsibility, there is nothing in the contract for  
5 us.

6 The bottom line is that you're still  
7 awarding them something in the way of damages for a  
8 breach of contract. It's the same issue.

9 **MR. ADELMAN:** Your Honor --

10 **COMMISSIONER JACOBS:** Let me ask you, how  
11 would you separate out the nonrecurring charges that  
12 would apply here? How would you know for any  
13 particular instance which nonrecurring charges you  
14 would want to not pay?

15 **MR. ADELMAN:** Well, we would not want to pay  
16 the nonrecurring charges that are assessed against us  
17 for that cutover. In other words, if we request a  
18 cutover of a customer, and the way this works is the  
19 parties coordinate; they schedule a cutover date.  
20 Oftentimes, a technician from ITC^DeltaCom must be  
21 present and a technician from BellSouth must be  
22 present if it's clear -- and to be certain, the  
23 contract provision we are talking about is only in  
24 cases where there is no dispute. Where the BellSouth  
25 technician and doesn't show up. It's not the

1 customer's fault, it's not ITC^DeltaCom's fault. We  
2 don't contribute in any way, that we shouldn't have to  
3 pay the costs associated with that particular cutover.  
4 That's it's nonrecurring charge we don't want to pay.

5 I also got an answer with regard to Issue  
6 14. You had asked how the parties handle that today?  
7 And that is in the existing agreement, the one that  
8 was approved by in Commission.

9 The way it works today in the current  
10 agreement is that if a coordinated cutover is delayed,  
11 the party responsible -- the responsible party should  
12 pay the reasonable labor charges of the other party.  
13 To be clear, it's the responsible party.

14 Again, I'm a little bit perplexed because  
15 BellSouth continues to argue, well, they can always  
16 come after the fact and get damages, and even referred  
17 to a "sum" I think. Well, all we're saying is that we  
18 agree with the statements you made a few minutes ago,  
19 that the agreement has to hold together and we can't  
20 be required to litigate each and ever issue. And it's  
21 cost prohibitive and certainly not an efficient use of  
22 this Commission's resources for us to come forward  
23 every time there is a breach of the contract seeking a  
24 waiver, or I guess, a sum of damages as BellSouth  
25 itself has put it. But rather, we believe the way to

1 hold these agreements together is to have  
2 self-effectuating guarantees such as where it's clear  
3 that BellSouth causes a missed cutover, that the  
4 nonrecurring charge be waived. And that is what Issue  
5 1, Issue 2, Issue 14, Issue 20(b), that's what they're  
6 all about.

7           **COMMISSIONER JACOBS:** I'm going do deny the  
8 motion as to 20(b).

9           Help me understand what's happening with  
10 Issue 41.

11           **MR. ADELMAN:** Commissioner, if I could take  
12 a crack at it.

13           Where a customer is disconnected, BellSouth  
14 argues that there's always a cost associated with that  
15 disconnection and that the ALECs should pay for the  
16 disconnection.

17           Now, it's my understanding that in  
18 Florida -- perhaps it's voluntary -- I don't know if  
19 it's mandatory or not, there is a warm dial tone, or  
20 sometimes called soft dial tone requirement which  
21 allows a telephone line to be used, even when it's  
22 technically disconnected, used to access 911 services  
23 and E911 services.

24           We will provide testimony to you that where  
25 there is a disconnection but warm or soft dial tone is

1 maintained on a line that there is no cost to  
2 BellSouth associated with this disconnection. And all  
3 we're asking for is that the agreement say where there  
4 is no cost, that there be no charge. We believe  
5 that's fair. And BellSouth has not even argued that  
6 this is an issue that's not appropriate for  
7 arbitration.

8 I know that the Staff Prehearing Statement  
9 it argued that in not appropriate for arbitration, but  
10 neither of the parties have suggested as such.

11 **COMMISSIONER JACOBS:** BellSouth, your  
12 position on that?

13 **MR. GOGGIN:** First of all, to be clear, when  
14 there are no costs for disconnection, BellSouth has  
15 agreed not to charge any costs for disconnection. We  
16 have submitted testimony on the costs that are  
17 associated with disconnection. So there is definitely  
18 a disagreement on the merits.

19 I'm trying to get back to our motion right  
20 now, to find out whether, in fact, we did raise this  
21 as an issue. I thought we did. Yes, we did.  
22 Mr. Alexander.

23 **MR. ALEXANDER:** I'll try to help out, if I  
24 can.

25 Commissioner Jacobs, the question is whether



1 or not we should be permitted to charge a  
2 disconnection. And the premise of the issue is when  
3 we don't incur any costs associated with  
4 disconnection. And BellSouth has agreed if there is  
5 no cost, we won't charge them. However, that's not  
6 what they are really seeking here. They're trying to  
7 have us not charge for disconnection.

8 **COMMISSIONER JACOBS:** It sounds like the  
9 more appropriate issue is, what is the charge for a  
10 disconnect?

11 **MR. ADELMAN:** We believe the issue is  
12 whether there is any cost associated with  
13 disconnection. That's where the parties disagree.

14 **COMMISSIONER JACOBS:** Okay. Should anybody  
15 incur a cost for a disconnect?

16 **MR. ADELMAN:** That's correct. They will  
17 present testimony that there are costs associated with  
18 disconnection. We will present testimony that there  
19 are not.

20 **MR. GOGGIN:** If they were proof that costs  
21 were incurred, would you concede that a charge would  
22 be appropriate?

23 **MR. ADELMAN:** Oh, that's for the Commission.  
24 If the Commission determines that there are costs  
25 costs and we incurred -- excuse me, we caused the cost

1 to be incurred, then there should be cost base rates.

2           **MS. CALDWELL:** Commissioner, also, Staff has  
3 reviewed this a little further an we want to modify  
4 our position to take no position at this time because  
5 of the cost.

6           **COMMISSIONER JACOBS:** I want to ask you all  
7 to -- you all try to rephrase that. I'm going to deny  
8 it as to Issue 41 right now. I think I'd like to  
9 rephrase it to address the real issue there.

10           **MR. ALEXANDER:** Thank you, Your Honor.

11           **COMMISSIONER JACOBS:** Okay. Issue 46 is the  
12 one -- after looking at it again, I'm going to grant  
13 the motion as to Issue 46. And Issue 47.

14           **MR. ALEXANDER:** Commissioner Jacobs, I think  
15 that issue has been resolved between the parties.

16           **COMMISSIONER JACOBS:** Okay. Great. And  
17 Issue 49. I'm going to grant it as to Issue 49 as  
18 well.

19           Okay.

20           **MR. ADELMAN:** Commissioner, could I, just  
21 for clarification, it sounds to me like you're about  
22 to move to the next subject this morning.

23           I just want to understand the intent of your  
24 ruling, combined with the statements that you  
25 previously made.

1           Is it your intent that ITC^DeltaCom be  
2 prohibited from providing any evidence, including  
3 evidence of past nonperformance or any opinion with  
4 regard to self-effectuating guarantees as part of the  
5 evidence? I guess to put a very fine point on it, are  
6 you, in granting the motion with regard to 1, 2, 14,  
7 16 and a few of the others, are you finding, as a  
8 matter of law, that we may not present any evidence or  
9 testimony which relates to these issues?

10           **COMMISSIONER JACOBS:** Let me be very clear.  
11 As to whether or not this Commission should entertain  
12 a provision as arbiter on liquidated damages, I do not  
13 think that evidence supporting such a provision is  
14 appropriate. However, you have parity issues in this  
15 case, if I'm not mistaken. To the extent that your  
16 evidence goes to the question of parity, I think it's  
17 wholly appropriate to present that evidence.

18           **MR. GOGGIN:** We have no objection to that,  
19 Commissioner. We'll get together with DeltaCom and  
20 see if we can agree as to which portions of our  
21 testimony and which portions of their testimony should  
22 be withdrawn, and which portions are relevant for  
23 other purposes.

24           **MR. ALEXANDER:** Okay.

25           **MR. ADELMAN:** To be clear -- just that I

1 want everyone to have the same expectation. The  
2 reason we have proposed various self-effectuating  
3 guarantees is to ensure parity.

4 **COMMISSIONER JACOBS:** Exactly. Exactly.

5 **MR. ADELMAN:** So we will intend to put in  
6 the testimony that's been prefiled on the issue of  
7 self-effectuating guarantees.

8 **COMMISSIONER JACOBS:** If you guys -- I think  
9 you can reason through that. But I want to be clear  
10 that I do see the issue of parity as still in this  
11 proceeding, and to the extent that you think your  
12 evidence supports that issue, or your position on that  
13 issue, then I think that would be appropriate.

14 **MR. ALEXANDER:** Commissioner Jacobs, Tom  
15 Alexander from BellSouth.

16 It sounds like Mr. Adelman is rearguing the  
17 motion, in effect, asking for clarification of your  
18 decision. The issues have been struck that you've  
19 ruled on here today, and by asking now to sort of  
20 recast it in the parity light, he's going beyond  
21 questions or parity in introducing these guarantees,  
22 penalties, incentives and that type testimony -- which  
23 I don't think goes to parity; it goes to their  
24 enforcement that he's talking about.

25 **COMMISSIONER JACOBS:** I leave that to you

1 gentleman to ferret out. But I want to be real clear,  
2 as to whether or not your evidence supports your  
3 position on the question of parity, I think, is  
4 appropriate. Okay?

5 **MS. CALDWELL:** Staff has a question.

6 You had granted 20(b). Staff saw that as  
7 similar to the same issues as 1, 2, 14 and 15.

8 **COMMISSIONER JACOBS:** I looked back at Issue  
9 2 just now.

10 **MR. GOGGIN:** I'm sorry. I thought he had  
11 denied as point (b) in --

12 **COMMISSIONER JACOBS:** I denied as to Issue  
13 20(b.)

14 **MS. CALDWELL:** So we would be taking  
15 testimony on 20(b).

16 **COMMISSIONER JACOBS:** Yes. But then I  
17 looked back at Issue 2 and Issue 2 is very similar --  
18 and you're right, Issue 2 is very similar. To the  
19 extent that it's consistent with Issue 20(b), then  
20 Issue 2, I guess, is denied in part and granted in  
21 part. I summarily granted as to what the focus of  
22 Issue 20(b) is. Okay. And I think we can agree that  
23 Issue 2 was a general statement previously. Okay.

24 **MS. CALDWELL:** Would it be appropriate to  
25 maybe modify Issue 2? The language in Issue 2 and the

1 language --

2           **COMMISSIONER JACOBS:** I think you all could  
3 strike it and make it conform to Issue 20(b). That  
4 would be my preference. That would be my preference  
5 would be to strike Issue 2 and make it --

6           **MR. ADELMAN:** Consolidate the two issues?

7           **COMMISSIONER JACOBS:** Yeah, consolidate the  
8 two.

9           **MR. ADELMAN:** Just so I understand, the  
10 ruling is that the motion is denied with regard to an  
11 issue which is to consolidate Issue 2 and Issue 20(b).

12           **COMMISSIONER JACOBS:** That's correct.

13           **MR. GOGGIN:** 20(b) is the issue, right?

14           **COMMISSIONER JACOBS:** Is the surviving  
15 issue.

16           Okay. Any other issues on that point?

17           **MR. ADELMAN:** There is one, Your Honor.

18           Issue 45 relates to how an audit is paid  
19 for. That is where parties have to report different  
20 data to each other. BellSouth has taken the position  
21 that where DeltaCom provides a report, and it is later  
22 audited, and the report that DeltaCom provides is  
23 inaccurate in some way, that DeltaCom should have to  
24 compensate BellSouth for costs associated with the  
25 audit. And I would just submit to you that if you're

1 going to exclude or prohibit consideration of issues  
2 that relate to penalties or guarantees, that here's  
3 one where I believe BellSouth is trying to have it  
4 both ways. This is not unlike the positions that  
5 ITC^DeltaCom sought to be arbitrated. And if you're  
6 going to exclude Issue 1, for example, then -- or  
7 Issue 46, for example, then you must exclude Issue 45  
8 in order to be consistent.

9           Now, if BellSouth argues that their position  
10 on this is required for parity, or some such other  
11 exception to your ruling, so be it, but to be  
12 consistent with your general ruling, I believe, 45  
13 would have to be stricken as well.

14           **COMMISSIONER JACOBS:** BellSouth.

15           **MR. ALEXANDER:** In response, Commissioner  
16 Jacobs, if you look at it, it's actually a two-way  
17 street. If you look at the way DeltaCom has set up  
18 their arguments about penalties and incentives,  
19 financial -- it's all for BellSouth to be penalized --  
20 in this instance the case of the audits, one, it's a  
21 determination. There are actual costs incurred. You  
22 have a third-party auditor come in. He or she does an  
23 audit, makes a finding. If that audit shows that one  
24 party or the other -- not just DeltaCom but BellSouth  
25 could have to pay for that audit -- if it's in

1 violation by more than 20%, it's actual cost incurred.

2           **COMMISSIONER JACOBS:** Say that last part  
3 again.

4           **MR. ALEXANDER:** It's either party. If  
5 either party is out of sync by more than 20%, that  
6 party would have to pay. It's not strictly penal to  
7 DeltaCom, as Mr. Adelman has argued, that it's like  
8 the ones that they're trying to impose on BellSouth  
9 for BellSouth's failure to meet some standard or some  
10 benchmark. BellSouth get's penalized.

11           **COMMISSIONER JACOBS:** So it's not who asked  
12 for the audit, it's the party that's out of sync by  
13 more than 20%?

14           **MR. ALEXANDER:** That's correct.

15           **MR. ADELMAN:** He's correctly phrased the  
16 issue but, Commissioner, this is the third time  
17 they've made this distinction between a two-way street  
18 and a one-way street. Just to be clear, number one,  
19 that's an argument on the merits that would be  
20 appropriate for the Commission to consider if they  
21 didn't like performance guarantees, because they only  
22 flowed one way, then the Commission could say so. And  
23 they should argue so in the hearings.

24           More importantly, we proposed that these  
25 issues be issues for arbitration. They filed an



1 answer and they could have filed their position. If  
2 it's their position that the waiver of NRC's or  
3 whatever guarantees needs to be symmetrical, then they  
4 could, and I believe they will do so if they testify  
5 in this case on this issue. That goes to the merits.  
6 It doesn't go to whether the Commission can hear the  
7 issue of guarantees. It goes to whether they like the  
8 guarantees that we have proposed.

9           There is an important distinction and they  
10 continue to rely and this sort of one-way street  
11 argument in support of their attempt to exclude the  
12 issues.

13           All I'm pointing out with regard of Issue 45  
14 is it's the same type of issue where there's a  
15 nonperformance; whether it be a poor report, that they  
16 want there to be some financial consequences.

17           We agree that it's an appropriate issue for  
18 arbitration, but in light of your ruling with regard  
19 to some other issues, I believe just to be consistent,  
20 it should be excluded.

21           **COMMISSIONER JACOBS:** Why would an audit  
22 come up in the first place? I understand a little bit  
23 about this but I want to be very clear about it. Why  
24 would an audit come up in the first place?

25           **MR. ADELMAN:** That's a good question. PIU

1 and PLU are percent interstate usage and percent local  
2 usage. It's the way companies measure the type of  
3 traffic that is handled as part of the interconnection  
4 arrangement. And the parties rely on each other to  
5 report the type of traffic which is interstate in  
6 nature versus the type of traffic which is local in  
7 nature, and as part of our agreement we report to each  
8 other. Now, each party would have the right --  
9 because there's reliance on these reports, to audit  
10 the other side to make sure that the report is  
11 accurate. We don't dispute that and be glad to do  
12 that.

13           BellSouth has argued that where one party is  
14 audited and the audit determines that the report was  
15 20% or more inaccurate, that the party that was  
16 inaccurate pay the costs associated with the audit.  
17 And I'm just submitting to you that that is not unlike  
18 where -- that's exactly like where there's a failure  
19 to perform under the contract, that is, to provide an  
20 accurate report, that there be some financial  
21 consequences.

22           **MR. GOGGIN:** Commissioner?

23           **COMMISSIONER JACOBS:** I think I understand.  
24 My only concern here would be if one party -- if an  
25 ILEC knows that an ALEC is not reporting it accurately

1 and they ask for continual audits. I don't think that  
2 that would happen, but that will be a concern.

3 I, first of all, want -- he didn't have a  
4 formal motion to look at this issue. I will go ahead  
5 and take your concerns here as a motion at the bench.  
6 I think the issue is -- it can be distinguished a bit  
7 from the other proceeding, but I do have that concern  
8 about this process and I would ask the parties to sit  
9 down if they can come and revise this language to  
10 address the issue that it should not be arbitrary  
11 audit requests. I'm sorry. Mr. Goggin.

12 **MR. GOGGIN:** I was just going to say,  
13 Commissioner, that the language that is outlined by  
14 the issue is the way I understand the agreement  
15 between the parties currently works.

16 **COMMISSIONER JACOBS:** Is that right?

17 **MR. GOGGIN:** This issue was proposed by  
18 DeltaCom. And to the extent that they now wish to  
19 withdraw the issue, we would not object to that.

20 **MR. ADELMAN:** Again, we believe it's  
21 appropriate for arbitration. The reason I pointed  
22 this out was because to be consistent, we believe all  
23 these issues in our petition were appropriate for  
24 arbitration. And all I would suggest is that where  
25 you excluded issues where there are financial

1 consequences associated with poor performance or  
2 nonperformance, that this is an issue where we have  
3 again proposed that there's financial consequences  
4 associated with poor performance.

5           **COMMISSIONER JACOBS:** I understand. Now, I  
6 will deny the motion and Issue 45 remains for the  
7 moment. If you guys want to address it or withdraw  
8 it, I'll leave that open to you until we come up with  
9 a final order. Okay.

10           **MS. CALDWELL:** Commissioner, in the petition  
11 there was an additional request about striking some  
12 testimony.

13           **COMMISSIONER JACOBS:** Regarding the issues  
14 that we just -- on Page 4, right.

15           **MS. CALDWELL:** BellSouth requested the  
16 Commission to strike these portions of the testimony  
17 discussing MSAG.

18           **COMMISSIONER JACOBS:** That had to do with  
19 the Issue 50 thing, right? We haven't addressed --  
20 no, I'm sorry. It doesn't. I see it.

21           **MR. ALEXANDER:** We were going to take that  
22 up separately. Is that what you're pointing out, that  
23 we need to do that now?

24           **MS. CALDWELL:** Or when we got through the  
25 rest of the motions.

1           **COMMISSIONER JACOBS:** Right. We do have to  
2 get through the rest of the motions. We should move  
3 on.

4           Why don't we go ahead and deal with this.  
5 Let's hear arguments on the Issue 3(b)(1).

6           **MR. ALEXANDER:** If I may, Commissioner  
7 Jacobs, just argue the second half of the motion,  
8 Issue 3(b)(1) and Issue 50.

9           **COMMISSIONER JACOBS:** They are --

10          **MR. ALEXANDER:** Together.

11          **COMMISSIONER JACOBS:** In my mind I had  
12 attached it too as well. Go ahead.

13          **MR. ALEXANDER:** Okay. This is Tom Alexander  
14 for BellSouth.

15                 At the heart of this is whether or not  
16 DeltaCom has complied with the Act and the  
17 requirements of the Act with respect to setting forth  
18 issues so that they are properly before this  
19 Commission and so that they are properly noticed to  
20 the responding party, in this instance, BellSouth.

21                 252 (b)(2)(A)(i) of the Act requires that --  
22 actually 1 through 3 -- sets forth the duties of the  
23 petitioner. So Part 1 requires that the unresolved  
24 issues be set forth in the petition. And this  
25 Commission is limited under Section 252(b)(4)(a) of

1 the Act. It's limited to consider -- limit its  
2 consideration of any petition under Paragraph 1 to the  
3 issues set forth in the petition and in the response  
4 if any filed under Paragraph 3.

5 And it's against this setting, if you will,  
6 Your Honor, that DeltaCom is now trying to expand, and  
7 we believe improperly, the issues that it set forth in  
8 its petition.

9 As you may recall, DeltaCom set forth 73  
10 issues when it filed for arbitration and it argued at  
11 the issue ID that it went into such detail because it  
12 wanted to have enough specificity that the Commission  
13 would understand the issues.

14 Yet here they are today trying to expand  
15 through testimony of a witness, Michael Thomas -- and  
16 his testimony, I believe, begins at pages -- in his  
17 direct prefiled, it's 6 through 7, includes an issue  
18 that expands improperly, Issue 3(b)(1), which relates  
19 to the parity question and access to OSS. And,  
20 likewise, they are expanding or trying to expand Issue  
21 50, and that occurred as early as the issue  
22 identification conference that the Staff held.

23 And they are taking an issue stated in one  
24 instance very clearly of Issue 5, for example. Says,  
25 "Should the parties continue operating under existing

1 local interconnection arrangements?" And ITC's  
2 position on that in the petition was "Yes. There is  
3 no reason to change the arrangement for local  
4 interconnection that has worked well for the past two  
5 years. That arrangement was previously approved by  
6 the Commission."

7           Now they're asking the Commission to expand  
8 that into four separate issues. One of those four in  
9 the (d) that is listed in the issues list that was  
10 Attachment A to the Prehearing Order, relates to,  
11 should the parties implement a procedure for binding  
12 forecast? Nowhere in the current agreement is the  
13 matter of binding forecast discussed. We believe  
14 that's wholly improper to try to add that now to the  
15 issues list and try to submit testimony.

16           So we think on both of those issues it's an  
17 improper expansion. DeltaCom will argue that they're  
18 just clarifying and saying that what we really meant  
19 through those 73 issues that they set out. And  
20 BellSouth contends that they should have mentioned  
21 those in their petition and not simply try to do so  
22 through testimony.

23           Now, let me deal with -- if I can, back up  
24 and deal with Issue 3(b)(1), the MSAG. They have  
25 asked for a download of the RSAG, which is the

1 Regional Street Address Guide. That is a different  
2 database than the MSAG, which stands for the Master  
3 Street Address Guide.

4 Now, they'll make some arguments to say that  
5 it's a public necessity because MSAG provides  
6 information relevant to 911 and E911.

7 **COMMISSIONER JACOBS:** I couldn't tell for  
8 sure, but it does not appear that one is a subset of  
9 the other?

10 **MR. ALEXANDER:** No.

11 **COMMISSIONER JACOBS:** They're totally  
12 different.

13 **MR. ALEXANDER:** They're different databases.

14 **COMMISSIONER JACOBS:** Okay.

15 **MR. ALEXANDER:** And the MSAG relates to the  
16 911 database. Now, BellSouth provides that database  
17 today and we'll do so in the future. We've agreed to  
18 do that. What they're wanting is regular updates at  
19 no cost. And they're trying to expand that issue and  
20 claim that it's in the public interest, the public  
21 necessity, if you will, because it relates to 911  
22 services.

23 Well, that's really a red herring.  
24 BellSouth does provide that today and BellSouth will  
25 continue to provide that in the future. It is not --



1 more importantly for purposes of this morning, it is  
2 not an issue that was raised anywhere in the petition,  
3 and they're doing so through one of their witnesses,  
4 Michael Thomas, in his prefiled direct. They should  
5 have, under the Act, stated it clearly as an issue in  
6 the petition. Just like they did for the RSAG.

7           As to Issue 50, again, that's an expansion  
8 of the issue list in the petition. DeltaCom will  
9 argue that, well, we listed it in Exhibit B and  
10 Exhibit A, in attachments to a proposed  
11 Interconnection Agreement, or we set it forth in  
12 issues listed as being, in their mind, DeltaCom's  
13 mind, as being unresolved between the parties.

14           Well, we've already seen that addressed.  
15 There's a -- in fact the District Court in California  
16 has addressed that very argument. And I believe in  
17 that case it was styled MCI Telecommunications Corp  
18 versus Pacific Bell, and there were other parties  
19 involved in that case.

20           But clearly in that instance, as I recall,  
21 MCI was trying to insert an issue regarding dark  
22 fiber, and they only did it through attachments to the  
23 petition, not in the petition itself. And the  
24 District Court in that case said you cannot do that.  
25 In fact, I have copy of the case here. And it says

1 "The Court agrees with Pacific Bell that simply  
2 listing an issue in an appendix to a petition does not  
3 sufficiently set forth" -- and that's in quotes  
4 because that's coming out of the requirement in the  
5 Act to list the issues that are unresolved between the  
6 parties. "Does not sufficiently set forth the issues  
7 for arbitration, and, accordingly, the issue is not  
8 properly before the court."

9           Even accepting MCI's arguments that its  
10 challenge is properly before the Court, however the  
11 Court concludes for the reasons set forth below that  
12 the CPUC's, the California Public Utilities  
13 Commission, determination was reasonable and  
14 consistent with the Act.

15           We believe that they clearly had a duty,  
16 which they acknowledge and recognize by filing 73  
17 issues in their petition for arbitration, to list this  
18 as an issue and they did not do so.

19           And with regard to, again, the binding  
20 forecast matter, that's particularly egregious,  
21 because it's not even in the current local  
22 arrangements for interconnection.

23           If I can reserve a little time to respond to  
24 Mr. Adelman, I would like to.

25           **COMMISSIONER JACOBS:** Very well.

1           **MR. ADELMAN:** Commissioner, I'll take the  
2 second one first, the binding forecast issue. Can I  
3 approach? I have something I'd like to provide.

4           **COMMISSIONER JACOBS:** Okay. Do you have  
5 copies?

6           **MR. ADELMAN:** Commissioner, I'm handing you  
7 a few -- these are all documents that were filed on  
8 June the 11th with this Commission. The cover page is  
9 just a cover of our petition and I distribute that  
10 just to orient you and show you where these excerpts  
11 came from.

12           I'd like you to take a look at Paragraph 7  
13 of this petition that was filed on June the 11th. And  
14 you can see there it's clear that with regard to all  
15 of the documents that were filed on the June 11th, we  
16 specifically and expressly incorporated those  
17 documents into our petition.

18           Paragraph 8, the same was done. That all of  
19 the documents that were filed on June the 11th were  
20 part of our petition. Now, Mr. Alexander began by  
21 saying the heart of this very issue is a requirement  
22 in the Act that parties be given an opportunity to  
23 respond; a fair opportunity to respond to the issues  
24 in the petition.

25           Well, with regard to the binding forecast

1 issue, they were given the opportunity and they did.  
2 It was a part of the petition that was filed on June  
3 the 11th and if I could ask you to keep flipping  
4 through this packet you'll see in Attachment A,  
5 Forecasting Requirements, 4.7.1.

6           And then perhaps even most clearly in  
7 Attachment B you can see that the section to the --  
8 the proposed agreement is referenced. That the issue  
9 is articulated as both parties provide each other  
10 forecasts that are binding with penalties.

11           The BellSouth position, as best we could  
12 tell on June 11th was they're still reviewing. And as  
13 a footnote, they have prefiled testimony in this case,  
14 testimony of Mr. Varner, where they say they're still  
15 reviewing the issue, our position, of course, and then  
16 the petition reference. So they've not only had an  
17 adequate opportunity to respond with regard to the  
18 binding forecast issue, they have responded.

19           Now, it's interesting if you look at the  
20 underlying facts of the California case that was cited  
21 by BellSouth, you'll see that the California  
22 Commission, in fact, did consider the issue of dark  
23 fiber in that case. But what's the most important  
24 distinction, I believe, in that case from this case  
25 is, the issue of dark fiber in that petition was

1 merely mentioned; merely mentioned in the attachments  
2 to a petition that presumably was filed by MCI  
3 Telecommunications. Here it was specifically  
4 incorporated and the positions of the parties were  
5 specifically articulated. Language was proposed.  
6 This was all filed on June the 11th, and I think most  
7 importantly, they in no way have been prejudiced by  
8 inclusion of this issue for this hearing because they  
9 have responded.

10           Now, we'll tell you in our testimony, if  
11 given the opportunity, that we think their response  
12 continues to be inadequate. That is, they're still  
13 reviewing the issue, and we have a position that we're  
14 ready to bring forward for arbitration. But it's  
15 certainly appropriate for your consideration. They've  
16 had an adequate opportunity and they have responded.

17           Now, with regard to the MSAG, the Master  
18 Street Address Guide is very simple. It's the data  
19 that we need -- that any local exchange company needs  
20 so that it can efficiently, quickly and accurately  
21 route 911 and E911 calls. It's public safety and  
22 welfare issue. I don't think BellSouth would dispute  
23 as much.

24           We want daily downloads of the MSAG so that  
25 when information changes, house or building is

1 constructed and service is established, that on the  
2 first day that service effectuated that 911 calls  
3 could be handled effectively, efficiently and  
4 accurately from that location.

5           The MSAG is the subject of Mike Thomas'  
6 testimony. It's a small issue in Mr. Thomas'  
7 testimony and they have had -- yes, sir.

8           **COMMISSIONER JACOBS:** During negotiations,  
9 were these working papers or working documents that  
10 would have come up during that time?

11           **MR. ADELMAN:** All of these issues were  
12 negotiated beginning back in January; some perhaps  
13 before. And with regard to the MSAG, BellSouth,  
14 again -- and if I can get you to look at these  
15 documents that were filed on June the 11th.

16           Look at the very last document. You can see  
17 the MSAG about halfway through. The section to the  
18 proposed contract is referenced. The issue is just  
19 MSAG, which everyone knows what it is.

20           The BellSouth position is, BellSouth will  
21 provide the MSAG database to ITC^DeltaCom but will not  
22 do so on a daily basis. Our position is articulated  
23 and the petition reference is provided. They've  
24 responded to this one as well or they certainly will  
25 be given an opportunity to respond at the hearing.

1           **COMMISSIONER JACOBS:** So the section number  
2 is a part of the proposed contract that was exchanged  
3 amongst the parties in negotiations?

4           **MR. ADELMAN:** Yes, sir. And it's the  
5 proposed contract that was filed with this Commission  
6 on June the 11th. If I can get you to look at the --  
7 well, the third to last page or the middle page at the  
8 very top. You'll see a -- we're using kind of an  
9 unusual convention, but it's 4.8.3.4. That's the  
10 language that ITC^DeltaCom proposes be incorporated  
11 into the agreement, which is the subject of this  
12 arbitration. And we certainly invite BellSouth to  
13 respond on the merits of our argument. Thank you.

14           **COMMISSIONER JACOBS:** Thank you.

15           **MR. ALEXANDER:** In response, Mr. Adelman has  
16 not pointed to one single reference in the petition  
17 where the issues are listed between the parties, where  
18 either MSAG is listed or where the Issue 5 is  
19 expanded. The issues are stated there and the  
20 positions are stated there.

21           If I could direct you -- and I'm sorry I  
22 don't have copies to hand out. But at Paragraph 11  
23 under Section 5, it's Page 4 of DeltaCom's arbitration  
24 petition, Paragraph 11.

25           **MR. GOGGIN:** Commissioner, I believe it's

1 included in the excerpt.

2           **COMMISSIONER JACOBS:** What you just gave me?

3           **MR. ADELMAN:** Correct.

4           **COMMISSIONER JACOBS:** I should look in that,  
5 shouldn't I? Thank you.

6           **MR. ALEXANDER:** It is at the bottom of  
7 Page 4 in what Mr. Adelman handed out. Section 5 says  
8 Issues for Arbitration. The issues -- and this is  
9 Paragraph 11 of their Petition for Arbitration. "The  
10 issues enumerated below are the unresolved matters  
11 between ITC^DeltaCom and BellSouth. ITC^DeltaCom  
12 expressly reserves the right to address any issues not  
13 discussed here and that are brought forward by the  
14 Commission, BellSouth or any other party."

15           Well, BellSouth did not add any issues to  
16 this. The Commission's not adding issues to this  
17 matter. The issues are set forth in the 73 separate  
18 issues. Neither MSAG nor the expansion of Issue 5 to  
19 the four matters that they're requesting now are  
20 listed there in this petition.

21           Now, Mr. Adelman is arguing that they can  
22 incorporate those. In fact, one of their witnesses,  
23 whose name is Thomas Hyde, says that we generically  
24 listed issues, making reference to the two attachments  
25 to their petition.



1           BellSouth's not required, nor is the  
2 Commission required, to ferret through numerous pages  
3 of attachments to figure out what are the unresolved  
4 issues between the parties.

5           DeltaCom was required, the indeed did, list  
6 those 73 issues as they were required to under the Act  
7 in its petition for arbitration. Neither MSAG nor the  
8 expansion of Issue 5 are contained there.

9           **COMMISSIONER JACOBS:** Okay. Staff.

10          **MS. CALDWELL:** I think it would be Staff's  
11 position that unless the issues are clearly identified  
12 when the petitions are filed, that it would be unduly  
13 burdensome for Staff, as well as the parties, to go  
14 through and go through the interconnection -- proposed  
15 interconnection agreement with a fine-tooth comb to  
16 make sure that all of these issues are raised in the  
17 actual petition, and I don't think that it would be a  
18 precedent that ought to be set; that you're going to  
19 go outside the issues that were raised.

20          **COMMISSIONER JACOBS:** What's the standard  
21 for entry to arbitration? I think I've heard it. It  
22 was 250 --

23          **MR. ALEXANDER:** For the Commission? Their  
24 duty?

25          **COMMISSIONER JACOBS:** Yes.

1           **MR. ALEXANDER:** It was 252.

2           **COMMISSIONER JACOBS:** (b) (4)?

3           **MR. ALEXANDER:** (b) (4) (a). Yes, sir.

4           **COMMISSIONER JACOBS:** I don't have that in  
5 front of me.

6           **MR. ADELMAN:** I don't know if you're  
7 interested in any further commentary. I would be glad  
8 to respond.

9           **COMMISSIONER JACOBS:** Let me see what this  
10 says. Thank you.

11           You had another point, Staff? That was it?

12           **MS. CALDWELL:** Uh-huh.

13           **COMMISSIONER JACOBS:** You were done?

14           **MS. CALDWELL:** Yes.

15           **COMMISSIONER JACOBS:** Now, let me make sure  
16 I understand this now. The controversy is that Issue  
17 3(b) (1) is sufficiently narrow that it excludes any  
18 reference to MSAG or -- what was the other one? I'm  
19 sorry. The second one.

20           **MR. ADELMAN:** The binding forecast, I  
21 believe, came up in the context of what is numbered  
22 here as Issue 50, so as not to confused the two.

23           **MR. ALEXANDER:** And there was an issue, Your  
24 Honor, that related to the download of the RSAG and  
25 it's not contained there, either.

1                   **COMMISSIONER JACOBS:** Right.

2                   **MR. ADELMAN:** Commissioner, if I could  
3 direct your attention to what was filed on June the  
4 11th and expressly incorporated in the petition, we  
5 have clearly referred to 2(a)(i)(1). We've provided  
6 the positions of the parties, the issue and, in  
7 addition, the specific reference to the proposed  
8 Interconnection Agreement. And BellSouth has been  
9 given, and will have, an adequate opportunity to  
10 respond to this issue of the 911, E911 database and  
11 the updates. So I would submit that it has been fully  
12 set forth and was done so on June the 11th, and the  
13 key policy here is to consider that BellSouth must be  
14 given an adequate opportunity to respond.

15                   **COMMISSIONER JACOBS:** I understand. I  
16 understand. Here is my concern. Is MSAG a normal  
17 element of an OSS system? I don't understand that  
18 yet. Is it normally anticipated in the operation of  
19 OSS?

20                   **MR. ALEXANDER:** Commissioner Jacobs, since  
21 your question is directed to is it a UNE, since it may  
22 be an OSS, it is a data -- I'm sorry.

23                   **COMMISSIONER JACOBS:** I understand. I'm  
24 looking at issue 3(b)(1), and it says -- Issue 3(b)  
25 says "Pursuant to this definition," which has to do

1 with -- I'm sorry -- has to do with -- what is the  
2 definition of parity. Okay. Issue 3(b)(1) says  
3 "Pursuant to this definition, should BellSouth be  
4 required to provide operational support systems?"  
5 Okay. In my mind that issue says whatever -- should  
6 BellSouth be required to provide OSS pursuant to this  
7 Interconnection Agreement? Now my question is, was  
8 that sufficiently specific that it would not have  
9 automatically referenced MSAG?

10 **MR. ADELMAN:** The answer for ITC^DeltaCom,  
11 Commissioner -- excuse me.

12 **COMMISSIONER JACOBS:** I think I asked  
13 BellSouth first. I'll hear from you, though.

14 **MR. ALEXANDER:** Our -- well, let me -- I  
15 have a two-part answer. First, it's actually access  
16 to OSS, not to OSS itself that BellSouth must be  
17 required to provide. And that access has to be  
18 provided at parity. BellSouth is providing access to  
19 MSAG. In fact, I think the parties have agreed on  
20 that. The question is they just want it in a  
21 different manner than what BellSouth has offered on  
22 getting that download of MSAG.

23 **COMMISSIONER JACOBS:** Well, the OSS  
24 requirement is that you have access to MSAG, not that  
25 you have the actual database.

1           **MR. ALEXANDER:** I'm not sure that MSAG is  
2 captured in that OSS. It is a database. It is not a  
3 provisioning-type situation. It relates to the 911  
4 database and the information there. And BellSouth is  
5 providing access to that database. They just want it  
6 in a different manner than what BellSouth has  
7 provided.

8           But, Commissioner Jacobs, I think we're  
9 losing track of Mr. Thomas, Michael Thomas, is the  
10 witness sponsoring this MSAG testimony. And he does  
11 so, as I recall -- I don't have it in front of me --  
12 but under Issue 5, which states "Should BellSouth be  
13 required to provide a download of the Regional Street  
14 Address Guide, RSAG? If so, how?" And then he goes  
15 on to add discussion in his testimony at this location  
16 of Issue 5 about the MSAG.

17           **COMMISSIONER JACOBS:** Also MSAG in Issue 5  
18 as well.

19           **MR. ALEXANDER:** It's not in the issue is  
20 BellSouth's point.

21           **COMMISSIONER JACOBS:** Oh, I'm sorry. I'm  
22 with you.

23           **MR. ALEXANDER:** But where Mr. Thomas  
24 discusses it is in connection with Issue 5, not Issue  
25 3(b)(1).

1           **COMMISSIONER JACOBS:** I understand.

2           **MR. ALEXANDER:** We just raised Issue 3(b)(1)  
3 because it is clearly not in Issue 5. The only thing  
4 that could even remotely come up with Issue 3(b)(1) is  
5 why we raised that.

6           **COMMISSIONER JACOBS:** I understand. So my  
7 question, I think, is still consistent, though,  
8 because what you're saying is that essentially it  
9 would not be considered a part of the OSS.

10          **MR. ALEXANDER:** Well, it is a database that  
11 BellSouth uses.

12          **COMMISSIONER JACOBS:** The actual download of  
13 the database, rather than as opposed -- I should say  
14 as opposed to the access to that database, but the  
15 download of MSAG is not, in your view, a part of  
16 normal OSS?

17          **MR. ALEXANDER:** Can we have one moment?

18          **COMMISSIONER JACOBS:** Yes.

19          **MR. ALEXANDER:** Okay.

20          **COMMISSIONER JACOBS:** I guess, actually --

21          **MR. ADELMAN:** Commissioner, I don't know if  
22 I'll be given an opportunity to respond.

23          **COMMISSIONER JACOBS:** Yes, you will.

24          **MR. ADELMAN:** Okay.

25          **MR. ALEXANDER:** I guess, Commissioner

1 Jacobs, the concern here is that BellSouth does  
2 acknowledge it's a database that it maintains. There  
3 is proprietary information associated with that.  
4 There is proprietary customer-related information  
5 associated with the RSAG. The issues, as we  
6 understand it, between the parties is not whether we  
7 will give this information to them, because we've said  
8 to them before, and certainly said here this morning,  
9 that we do provide that. And we noted in our motion  
10 that we provide that and will continue to provide  
11 that. We provide that to DeltaCom today on a  
12 quarterly basis, giving a download of this MSAG. They  
13 can use it. The issue is how and what price?

14 DeltaCom is asking to add to their petition  
15 for arbitration now, I assume under Issue 5, because  
16 that relates to the RSAG download, that they are  
17 wanting now to get the MSAG on a daily basis. We're  
18 already giving it to them quarterly and will continue  
19 to do so. And they also want to get it at no cost.  
20 They don't want to pay for it.

21 **MR. ADELMAN:** Parity requires that they  
22 provide it, but I think I'm hearing agreement. I want  
23 to read you from the Louisiana II decision, what the  
24 FCC said about OSS and how they defined OSS.

25 BellSouth's OSS, which is defined by the

1 FCC, include, quote, "information systems and  
2 personnel necessary to support the elements and  
3 services." And that's from the Louisiana II decision  
4 at Page 9.

5 It is OSS. It is a UNE. We do have a  
6 dispute as to how often and at what cost the downloads  
7 should be provided and that's an appropriate issue for  
8 you to consider evidence on.

9 **MR. ALEXANDER:** Can I add one thing?  
10 They're still -- they're arguing the merits of this  
11 and forcing us to argue the merits. The issue is, for  
12 the decision today, whether they improperly included  
13 it as an issue for arbitration under their petition?

14 **COMMISSIONER JACOBS:** I understand.

15 Staff, do you have a --

16 **MS. CALDWELL:** It's Staff's position that as  
17 to Issue 5, it was not -- Issue 5 is not broad enough  
18 the way it's written to include discussion or  
19 testimony on MSAG, and, therefore, for that reason  
20 should be excluded. The fact that it can be used  
21 under, you know, 3(b)(1) or 3(b)(5), it was not --  
22 it's not being proffered for that particular issue.  
23 So that I think they would be precluded because it's  
24 not transferable. I mean, they've already stated that  
25 it's for this particular issue.



1           **COMMISSIONER JACOBS:** Okay. I agree as to  
2 Issue 5, I don't think you've identified it. I think,  
3 however, that what you have is exactly, as was stated  
4 here, a dispute as to what is the context by which  
5 that information would be provided pursuant to OSS.  
6 And I think that's the issue that comes under 3(b)(1).  
7 And I think that that evidence as to that point is  
8 appropriate under 3(b)(1).

9           Go ahead.

10           **MR. ALEXANDER:** Are you saying that just  
11 from a parity perspective that they can raise an issue  
12 by getting a download of a specific database?

13           **COMMISSIONER JACOBS:** No, I'm not even  
14 saying that. What I'm saying is there is a dispute as  
15 to the manner by which they will have access to that  
16 data pursuant to the OSS.

17           **MR. ALEXANDER:** So you're saying --

18           **COMMISSIONER JACOBS:** There -- there is a  
19 dispute amongst the parties as to whether -- how and  
20 in what manner access -- you define -- I don't think  
21 there's a dispute -- and that's why I asked that  
22 question -- that there is a manner by which a party  
23 can have access to the data under the provision of  
24 OSS. You indicated to me what you normally do. It  
25 sounds like that is in disagreement with what they

1 would like. Okay. So there is a dispute as to how  
2 and in what manner they'll have access under your  
3 normal provision of OSS.

4 Now, I assume what your position would be is  
5 that what you just said. You provide that information  
6 on OSS under these contexts. They have a position  
7 that a reasonable OSS should have it available under  
8 what they think it should be. And so now -- and then  
9 you have the issue of parity. Well, how do you  
10 provide it? You know, how does parity apply to that?  
11 This is how I see that issue playing in. I do not see  
12 it -- and then you go from there -- I should  
13 caution -- all of that comes under whether or not and  
14 how and what manner is provided under your normal  
15 provisioning of OSS.

16 **MR. ALEXANDER:** I guess the question -- the  
17 reason I'm struggling here is that you're saying that  
18 they can discuss it as parity issue. We're now  
19 getting down to where the Commission has before it an  
20 issue that BellSouth would be required, like it does  
21 Issue 5, relating to RSAG, that BellSouth could be  
22 required through this arbitration to provide a  
23 download of the MSAG on a daily basis at no cost.

24 **COMMISSIONER JACOBS:** They did not -- they  
25 did not identify that issue, so I don't think that

1 that issue is available to them.

2           **MR. ALEXANDER:** Thank you. That's what I  
3 was trying to clarify.

4           **MR. ADELMAN:** Excuse me. Just so I  
5 understand, you do or do not expect to see evidence  
6 with regard to --

7           **COMMISSIONER JACOBS:** Let me be very clear.  
8 As to how and what manner you'll have access to this  
9 data under the normal provisioning of OSS, I would  
10 expect to see evidence as to that point. As to  
11 whether or not you can specify your own standards for  
12 provisioning of MSAG, you do not identify that. And I  
13 don't think that's a proper issue.

14           **MR. GOGGIN:** At the risk of beating a dead  
15 horse, so what you're saying is that our motion with  
16 regard to whether the issue is appropriate for  
17 arbitration is granted, but that none of the testimony  
18 will be struck or withdrawn?

19           **COMMISSIONER JACOBS:** I'll leave open that  
20 if you see testimony that you think that you want to  
21 raise at hearing, that's fine, but as of now I would  
22 make the ruling that the -- that -- however you just  
23 said it.

24           **MR. GOGGIN:** I'm sorry.

25           **COMMISSIONER JACOBS:** That --

1           **MR. GOGGIN:** If we get you to say it often  
2 enough we're going to make you make a mistake  
3 eventually.

4           **COMMISSIONER JACOBS:** Yeah. Let me just  
5 stop for a moment.

6           **MR. GOGGIN:** I apologize.

7           **COMMISSIONER JACOBS:** No, that's okay.

8           As to whether or not ITC^DeltaCom has  
9 specifically stated an issue as to a daily download of  
10 MSAG data, that issue was not specifically addressed  
11 in the petition and it's not appropriate. Evidence  
12 which would support the manner and status by which  
13 BellSouth would provide access to MSAG data under its  
14 normal provisioning of OSS is appropriate pursuant to  
15 Issue 3(b)(1). Is that clear enough?

16           **MR. ALEXANDER:** Yes, Your Honor.

17           **COMMISSIONER JACOBS:** Okay.

18           **MR. ALEXANDER:** The only other one we have  
19 is now Issue 50, and I don't know that -- if I can  
20 just add one point about that. I assume it's ready  
21 for you to decide as well, but --

22           **COMMISSIONER JACOBS:** Let me just modify  
23 just a little bit.

24           **MR. ALEXANDER:** Sure. Sorry.

25           **COMMISSIONER JACOBS:** They get to argue what

1 they think is reasonable on that.

2 **MR. ADELMAN:** On the MSAG or on the binding  
3 for --

4 **COMMISSIONER JACOBS:** On the MSAG. You get  
5 to argue what you think is reasonable and what you do  
6 now.

7 **MR. ALEXANDER:** To the extent that that  
8 argument addresses parity as opposed to their getting  
9 MSAG as they argue for it.

10 **COMMISSIONER JACOBS:** That's it. That's  
11 all.

12 **MR. ADELMAN:** Just to be clear,  
13 Commissioner, we're asking for this because we think  
14 the Act's parity requirement requires they do so.  
15 That's the way our testimony is written.

16 **COMMISSIONER JACOBS:** And We'll have a fun  
17 time determining whether or not that's the case.

18 **MR. ALEXANDER:** Their testimony may be  
19 written that way, but the Petition doesn't capture  
20 that. The last word.

21 **COMMISSIONER JACOBS:** Now it will.

22 **MR. ALEXANDER:** Sorry.

23 **COMMISSIONER JACOBS:** What do we have  
24 remaining on Issue 50?

25 **MR. ALEXANDER:** Issue 50 is the expansion of

1 the way it's written in the Petition.

2 **COMMISSIONER JACOBS:** All right. Correct.

3 **MR. ALEXANDER:** And they've tried to expand  
4 it to four, and we've only highlighted one, Your  
5 Honor, and that was the binding forecast. And we  
6 highlighted that was because it doesn't even reach  
7 their argument that it was -- you know, it generically  
8 listed that. They had a witness, Thomas Hyde, to say  
9 that it was generically listed in their petition so  
10 that they could reserve the right to talk about it  
11 later. And with that respect and looking at Paragraph  
12 8 in the petition, Mr. Adelman tries to say that we've  
13 captured this. He says Exhibit B is appended hereto  
14 and incorporated herein by reference, provides a  
15 summary of the issues which DeltaCom thinks the  
16 parties have not reached an agreement. It's a summary  
17 an issue; it's not a specific recitation of an  
18 unresolved issue set forth in the Petition. And,  
19 again, it has to be in the Petition for BellSouth to  
20 be able to respond to it.

21 To take Mr. Adelman's position that this  
22 attached to the back of the Petition, we would have to  
23 expand our answer to write a response to everything  
24 that may have been listed in this Exhibit B or Exhibit  
25 A that was not set forth in the Petition. I don't

1 think the Act requires that.

2           **COMMISSIONER JACOBS:** Is that an expressed  
3 term in the existing contract?

4           **MR. ADELMAN:** Not in the existing contract.  
5 In the contract that we proposed on June the 11th.  
6 And --

7           **COMMISSIONER JACOBS:** No, no, no. I mean, I  
8 wasn't clear. Does the existing contract have  
9 explicit effective dates?

10           **MR. ADELMAN:** Effective dates?

11           **COMMISSIONER JACOBS:** Yes.

12           **MR. ALEXANDER:** Yes, Your Honor, it does.

13           **COMMISSIONER JACOBS:** A date it comes to an  
14 end.

15           **MR. ADELMAN:** Yes.

16           **COMMISSIONER JACOBS:** Okay. How, then,  
17 would this issue get you -- you're proposing, then,  
18 that these issues extend beyond the ending date of the  
19 existing contract?

20           **MR. ADELMAN:** No. We just want these issues  
21 to be -- the provisions covering these issues to be  
22 included in the Interconnection Agreement that will be  
23 arbitrated and will result from this proceeding. And  
24 that's why we've included it on this matrix, and  
25 that's why we argued it in our testimony. And

1 BellSouth responded in its testimony on this issue.  
2 And all we're asking for is the opportunity to swear  
3 that testimony in and have you make a decision on it.

4 **MR. ALEXANDER:** And BellSouth's response to  
5 the issue and the testimony was "We do not think this  
6 is appropriate. However, this is the position on  
7 that." We continue to maintain it was inappropriate,  
8 even in the testimony.

9 **MR. ADELMAN:** But they do offer a position  
10 on the merits, and they have had an adequate  
11 opportunity to respond, and that's really my point.

12 **MR. ALEXANDER:** We disagree.

13 **COMMISSIONER JACOBS:** Okay. Staff?

14 **MS. CALDWELL:** It's Staff's position that  
15 the subsequent issues, (a), (b), (c) and, I think (d)

16 **A** , do go beyond the scope of the original  
17 issue that was stated.

18 **COMMISSIONER JACOBS:** It does not appear  
19 that the specific issue as to whether or not these  
20 provisions -- whether it's contained in your prior  
21 agreement or not were before you all and as a  
22 provision that you would choose to arbitrate in this  
23 agreement, and that does not appear in your petition.  
24 And I think that's the standard we have to look to.  
25 And so as to that, I will grant the motion.



1           **MR. ALEXANDER:** Thank you, Your Honor.

2           **COMMISSIONER JACOBS:** All right. Well, now,  
3 that takes us through preliminary matters. We should  
4 -- any other preliminary matters?

5           **MR. ALEXANDER:** Diana, did we mention about  
6 Mr. Milner adopting testimony of Mr. Thierry?

7           **COMMISSIONER JACOBS:** We can go ahead and do  
8 that when we go over the exhibit testimony.

9           **MR. ALEXANDER:** That will be fine. That  
10 will be fine.

11           **COMMISSIONER JACOBS:** Okay. What I'd like  
12 to do, then, is very -- as quickly as possible review  
13 the draft prehearing order.

14           Do I have the latest version.

15           **MS. CALDWELL:** You should.

16           **COMMISSIONER JACOBS:** Okay. And we will  
17 just go through this section by section, and if you  
18 have any modification or revisions, then please so  
19 state.

20           On the introductory section, case  
21 background, any modifications?

22           Proceedings?

23           **MS. CALDWELL:** The Staff would like to make  
24 a preliminary comment. I have found a few  
25 typographical errors that we will correct that are

1 sort of disbursed throughout out the draft copy.

2           **COMMISSIONER JACOBS:** Okay. Section III,  
3 Procedure for Confidentiality? That's boilerplate.  
4 And, again, we'll resolve the issue at the hearing.

5           Section IV, Post-Hearing Procedures.  
6 That's boilerplate, as is Section V for Prefiled  
7 Testimony.

8           Let's go to Section VI. Order of Witnesses.

9           **MR. GOGGIN:** Sorry. Commissioner, on  
10 Section V. This is the point, I think, where we  
11 probably need to raise our request that Mr. Milner  
12 would be adopting the testimony of Mr. Thierry.

13           **COMMISSIONER JACOBS:** Okay. Mr. Milner is  
14 adopting the testimony of David Thierry.

15           **MR. ADELMAN:** We have no objection.

16           **COMMISSIONER JACOBS:** Okay.

17           **MR. GOGGIN:** And we have also discussed with  
18 DeltaCom supplementing the prefiled testimony to take  
19 into account the FCC's press release on Rule 319  
20 and/or the rule, if and when it comes out.

21           **COMMISSIONER JACOBS:** Sorry. Say that --  
22 could you repeat that please.

23           **MR. GOGGIN:** As you know, the FCC's original  
24 Rule 319, as it appeared in the -- in its order that  
25 came out pursuant to the Telecommunications Act was

1 vacated, and the Federal Communications Commission has  
2 been engaged in proceedings to adopt a new Rule 319.  
3 And they have announced that they have adopted such  
4 rule, but they have not yet released such a rule.  
5 Given the timing of when they issued the press release  
6 and the timing of when they say this rule should come  
7 out, we think it may be helpful for the Commission for  
8 the parties to supplement their prefiled testimony to  
9 say something about how, if at all, that rule would  
10 affect the proceedings here.

11           **MR. ADELMAN:** Commissioner, to be clear,  
12 what the Supreme Court did was it remanded the issues.  
13 The rule wasn't vacated, but it was remanded and  
14 further specific -- specifics were requested by the  
15 court. A press release was issued on September the  
16 15th, of this month, and announced an order was  
17 forthcoming. The order hasn't come out of the FCC,  
18 and we certainly would want, and not object to,  
19 BellSouth so long as the testimony is prefiled. And  
20 the parties, I think, could agree on a date where the  
21 positions would be prefiled.

22           **COMMISSIONER JACOBS:** Staff, is that -- is  
23 that reasonable?

24           **MS. CALDWELL:** I think that's reasonable,  
25 other than we would prefile it up to a specific date.

1 And I guess --

2           **COMMISSIONER JACOBS:** I wouldn't want it  
3 to -- I wouldn't want to say within some period of  
4 time after the issuance of the order.

5           **MS. CALDWELL:** Well, I think my concern  
6 would be, though, is if the Order is issued on the  
7 26th and we go to hearing on the 27th, how do we want  
8 to deal with that?

9           **COMMISSIONER JACOBS:** I would think post --

10          **MS. CALDWELL:** Post-hearing?

11          **COMMISSIONER JACOBS:** Yeah.

12          **MR. ALEXANDER:** And we would not disagree,  
13 Your Honor. It would be too close to the hearing.  
14 What we're talking about now is essentially, as best  
15 the parties can glean from the press release, to try  
16 to give you an indication of how that may impact the  
17 issues in this arbitration.

18          **COMMISSIONER JACOBS:** But we should say --

19          **MR. ALEXANDER:** That's all we have.

20          **COMMISSIONER JACOBS:** -- up to seven days?

21          **MS. CALDWELL:** I think that would be  
22 appropriate.

23          **COMMISSIONER JACOBS:** The parties would have  
24 the opportunity up to seven days prior to hearing to  
25 amend -- to reflect the issuance of the FCC's Order.

1           **MR. ALEXANDER:** And/or if no Order has been  
2 released, up to seven days.

3           **COMMISSIONER JACOBS:** If not issued by then,  
4 then they to it post-hearing?

5           **MR. ALEXANDER:** With regard to --

6           **COMMISSIONER JACOBS:** Now, how will we do  
7 that? Will they file supplemental or briefs? We  
8 wouldn't do testimony. It would be briefs,  
9 post-hearing?

10          **MS. CALDWELL:** I think it would have to be  
11 in a post-hearing brief to that extent. I think if  
12 you get -- if you filed supplemental testimony, then  
13 you would not have the opportunity for cross  
14 examination.

15          **COMMISSIONER JACOBS:** Right. You wouldn't  
16 do testimony at post-hearing. I would suggest you do  
17 in briefs.

18          **MR. ADELMAN:** Then, Your Honor, that would  
19 be appropriate. These are legal issues.

20          **MR. ALEXANDER:** We agree.

21          **MR. ADELMAN:** The only thing I wanted a  
22 clarification of, if I could, is that on the seventh  
23 day prior to the hearing, if there has been no order,  
24 the parties are asking to simply file testimony with  
25 regard to the press release, the knowledge that we

1 have at that time.

2           **COMMISSIONER JACOBS:** Yes, but you wouldn't  
3 want to hang too much of a hat on -- let me get it,  
4 let me just say I would be very cautious about doing  
5 that. But, yeah, you're free to limit --

6           **MR. ALEXANDER:** Limited testimony, how about  
7 that?

8           **MR. ADELMAN:** Base your ruling on a press  
9 release?

10          **MR. GOGGIN:** I understand.

11           There was one other preliminary matter with  
12 regard to the witnesses. DeltaCom has listed a number  
13 of witnesses for direct and no witnesses for rebuttal.  
14 BellSouth has listed a number of witnesses for direct  
15 as well as rebuttal.

16          **MR. ADELMAN:** Are we going into the Order of  
17 Witnesses Section now?

18          **MR. GOGGIN:** Yeah, we're in Part V, I  
19 believe. Oh, I'm sorry.

20          **COMMISSIONER JACOBS:** We were in V, but I  
21 think what we're doing now is more appropriately in  
22 VI.

23          **MR. GOGGIN:** I skipped a Roman numeral.  
24 Excuse me.

25          **MR. ADELMAN:** With regard to VI, you know, I

1 think this may be the same issue. Our intent was --  
2 we filed both direct and rebuttal testimony for all of  
3 our witnesses, and it's listed here as just direct.  
4 And that my error in my Prehearing Statement. It was  
5 intended that Witnesses Rozycki, Thomas, Hyde and Wood  
6 all be both direct and rebuttal.

7 **MR. GOGGIN:** That was the point that I going  
8 to make, is that we have no objection to them also  
9 addressing the testimony that they prefiled as  
10 rebuttal. And the parties have agreed that each  
11 witness would appear only once, rather than being  
12 called up once for direct and once for rebuttal.

13 **MR. ADELMAN:** Okay.

14 **COMMISSIONER JACOBS:** Very Well. So as I  
15 understand the revisions to be, Mr. Milner will adopt  
16 the testimony of Mr. Thierry, and I guess also be  
17 listed as testifying as to Issue 36. And all of ITC's  
18 witnesses will show having rebuttal testimony.

19 **MR. GOGGIN:** Right. There are, I should  
20 note, a few witnesses for whom BellSouth is submitting  
21 only rebuttal testimony. And I presume they would  
22 just be at the end where they appear now.

23 **COMMISSIONER JACOBS:** That should be fine.  
24 Is that okay?

25 **MR. ADELMAN:** No objection, Commissioner.

1           **COMMISSIONER JACOBS:** Okay. Now, Basic  
2 Positions. What I would ask here is that you guys  
3 just get with Staff and if you have any significant  
4 revisions to your basic positions, you can just do  
5 them that way. I suspect there may be some, but I  
6 just leave that to your discretion.

7           Issue 1, which we struck.

8           Issue 2 is reformed to be consistent with  
9 20(b).

10

11           **MR. GOGGIN:** I'm sorry, I misunderstood. I  
12 thought Issue 2 would be struck, but that to the  
13 extent that it was under 20(b --)

14           **COMMISSIONER JACOBS:** Under 20(b), yes.  
15 Correct.

16           Issue 3(a), any modifications to positions  
17 there?

18           **MR. ADELMAN:** Well, Commissioner, just to be  
19 clear, as more fully set forth in our testimony, we  
20 have -- what this issue is about is the definition of  
21 parity. We believe the contract should include a  
22 definition, and they believe it should not. So our  
23 initial position is that it should include a  
24 definition. And we have proposed the definition we  
25 would use. It's not necessarily word-for-word what's



1 contained in this summary of positions.

2 **COMMISSIONER JACOBS:** I understand.

3 **MR. ALEXANDER:** And just to be clear,  
4 bellSouth gave DeltaCom a definition of parity. And  
5 we are just not clear why it should be in the  
6 contract. But it -- you know, as our position sets  
7 forth, we gave them an issue --

8 **COMMISSIONER JACOBS:** Should we change the  
9 issue? No, I guess that's adequate. That's adequate.  
10 Okay. Very well.

11 Now, there's only an issue -- I only see an  
12 Issue 3(a), so no 1s, 2s or 3s, okay? Is that  
13 correct? No subissues of 3(a)?

14 **MS. CALDWELL:** That's correct.

15 **COMMISSIONER JACOBS:** Okay. Issue 3(b)(1),  
16 (1). Pursuant to this definition -- should we say  
17 pursuant to the definition resolved in Issue 3(a), so  
18 it would be actually clear? If I understand -- if one  
19 party prevails, there is a definition in the contract.  
20 If that party doesn't prevail, there is no definition  
21 in the contract. Okay. So should we say whatever  
22 definition comes out of it? Because in that instance  
23 you'll some other -- a definition from some other  
24 statute.

25 **MR. GOGGIN:** We have no objection to that.

1           **COMMISSIONER JACOBS:** Okay. One definition.  
2 That is resolved in Issue 3(a).

3           **MS. CALDWELL:** To be clear, should it say  
4 pursuant to the definition of parity resolved in Issue  
5 3(a)?

6           **COMMISSIONER JACOBS:** That's fine. That's  
7 fine. Yes, ma'am.

8           Okay. Okay. Any revisions to the parties'  
9 positions in 3(b)(1)?

10          **MR. ADELMAN:** No, Commissioner, other than  
11 we will, pursuant to your previous ruling, be  
12 providing testimony as it relates to the MSAG and  
13 technically on --

14          **COMMISSIONER JACOBS:** Now, it maybe useful,  
15 because I understand there are some issues that we may  
16 need to -- I'm wondering -- this may be a good time do  
17 this. I saw several issues in here that had been  
18 resolved or closed. I saw several issues where one  
19 party indicated that it had been resolved but the  
20 other party didn't. Would it be useful to do that  
21 now, or should we do it as we go through them? How  
22 would you like to do that?

23          **MR. ADELMAN:** We are prepared to do it as we  
24 go through it. I think just for convenience that may  
25 be the way to do it. And I believe in every case that

1 where one party indicates the issue is resolved that  
2 it is resolved, but --

3           **COMMISSIONER JACOBS:** Okay. Then we'll  
4 proceed. We'll go issue by issue.

5           Issue 3(b)(2), any modification there?  
6 Okay.

7           Issue 3(b)3, this is the one where the  
8 parties indicate that it has no resolve?

9           **MR. ADELMAN:** Yes.

10           **COMMISSIONER JACOBS:** Okay. So it can be  
11 stricken from the prehearing order.

12           Issue 3(b)(4), any modifications to the  
13 parties' positions?

14           On to 3(b)(5).

15           **MR. ALEXANDER:** I guess -- it's not a  
16 modification, but I guess, just to be honest, I don't  
17 understand DeltaCom's position on 3(b)(4), but we can  
18 take that up at the hearing.

19           **COMMISSIONER JACOBS:** Yes. If they want to  
20 change it -- we'll leave it.

21           3(b)(6).

22           **MR. ADELMAN:** Was that 3(b)(4) that you just  
23 referred to or 3(b)5?

24           **MR. ALEXANDER:** 3(b)(4), Access to  
25 Numbering --

1           **MR. ADELMAN:** Well, I'm sorry.

2           **COMMISSIONER JACOBS:** No, we struck 3(b) --  
3 I'm sorry. No, no. 3(b)(4) is that one that we were  
4 just at. You're right. And there were no revisions  
5 to 3(b)(4).

6           **MR. ADELMAN:** Correct, no revisions.

7           **MR. ALEXANDER:** Correct.

8           **COMMISSIONER JACOBS:** And then we move to  
9 3(b)(5).

10          **MR. ADELMAN:** No revisions.

11          **COMMISSIONER JACOBS:** 3(b)6.

12          **MR. ALEXANDER:** That issue is resolved.

13          **COMMISSIONER JACOBS:** Okay. So 3(b)6 is  
14 stricken.

15                 How about 7 and 8 and 9?

16          **MR. ALEXANDER:** They're all resolved.

17          **COMMISSIONER JACOBS:** Okay. So 3(b)6 --

18          **MR. ADELMAN:** Not so fast, Commissioner.

19 Let me just make sure.

20          **COMMISSIONER JACOBS:** I'm sorry.

21          **MR. ADELMAN:** Your Honor, can we --

22          **COMMISSIONER JACOBS:** It may be a good idea.  
23 She looked over here. I forgot all about this young  
24 lady over here typing. Why don't we take about a  
25 five-minute break?

1 (Brief recess.)

2

3 **COMMISSIONER JACOBS:** Go back on the record.

4 Let's see, we were at Issue 4. We were done with  
5 Issue 3. Issue 4. We were beyond that, weren't we?

6 **MS. CALDWELL:** I was -- we're on 3(b)(7)  
7 which is about Page 20 of the Prehearing Order draft.

8 **COMMISSIONER JACOBS:** I'm sorry. You guys  
9 were going to review whether or not it was okay to  
10 extract 6, 7, 8 or 9.

11 **MR. ADELMAN:** And we have determined those  
12 issues are resolved.

13 **COMMISSIONER JACOBS:** We'll strike those  
14 issues. That takes us to Issue 4. I show that  
15 Issue 4 is available to be stricken as well?

16 **MR. ADELMAN:** It is resolved.

17 **MR. ALEXANDER:** That's correct.

18 **COMMISSIONER JACOBS:** Issue 5, any  
19 modifications to your positions? (No response.)

20 Issue 6. No changes to Issue 6.

21 Issue 7. Moving along now. Issue 8, any  
22 modification? 8(A). Any modifications.

23 **MR. ALEXANDER:** Excuse me, Commissioner.  
24 Diana, did you have a question on Issue 7, a  
25 clarification?

1           **MR. ADELMAN:** You asked about which  
2 Commission the issue refers to.

3           **MS. CALDWELL:** Yes.

4           **MR. ADELMAN:** As I recall.

5           **MS. CALDWELL:** I think, just in stating the  
6 position, "until the Commission makes a decision" I'd  
7 like to know whether it's supposed to be the FCC or  
8 the FPSC.

9           **COMMISSIONER JACOBS:** I have that question  
10 as well. This is intended to refer to the FCC, right?

11           **MR. ADELMAN:** No, sir, it's intended to  
12 refer to this Commission making a decision regarding  
13 UNE combinations, but we acknowledge that this  
14 Commission's decision will necessarily relate to the  
15 FCC order.

16           **COMMISSIONER JACOBS:** Is that your  
17 understanding as well, Mr. Cotton (sic)?

18           **MR. ALEXANDER:** Actually it definitely  
19 does -- I'm sorry.

20           **COMMISSIONER JACOBS:** I'm sorry, I said  
21 Cotton, I meant Goggin.

22           **MR. GOGGIN:** I'm going to defer to  
23 Mr. Alexander.

24           **MR. ALEXANDER:** It refers to both. Clearly  
25 the FCC is going to make a pronouncement about this.

1 The FCC is the Commission -- I was going to go back  
2 and check the petition. I know at the issue ID this  
3 may have been one that had been rewritten. If you'll  
4 give me a moment, I'll try to find that issue from the  
5 original petition.

6 I think it clearly -- since both Commissions  
7 have proceedings on this issue, that it should be both  
8 Commissions; not just the state commission but the  
9 FCC.

10 **MR. ADELMAN:** We wouldn't object to  
11 modifying the language to say "until the FCC and the  
12 Florida PSC make a --"

13 **MR. ALEXANDER:** That's acceptable to  
14 BellSouth.

15 **COMMISSIONER JACOBS:** Sounds good. Great.  
16 So with that modification, Issue 7.

17 We'll move to Issue 8(a). Any modifications  
18 there? (No response.)

19 8(b). Okay. Issue 9. Is that to be  
20 resolved?

21 **MR. ADELMAN:** It is resolved.

22 **MR. ALEXANDER:** Yes, as well as 10.

23 **COMMISSIONER JACOBS:** Issue 9 and 10 are  
24 resolved and stricken.

25 Issue 11. Any modifications of the parties

1 positions? (No response.)

2 Issue 12(a). No changes. Issue 12(b). Any  
3 modifications? We'll move to Issue 13. I'll just go  
4 ahead and say if you have any modifications, just  
5 speak up; otherwise, we'll move on.

6 Issue 14. (No response.)

7 **MR. GOGGIN:** Commissioner, I think  
8 Issue 14 -- (Simultaneous conversation.)

9 **COMMISSIONER JACOBS:** I'm sorry, you're  
10 right. That was issue -- 14 was stricken in the  
11 motion. Issue 15. And 16 is stricken also, right?

12 **MR. GOGGIN:** Right.

13 **COMMISSIONER JACOBS:** We'll move to  
14 Issue 17. I have a question mark.

15 I was wondering whether or not there's a  
16 disagreement but I believe now there is still a  
17 disagreement.

18 **MR. ADELMAN:** There is a dispute with regard  
19 to that issue.

20 **COMMISSIONER JACOBS:** Issue 18, should that  
21 be -- is that resolved?

22 **MR. ALEXANDER:** Yes, it is.

23 **COMMISSIONER JACOBS:** Issue 19 as well?

24 **MR. ALEXANDER:** Yes, it is.

25 **COMMISSIONER JACOBS:** Issue 20(a). Changes?



1 20(b).

2           **MS. CALDWELL:** Commissioner, I'd like to  
3 just bring out one additional point on 20(b). I know  
4 that you had moved to leave issue in.

5           I think it needs to be clarified whether in  
6 waiving these recurring -- or these applicable  
7 nonrecurring charges, that in that case if the charge  
8 is waived, when BellSouth comes back and actually the  
9 work, is BellSouth paid or is that fee waived when  
10 BellSouth does the work?

11           **COMMISSIONER JACOBS:** Okay. What's the  
12 intent?

13           **MR. ADELMAN:** Commissioner, we would submit  
14 that where BellSouth misses or delays a cutover date  
15 that the nonrecurring charge be waived so that there's  
16 a financial consequence associated with  
17 nonperformance. So that's indeed even when the  
18 cutover is completed that the NRC be waived. We think  
19 they need an incentive to meet it the first time.

20           **MR. GOGGIN:** It was also BellSouth's  
21 interpretation that they intended this to be some form  
22 of penalty, and that while we obviously disagree with  
23 the conclusion, that's how we understood the issue to  
24 be framed.

25           **MR. ADELMAN:** And we would intend to

1 discuss, or incorporate our discussion which related  
2 to Issue 2 along with 20(b) per your earlier ruling.

3           **MS. CALDWELL:** And it would be Staff's  
4 position that if BellSouth had actually performed  
5 these services even though eventually that if you --  
6 if they were not allowed to collect, it would be  
7 Staff's position that not being paid for that service  
8 would be some type of penalty, and, therefore, would  
9 not be within the Commission's jurisdiction.

10           **COMMISSIONER JACOBS:** That's interesting.  
11 Is there -- I guess I can't do that. I'm  
12 reconsidering my rationale on this.

13           What I'd like to do is have the parties  
14 explore -- first, let me say this, make sure about  
15 this: I think I'm persuaded by Staff that if in the  
16 event of BellSouth ultimately comes and completes the  
17 cutover, and there's no payment -- and, again, this is  
18 only addressing nonrecurring charges so you get paid  
19 your recurring charges in any regard, but there's no  
20 payment of nonrecurring charges -- it raises the  
21 argument as to whether or not it's a penalty. And the  
22 dispute is there. That's not resolved by this -- by  
23 this language being in the arbitration agreement.

24           I'm wondering if -- well, let me suggest  
25 that maybe you guys can sit down and figure out a way

1 of framing this such that it can invade the prospect  
2 of being a penalty. And I will toss this out: The  
3 thought occurs that normally, in the normal course of  
4 business, there are these provisions of the -- what,  
5 net 30 or something of that sort where, you know --  
6 I'm wondering if some provision like that could be put  
7 in here?

8           The idea that commitments of the ILEC are  
9 important to the ALEC in committing to its services I  
10 think is really important. And other than that, I  
11 won't state much more because I don't know how you  
12 would want to resolve that. I'd hope you can sit down  
13 and figure out a way of framing this issue, so that it  
14 captures the idea that what you want to say. You want  
15 to highlight the issue that you're losing considerable  
16 benefit if this cutover fails to occur by reason of  
17 actions of the ILEC.

18           **MR. ADELMAN:** All we're asking is the  
19 opportunity to present evidence; just our day in  
20 court. If you disagree with us after presenting  
21 evidence, we certainly respect that. We just want to  
22 present our argument.

23           **COMMISSIONER JACOBS:** Right. And failing  
24 the parties' ability to rephrase this issue, and if it  
25 remains that the issue would state that BellSouth

1 would waive all recurring charges for that line, even  
2 for a minor delay, it does -- I'm going to go with  
3 Staff's ruling it does sound like a penalty. However,  
4 again, I'll restate my earlier position is that with  
5 regard to whether or not it falls within the  
6 definition of parity, okay? Testimony on this issue  
7 is particularly relevant as to parity, okay, on  
8 whether or not there are delays.

9           Let me step back for a moment. Not whether  
10 or not the weight should occur, but whether or not the  
11 delays occurred and the extent to which there are  
12 impacts to the parties. I think that's appropriate in  
13 the parity issue.

14           **MS. CALDWELL:** Are you asking the  
15 Issue 20(b) to be rephrased?

16           **COMMISSIONER JACOBS:** Yes. Yes. I am. I'm  
17 asking the parties to sit down -- I'm expecting that  
18 that will be a difficult transition, but I'm asking  
19 the parties to see if they can rephrase this issue so  
20 that it highlights the issue that I think ultimately  
21 is grounding here, is that there are impacts, and  
22 whether or not there is some way for those impacts to  
23 be identified in this agreement, absent there being  
24 some penalty imposed upon BellSouth, okay. I think  
25 we've come to the conclusion that we're in the

1 jurisdiction to arbitrate the provisions in this  
2 agreement that imposed such a penalty. If the parties  
3 can come back with a rephrase --

4 **MS. CALDWELL:** I want to hesitate with that  
5 because we're here today to set the issues and we need  
6 to set them today.

7 **COMMISSIONER JACOBS:** I will defer on this  
8 issue to see if they can do it very quickly. If they  
9 can't, then I assume that we can. Absent that, then  
10 my ruling is we strike Issue 20(b).

11 **MR. ADELMAN:** Your Honor, if I could, just  
12 to help us as we move away from here and try to  
13 rephrase the issue, just to be clear, our position is  
14 that we will pay for services when services are  
15 performed. So if we want a cutover made on a certain  
16 day, if it's made on that day, no waiver. But when  
17 the cutover is made three days later, then the service  
18 hasn't been performed. That is our position and that  
19 the genesis of our position is that it shouldn't be  
20 paid. That when we schedule a cutover on Monday, we  
21 pay for a cutover on Monday. If it occurs on  
22 Wednesday, we didn't get Monday cutover. We shouldn't  
23 have to pay for it. That's our position. We don't  
24 think it's a penalty.

25 **COMMISSIONER JACOBS:** What you just said, in

1 my mind, is an effective issue that you incur certain  
2 harms if it doesn't occur. The next step is that  
3 you're asking this Commission to arbitrate language  
4 which sets and imposes some recourse, some remedy for  
5 whatever it is you've lost. And what I'm suggesting  
6 to you is that the next step is a bar that we  
7 understand we can't cross. I think you guys could  
8 come up with something that highlights the fact that  
9 you incurred those losses, and maybe even state what  
10 they are in the contract. But we can't -- it's my  
11 understanding of the statutory and procedural  
12 precedence of the Commission, we can't have a issue  
13 where you set a process and an amount by which  
14 BellSouth would remedy that for you.

15 **MR. ADELMAN:** I appreciate that, Your Honor.  
16 I guess I would just offer that you've already  
17 indicated you're going to exclude the issue and then  
18 you direct us to try to work on language, there's not  
19 much negotiating leverage I have. I would be very  
20 surprised if this issue, the language was renegotiated  
21 in light of your ruling.

22 **COMMISSIONER JACOBS:** Well, I hope I've  
23 given you some guidance here by what I'm willing to  
24 entertain and the scope of that. I think there's some  
25 flexibility on both sides here. And if you guys can't

1 come up with something that approaches that, then,  
2 again, I think you still have the option of presenting  
3 the evidence.

4           The evidence I think you want to present  
5 here are whether or not we can remedy, give you the  
6 appropriate remedy that you think you deserve, I  
7 think, is a subpart of the real issue you really want.  
8 And that is, that you are incurring impact and  
9 consequences as a result of delays, any delays that  
10 might occur. And the issue -- here's an issue: Can  
11 we arbitrate a process by which this contract would  
12 make a statement as to what those are, whether or not  
13 you remedied for those or not? We don't -- you know,  
14 that's an interesting question for me. Quite frankly,  
15 I don't know the answer. Could you have a provision  
16 in this Interconnection Agreement that makes some  
17 statement what the impacts to you are in the event of  
18 a delay?

19           **MR. ADELMAN:** And that's precisely what we  
20 have.

21           **COMMISSIONER JACOBS:** I think what this is  
22 is a step beyond that, but that's a debate for another  
23 day. But I think it's arguable whether or not we have  
24 the jurisdiction to put that in. I won't ask you to  
25 make a comment on that right now, but I think that's

1 an interesting proposition to me.

2 But anyway, for the moment, the ruling on  
3 Issue 20(b) is this: I'm going to defer it for the  
4 moment to see if there is the opportunity to rephrase  
5 it that the parties can agree on. And then we'll come  
6 back and then we'll determine whether or not it's to  
7 be stricken or not based on that, okay?

8 **MS. CALDWELL:** I would suggest that maybe we  
9 continue here, take a five-minute break. Reconvene.

10 **COMMISSIONER JACOBS:** Go over the -- on with  
11 the rest of it. That would be my suggestion.

12 That take us to Issue 20(c).

13 **MR. ADELMAN:** That issue is resolved.

14 **COMMISSIONER JACOBS:** Issue 21. Any changes  
15 there?

16 Issue 22. On this one, under ITC's  
17 position, BellSouth makes reference to a proposed  
18 definition by ITC, but I didn't see that particular  
19 definition listed in their position. Quite frankly, I  
20 didn't see a real reference to it. Is that petition  
21 filed, Issue 5(c).

22 **MR. ADELMAN:** I believe that's right.  
23 That's what's referenced here. That's contained  
24 within the proposed Interconnection Agreement. It is  
25 al contained within the prefiled testimony.



1           **COMMISSIONER JACOBS:** Would you want to make  
2 a specific reference to that here? Just a reference,  
3 to it; you wouldn't have to include it. I'm sorry,  
4 that is a petition Issue 5(c) that's what you're  
5 telling me?

6           **MR. ADELMAN:** Yes, Commissioner.

7           **COMMISSIONER JACOBS:** Okay. I'm sorry.  
8 That's sufficient.

9           **MR. ADELMAN:** If you want to give me a  
10 moment on that I'll double-check.

11           **MR. GOGGIN:** We agree that it may be helpful  
12 for clarity's sake to propose a definition that  
13 ITC^DeltaCom would have the Commission adopt be  
14 listed, but we also think it's important to note that  
15 the issue is whether or not it should be defined in  
16 the agreement; not what should that definition be.

17           **MR. ADELMAN:** Obviously, if you determine  
18 that it should not be a defined term, then we need not  
19 argue about what the definition -- we, of course,  
20 argue, that the --

21           **COMMISSIONER JACOBS:** It should be defined.

22           **MR. ADELMAN:** -- it should be defined and  
23 then we have proposed a definition.

24           **COMMISSIONER JACOBS:** I wanted to clear on  
25 that. In fact, that's exactly what I want to clear

1 on.

2 Are you suggesting then that we more  
3 precisely state that in the Order: Should it be  
4 defined, and, if so, how?

5 **MR. ADELMAN:** That would accomplish the  
6 same, yes.

7 **COMMISSIONER JACOBS:** Is that agreeable to  
8 the parties?

9 **MR. ADELMAN:** Yes.

10 **COMMISSIONER JACOBS:** We move to Issue 23.  
11 No changes there. Then move to Issue 24.

12 **MS. CALDWELL:** Commissioner, if we could go  
13 back, I'd like to ask a clarification of ITC. On  
14 Page 44 of the order, after the bolded -- on Line 5 is  
15 some bolded writing.

16 **MR. ADELMAN:** Ms. Caldwell, I'm sorry, I  
17 think my pagination is different because I got the  
18 e-mailed version. Can you just tell me which issue.

19 **MS. CALDWELL:** Under Issue 23 it's  
20 ITC^DeltaCom's fourth paragraph, and it's the sentence  
21 that states "Subsequent to this pronouncement, the  
22 states of California, Maryland and Florida have all  
23 determined that compensation is due when traffic is  
24 determined to an ISP." It's my understanding that  
25 Florida has not made this determination yet, and would

1 ask Florida be stricken from that reference.

2           So it would just say "California and  
3 Maryland."

4           **MR. ADELMAN:** We don't object to striking  
5 Florida from our summary.

6           **COMMISSIONER JACOBS:** Very well.

7           **MR. ALEXANDER:** I had some good questions  
8 about that. I'm just kidding.

9           **COMMISSIONER JACOBS:** Issue 24. No  
10 revision.

11           Issue 25. Is that resolved?

12           **MR. ALEXANDER:** Yes.

13           **COMMISSIONER JACOBS:** 26 and 27.

14           **MR. ALEXANDER:** And 28.

15           **COMMISSIONER JACOBS:** And 28. Issue 29.  
16 Issue 30. Resolved.

17           **MR. ALEXANDER:** Yes.

18           **COMMISSIONER JACOBS:** 31, 32 and 33.  
19 Issue 34. No revisions. Issue 35 is resolved?

20           **MR. ALEXANDER:** Yes.

21           **COMMISSIONER JACOBS:** Should have 36. No  
22 revisions. Issue 37 is resolved. ITC, is that  
23 resolved for you?

24           **MR. ADELMAN:** Yes, it is.

25           **COMMISSIONER JACOBS:** Issue 38. Revisions.

1 (No response.)

2 39. Issue 40(a). Issue 40(b). Issue 41.

3 That issue is still in.

4 **MR. ALEXANDER:** If my notes were correct,  
5 Your Honor, I believe the parties will rephrase that.

6 **COMMISSIONER JACOBS:** Yes. Issue 42.  
7 Issue 43. Issue 44. And 45. I believe we kept that  
8 with the option that if you want to, you all could  
9 chose not to have --.

10 46 is stricken: Issue 47 is resolved.

11 **MR. ADELMAN:** Well, yes.

12 **COMMISSIONER JACOBS:** I'll restrict that.  
13 I'm sorry. Issue 48.

14 **MS. CALDWELL:** Staff would like to make a  
15 clarification on its position that it state on Line 3  
16 of the issues is not within the scope of the  
17 arbitration proceeding, rather than within the  
18 jurisdiction of the Commission.

19 **COMMISSIONER JACOBS:** Okay. Issue 49 is  
20 stricken. And Issue 50 is stricken.

21 Okay. That takes us to the exhibit list.  
22 I'll just go by each witness and if you have any  
23 revisions, you can just so state. Mr. Rozycki.

24 **MR. ADELMAN:** I believe that's the correct  
25 list.

1           **COMMISSIONER JACOBS:** Okay. Mr. Hyde.

2           **MR. ADELMAN:** That appears to be correct.

3           **COMMISSIONER JACOBS:** Mr. Thomas.

4           **MR. ADELMAN:** Again, that appears to be  
5 correct.

6           **COMMISSIONER JACOBS:** And Wood.

7           **MR. ADELMAN:** That appears -- that single  
8 exhibit.

9           **COMMISSIONER JACOBS:** Mr. Varner.  
10 Ms. Caldwell.

11           **MR. ALEXANDER:** Mr. Varner appears to be  
12 correct as does Ms. Caldwell.

13           **COMMISSIONER JACOBS:** And Mr. Milner.  
14 Mr. Pate.

15           **MR. ALEXANDER:** Yes. On Mr. Milner and, yes  
16 on Mr. Pate.

17           **COMMISSIONER JACOBS:** Mr. Thierry.

18           **MR. ALEXANDER:** Yes.

19           **COMMISSIONER JACOBS:** Mr. Coon.

20           **MR. ALEXANDER:** Yes.

21           **MR. GOGGIN:** If I could just ask that to the  
22 extent -- and I haven't been through all of the  
23 exhibits in detail since today's motions were handled  
24 obviously, but to the extent that any of the exhibits  
25 relate solely, or in part, to the issues that have

1 been excluded, that we also withdraw those exhibits,  
2 both parties.

3           **MR. ADELMAN:** Your Honor, again, just so the  
4 expectation is clear, we presented this in the  
5 interest of or arbitrating an agreement which meets  
6 the acts of parity requirement. So the expectation is  
7 clear, some of these exhibits relate to the  
8 BellSouth's requirement to provide nondiscriminatory  
9 access.

10           **MR. GOGGIN:** Obviously to the extent that  
11 they relate to issues such as nondiscrimination or  
12 parity or other issues that are still in the case we  
13 have no objection. But to the extent that they relate  
14 solely to, for example, proposing a tier of penalties,  
15 where that issue is not subject to arbitration, we  
16 think to that extent such an exhibit should be  
17 withdrawn.

18           **COMMISSIONER JACOBS:** Okay. I think we're  
19 pretty clear on that. If there are particular  
20 difficulties at the time the witness comes up, you can  
21 raise those issues. But I think it's pretty clear.

22           **MR. ADELMAN:** Thank you.

23           **MR. ALEXANDER:** Thank you.

24           **MS. CALDWELL:** Staff would also like to ask  
25 the parties to provide by Thursday evening, or

1 Thursday afternoon, if you want to go through and give  
2 me your witness list, and the revised issues that  
3 they'll be testifying to that way I can insert them  
4 directly into the order. And also to the extent that  
5 the witness list is revised any, to provide your  
6 witness list with the list of exhibits as well, and  
7 that would be Thursday afternoon, close of business or  
8 actually first thing Friday morning.

9           **MR. ALEXANDER:** What was the first part of  
10 that?

11           **MS. CALDWELL:** Both the witness list and so  
12 you can specify whether they are for rebuttal and  
13 direct, and to what issues they are testifying to, and  
14 the same with the exhibit list, if there are any  
15 modifications, if you'd just provide that in hard  
16 copy.

17           **MR. ALEXANDER:** List of them.

18           **MS. CALDWELL:** Electronic would be helpful.

19           **MR. ADELMAN:** Will the issues be renumbered  
20 in light of today's --

21           **MS. CALDWELL:** I think generally we do. And  
22 what I'll try to do is as soon as possible is get a  
23 list of issue just the issue with the issue numbers --  
24 oh, we do not. We do not renumber.

25           **MR. ALEXANDER:** I was going to point out as

1 a practical matter the testimony has already been  
2 filed.

3 **MS. CALDWELL:** Right. So we will not  
4 renumber. So it will go directly to the numbers as  
5 they appear here, so well have some --

6 **MR. GOGGIN:** We did it in ICG but I think as  
7 a general rule it's not been done.

8 **MS. CALDWELL:** I think in this particular  
9 case it would be too confusing if we did renumber  
10 them, so let's move forward with just the numbers  
11 stricken. Thank you.

12 **COMMISSIONER JACOBS:** Very well. That takes  
13 care of all of the issues in the Draft Prehearing  
14 Order.

15 At this point, I think it would be  
16 appropriate to see if we can resolve 20(b). You  
17 guys -- if you want to take a few minutes, we can  
18 recess for a few moments and give you an opportunity  
19 to discuss it if you think it would be worthwhile.

20 **MS. CALDWELL:** Maybe if we could come back  
21 at 12:30.

22 **COMMISSIONER JACOBS:** Okay. Is that  
23 reasonable? Okay. We'll recess until 12:30.

24 (Recess taken.)

25 **MR. ALEXANDER:** I think the parties have



1 reached a resolution of this issue and I would give  
2 you credit for prompting that.

3           What we will propose on the record and so  
4 that DeltaCom had an opportunity to accept or seek  
5 clarification, is that we really couldn't rewrite the  
6 issue. We discussed what you had ruled about  
7 penalties and whether or not we could come up with  
8 some way to recast the issue in a parity context. But  
9 in doing so we realized we can reach an agreement on  
10 what DeltaCom is willing to accept and what BellSouth  
11 is will to offer. And in that light, I propose this  
12 for the record: BellSouth will only charge the  
13 nonrecurring charge one time when it misses -- excuse  
14 me, when it performs a cutover. If, for example, the  
15 cutover is scheduled for a Monday and BellSouth  
16 performs it on Tuesday. We still collect for  
17 performing that nonrecurring charge associated with  
18 that cutover but it will only be applied on the day it  
19 takes place, on a Tuesday. They would not have to pay  
20 for the missed one on Monday. But when we actually  
21 perform the service, do the cutover, the nonrecurring  
22 charge would still be applicable but only be paid one  
23 time and it would be at the time the service is  
24 performed.

25           **MR. ADELMAN:** Commissioner, that's kind of

1 like getting the sleeves off their vest.

2           We don't agree, and respectfully disagree,  
3 with the Commissioner's ruling, and we certainly would  
4 like to preserve for the record that we believe the  
5 issue as it was pled and further refined in the  
6 Prehearing Order is appropriate for arbitration.

7           I believe you have ultimately ruled on the  
8 merits of this issue, and to the extent the issue  
9 could be rephrased as similar to what Mr. Alexander  
10 said, which is that where -- I'd like to use more  
11 precise language -- where BellSouth misses a scheduled  
12 cutover date, BellSouth shall waive the applicable  
13 nonrecurring charges for that missed date but may  
14 recover the nonrecurring charges when the cutover  
15 occurs. And I think I heard in the hallway that  
16 BellSouth agreed that that's what occurs today and  
17 that they would agree to language in the  
18 Interconnection Agreement which encapsulates or  
19 captures that process.

20           **MR. ALEXANDER:** No, we would not. Let me be  
21 clear and Mr. Adelman I think understood this. He's  
22 now saying that we're waiving a nonrecurring charge.  
23 There is no waiver because the activity for the which  
24 the nonrecurring charge did not occur.

25           **COMMISSIONER JACOBS:** Can we say delayed

1 collection? Delayed collection of the nonrecurring  
2 charge?

3 **MR. ADELMAN:** Sure. However you want to  
4 phrase it --

5 **COMMISSIONER JACOBS:** I'm touching on very  
6 shaky ground here -- I'm just trying to see if  
7 there's --

8 **MR. ALEXANDER:** It's actually not delayed  
9 collection. We will only collect when we perform the  
10 service. I think Staff correctly pointed out the  
11 problem with this issue is that we'll perform it at a  
12 later date and if you go back and recall what  
13 Mr. Adelman's respond was, he said if they started on  
14 Monday and don't do it until Wednesday, we don't want  
15 to pay it on Wednesday. Now I think we've reached an  
16 agreement we're still entitled to it because we're  
17 actually performing that cutover service.

18 All we're agreeing to do is to perform the  
19 service, collect at that time. Not collect when we  
20 schedule it and don't perform it and only collect one  
21 time, and that's BellSouth's proposal.

22 **MR. ADELMAN:** Commissioner, I think this is  
23 semantics. I think we agree, just doesn't want to use  
24 the word "waiver".

25 **MR. ALEXANDER:** That's correct we do not.

1           **MR. ADELMAN:** Just so I understand the  
2 context and so I understand your ruling. If we  
3 arrange to have a cutover done on a Monday, we tell  
4 our customer and we show up and BellSouth doesn't show  
5 up. But then it's rescheduled or delayed. And on a  
6 Wednesday BellSouth does show up and the cutover  
7 occurs. Then we would pay BellSouth for the Wednesday  
8 cutover even though the Monday cutover that we ordered  
9 never occurred; that we wouldn't pay for the Monday  
10 and the Wednesday. But would only pay one time. And  
11 I think they've agreed to that.

12           While we certainly want for the record to  
13 reflect that we respectfully disagree with your ruling  
14 with regard the way the issue was stated, and believe  
15 it's appropriate for arbitration, that we may not need  
16 to discuss this issue if they would agree to include  
17 in the contract which says, again in context, when  
18 Monday is missed but it's made up on Thursday, that  
19 we'll pay for Thursday. Of course, we believe it's  
20 not -- doesn't reflect what the Act requires or what's  
21 the best language for an enforceable and viable  
22 Interconnection Agreement. We accept your ruling.

23           **COMMISSIONER JACOBS:** What I think I hear is  
24 an agreement to address the substance of what you  
25 sought to get at on Issue 20(b). I'll leave it to the

1 drafters to come up with the final contract language.  
2 But it sounds like we will leave Issue 20(b) and  
3 address it at the beginning of the hearing as to  
4 whether it's finally resolved. Because I don't want  
5 to have the confusion of the testimony -- all of  
6 this -- I'm sorry, I'm contradicting myself, aren't I?

7           **MR. ADELMAN:** It's BellSouth's position that  
8 clearly as written, it's penalty or liquid damages  
9 they are asking us, and Mr. Adelman confirmed that,  
10 that if we don't do it, and we do it on a later date,  
11 then wants to waive the penalty -- I mean, to waive  
12 the nonrecurring charge.

13           **COMMISSIONER JACOBS:** It's not like you have  
14 an agreement as to the substance, essence of the --  
15 essence of your concern, but not as to what your  
16 chosen resolution of it would be. I think -- I agree  
17 that you preserve your options to discuss it however  
18 you may want it at a subsequent proceeding. But as to  
19 going forward here, let's do this: We're going to go  
20 ahead and strike 20(b), okay. We're going to go with  
21 the representation of the parties on the record that  
22 as to the terms of a tentative agreement, and the  
23 scope of that tentative agreement, and we would  
24 expect, at least that would hold.

25           Now, as to the further ramifications and the

1 things that go beyond the scope of that agreement, I  
2 leave that to the parties and how you would choose to  
3 resolve that. Is that fair enough?

4 **MR. ADELMAN:** Yes, Commissioner. Again, to  
5 be perfectly clear, we're not proposing to settle this  
6 issue but rather to come to language which captures  
7 your ruling.

8 **COMMISSIONER JACOBS:** Correct. Okay.

9 **MR. ADELMAN:** Thank you.

10 **COMMISSIONER JACOBS:** That's a fine  
11 statement from me, but I think we understand what the  
12 scope of your agreement is and we understand what the  
13 ruling was. I want to make sure we don't leave here  
14 with any confusion about that.

15 And to the extent that the ruling, you know,  
16 counters what you feel like you'd like to pursue,  
17 that's, again, up to you. That's fine with me. Okay?

18 **MR. ALEXANDER:** Anticipating -- we agree and  
19 understand what's said, but I also understand that  
20 they are wanting to get something out of this issue  
21 and the contract, and BellSouth's made their offer.  
22 I'm not sure what else we could do.

23 **COMMISSIONER JACOBS:** As to the contract  
24 language what represents what I hear to be your  
25 agreement here, I hope that you'll be consistent with

1 achieving that language. Okay as to your ability and  
2 your options to pursue rights, privileges beyond that  
3 agreement, I think you can pursue that as you chose.  
4 But as to this proceeding, Issue 20(b) is stricken.  
5 And then I hope you guys can come up with the kind of  
6 language that are reflect your positions there. Okay?  
7 Anything else?

8 **MS. CALDWELL:** I have nothing further.

9 **COMMISSIONER JACOBS:** This is scheduled for  
10 hearing when?

11 **MS. CALDWELL:** The Hearing begins on the  
12 27th and continues through the 29th.

13 **COMMISSIONER JACOBS:** If there are no other  
14 matters come before us today, this prehearing is  
15 adjourned.

16 (Whereupon, the hearing concluded at  
17 12:43 p.m.)

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1 STATE OF FLORIDA)  
 2 COUNTY OF LEON )

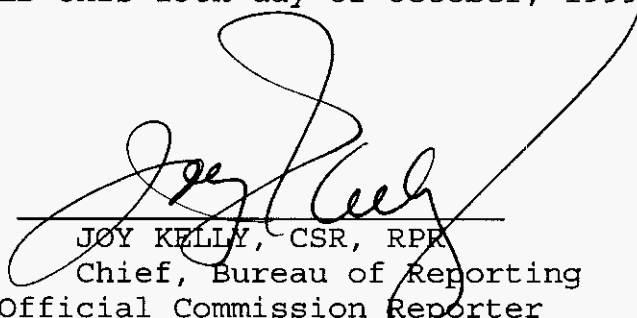
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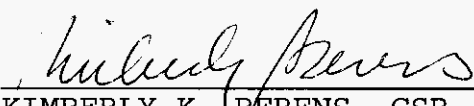
3 We, JOY KELLY, CSR, RPR, Chief, Bureau of  
 4 Reporting, Official Commission Reporter, and KIMBERLY  
 5 BERENS, CSR, RPR, Official Commission Reporter,

6 DO HEREBY CERTIFY that the Prehearing  
 7 Conference in Docket No. 990750-TP was heard by the  
 8 Prehearing Officer at the time and place herein  
 9 stated; it is further

10 CERTIFIED that we stenographically reported  
 11 the said proceedings; that the same has been  
 12 transcribed under our direct supervision; and that  
 13 this transcript, consisting of 120 pages, constitutes  
 14 a true transcription of our notes of said proceedings.

15 DATED this 13th day of October, 1999.

16  
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 18   
 19 \_\_\_\_\_  
 20 JOY KELLY, CSR, RPR  
 21 Chief, Bureau of Reporting  
 22 Official Commission Reporter  
 23 (850) 413-6732

24  
 25   
 \_\_\_\_\_  
 KIMBERLY K. BERENS, CSR, RPR  
 Official Commission Reporter



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