

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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Pages 113 - 285

COPY

GTE FLORIDA, INC.,  
Petitioner,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,  
Respondent.

CASE NO. 99-5368RP

PSC DOCKET NO. 980253-TX

BELLSOUTH TELECOMMUNICATIONS, INC.,  
Petitioner,

vs.

FLORIDA PUBLIC SERVICE COMMISSION,  
Respondent.

CASE NO. 99-5369RP

PSC DOCKET NO. 980253-TX

IN RE: Final Administrative Hearing

BEFORE Ella Jane P. Davis  
Administrative Law Judge

DATE: Tuesday, April 25, 2000

TIME: Commenced at 9:20 a.m.  
Concluded at 5:20 p.m.

LOCATION: 2727 Mahan Drive  
Building 3, Room D  
Tallahassee, FL

REPORTED BY: SANDI DIBENEDETTO-NARGIZ  
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PROCEEDINGS

1  
2 THE COURT: Let us be in order. We are  
3 reconvened. Ms. Caswell, do you have something  
4 you wanted to bring up?

5 MS. CASWELL: Yes, we have those additional  
6 exhibits we discussed this morning which are the  
7 transcripts of the Commission's agenda  
8 conferences.

9 THE COURT: Have you had a chance to look at  
10 these everyone?

11 MS. BROWN: Yes, Your Honor.

12 MR. GOGGIN: Yes.

13 THE COURT: You would like these marked as  
14 Joint Exhibit 66 through whatever they may turn  
15 out to be?

16 MS. CASWELL: Yes, there are four of them.

17 MR. GOGGIN: 66 through 69.

18 (Joint Exhibit Nos. 66 through 69 marked for  
19 identification.)

20 THE COURT: Joint 66 is the 3-10-98 agenda  
21 conference.

22 Joint 67 the 3-16-99 agenda conference.

23 Joint 68, is the 11-16-99 agenda conference.

24 Joint 69 is the 1-18-2000 agenda conference.

25 These are stipulated, Ms. Brown?

1 MS. BROWN: Yes.

2 THE COURT: Mr. Goggin?

3 MR. GOGGIN: Yes.

4 THE COURT: Ms. Caswell, since you are  
5 offering them, I assume you are. They are all  
6 admitted.

7 (Joint Exhibit Nos. 66 through 69 received  
8 in evidence.)

9 MR. GOGGIN: If I may, we have two other  
10 preliminary matters before we get back to  
11 witnesses, if you will.

12 The first is, as you suggested, we were able  
13 to discuss the issues surrounding issue number 6  
14 as it's been described on page 2 of the prehearing  
15 stipulation which is petitioner's claim that the  
16 proposed rules result from the material failure by  
17 the Commission to follow applicable rule-making  
18 procedures.

19 First, with respect to BellSouth's claim,  
20 that the oral notice of the SERC would constitute  
21 such material failure by the Commission to follow  
22 applicable rule-making procedures, BellSouth would  
23 like to withdraw that claim at this time.

24 Secondly, with respect to the issues  
25 surrounding the Joint Administrative Procedures

1 Committee communication with the Commission's  
2 staff, the parties have agreed to five  
3 stipulations of fact that I would like to read  
4 into the record subject to any objection to the  
5 wording of it, but I believe we had it worked out.

6 THE COURT: You read, the court reporter  
7 will take it down, and I will ask if there are any  
8 objections.

9 MR. GOGGIN: Stipulation number 1: Letter  
10 of John Rosner, R-o-s-n-e-r, senior attorney for  
11 the Joint Administrative Procedures Committee, to  
12 Dianna W. Caldwell, of the Public Service  
13 Commission, dated April 28, 1999, in parens, the  
14 JAPC letter, close parens, shall be admitted as a  
15 stipulated exhibited.

16 Number 2: The JAPC letter was received by  
17 the Commission.

18 Number 3: The JAPC letter was addressed by  
19 the staff in the November 4, 1999, Commission  
20 staff recommendation to the Commission in docket  
21 number 98-0253TX, which was considered by the  
22 Commission at its November 16 agenda conference.

23 Number 4: The JAPC letter itself was not  
24 submitted with the clerk of the Commission for  
25 inclusion in the record in docket number

1 98-0253TX.

2 Number 5: As of the date of this hearing,  
3 the Commission has not replied in writing to  
4 Mr. Rosner's letter.

5 THE COURT: Those are the stipulations,  
6 Ms. Caswell?

7 MS. CASWELL: Yes.

8 THE COURT: Those are the stipulations,  
9 Ms. Brown?

10 MS. BROWN: Yes, Your Honor.

11 THE COURT: Very well. I accept those  
12 stipulations. And if the court reporter would  
13 please indicate on the table of contents where  
14 that turns out when we transcribe.

15 What else can I do for you?

16 MR. GOGGIN: That is all.

17 THE COURT: Very well. The next witness.

18 MS. BROWN: We call Carolyn Marek.

19 THE COURT: Ms. Marek, if you weren't in  
20 the room when I gave my prior instruction, do you  
21 have a religious objection to swearing?

22 THE WITNESS: No.

23 Thereupon,

24 CAROLYN MAREK

25 was called as a witness, having been first duly sworn,

1 was examined and testified as follows:

2 THE COURT: Ma'am, you are going to have to  
3 speak up. I have an air conditioner over my  
4 head, I don't know what competition these other  
5 folks may have.

6 THE WITNESS: That's the first time I have  
7 ever been told that. I will do okay.

8 THE COURT: I notice people get real silent  
9 whenever they take that chair.

10 DIRECT EXAMINATION

11 BY MS. BROWN:

12 Q Please state your name and business address  
13 for the record.

14 A My name is Carolyn Marek. My address is 233  
15 Bramerton Court in Franklin, Tennessee, 37069.

16 Q By whom are you employed and in what  
17 capacity?

18 A I am employed by Time Warner Telecom as the  
19 vice-president of regulatory affairs for the southeast  
20 region.

21 Q How long have you been in that position with  
22 Time Warner Telecom?

23 A Since January 1995.

24 Q What are your job responsibilities?

25 A I am responsible for the regulatory and

1 legislative objectives for the nine southeast states.  
2 In that capacity, I manage the regulatory proceedings  
3 trying to establish a regulatory framework that is  
4 conducive to competition and also to direct the  
5 lobbying efforts.

6 Q What is your educational background,  
7 Ms. Marek?

8 A I have a bachelor of science degree in  
9 business administration from George Mason University in  
10 Fairfax, Virginia, and a Master's in business  
11 administration from Marymount University in Arlington,  
12 Virginia.

13 Q What is the purpose of your testimony in  
14 this case?

15 A The purpose of my testimony is to describe  
16 how the Commission's proposed Fresh Look rule would  
17 benefit consumers and also encourage the development of  
18 facility-based competition by allowing ALECs, or  
19 alternative local exchange companies such as Time  
20 Warner, to compete for customers who would otherwise be  
21 locked into long-term contracts.

22 Q Long-term contracts with whom?

23 A With the incumbent local exchange carriers.

24 Q Would you briefly describe the nature of  
25 Time Warner Telecom's business?

1           A     Yes. Time Warner Telecom is a fiber  
2 facilities-based communications carrier that offers the  
3 last mile broadband access or broadband connections for  
4 business customers for voice data and high-speed  
5 Internet access.

6           Q     When you say facilities-based, what do you  
7 mean?

8           A     Time Warner -- the Telecommunications Act  
9 actually envisioned three forms of competition.

10                     Facilities-based, which Time Warner is,  
11 where we offer predominantly -- our services  
12 predominantly over our own facilities, resellers who  
13 resell the services of the incumbent local exchange  
14 carrier; and then a combination of that where you put  
15 in your own facilities and also use the facilities of  
16 an incumbent local exchange carrier.

17                     But we have chosen to try and be a  
18 predominantly facilities-based carrier and offer  
19 services over the facilities that we actually put into  
20 the ground.

21           Q     When did Time Warner begin operations in  
22 Florida?

23           A     We began operations as an ALEC, in February  
24 of 1997 we put our switch in, we actually started  
25 serving customers in the Orlando area in the late

1 summer of '97.

2 In the Tampa area, we started offering  
3 service in the first quarter of '98. That's also the  
4 time when we filed our initial petition with the  
5 Florida Public Service Commission to initiate a Fresh  
6 Rule -- a Fresh Look rule making.

7 Q You mentioned Orlando and Tampa as two areas  
8 that Time Warner serves and provides service in Florida  
9 today. Are there any other areas?

10 A Outside of Florida, we operate in actually  
11 20 metropolitan service areas. But in Florida we  
12 operate in the greater Orlando and Tampa areas.

13 Q Does Time Warner Telecom provide any  
14 service to customers through resale?

15 A Time Warner Telecom does not offer any -- we  
16 do not offer any local exchange services underneath  
17 resale. We do provide some interchange of services  
18 through resale.

19 Q There was testimony earlier today in  
20 response to some cross questions from BellSouth and GTE  
21 regarding the resale of contract service arrangements.

22 Has Time Warner considered this option for  
23 providing service to its customers?

24 A No. We do not resale anything and to set up  
25 resale just for contract service arrangements puts you

1 in a scenario where you are trying to have to put in  
2 all the processes in place to actually accommodate  
3 resale.

4 That resale that -- the resale requirement  
5 for contract service arrangements does not help  
6 facilities-based carriers at all. That was a method  
7 that we thought the Commission used to help jump start  
8 resale competition just as we were hoping the Fresh  
9 Look rule would jump start facilities-based  
10 competition.

11 Q From Time Warner's perspective as a new  
12 facilities-based provider of competitive local  
13 telecommunication service, would you say that Florida  
14 local telecommunications market is fully competitive?

15 A Absolutely not. I guess I would  
16 characterize the Florida local exchange market as being  
17 one that is beginning to develop competition.  
18 According to the Commission, the Florida Public Service  
19 Commission's report that they submitted to the  
20 legislature that's dated December 1999, it said that  
21 ALECs have about 12.2 percent of the business access  
22 lines in Florida.

23 So not only do the incumbent local exchange  
24 carriers still control 85 percent of the market share,  
25 they also have a ubiquitous network that was built

1 under a guaranteed rate of return. They have brand  
2 identity, they have customer loyalty, they have -- they  
3 still probably most importantly still control the  
4 essential facilities that most of the ALECs need to  
5 have access to in order to provide service.

6 So I would say that it is not only not fully  
7 competitive, that it is just barely competitive at all.

8 Q Your use of the term essential facilities  
9 reminded me of a question I wanted to ask you earlier.

10 You used the term last mile access in answer  
11 to a previous question. Could you define what you mean  
12 by that?

13 A Sure. As a local exchange carrier,  
14 competing carrier, or any local exchange carrier, you  
15 have your switch in a central office. And in order to  
16 get out to the end user customer, you actually have to  
17 run some kind of facilities from the central office to  
18 the end user customer. That's generally described as  
19 the last mile.

20 And as a facilities-based carrier, Time  
21 Warner actually installs where we can the actual  
22 facilities ourselves.

23 In instances where we do not have the time  
24 or the resources immediately to put in our own  
25 facilities, we still do purchase facilities from the

1 incumbent local exchange carrier. So we are also still  
2 reliant upon the essential facilities as I just  
3 described of the incumbent local exchange carrier.

4 Q From Time Warner's perspective, why do you  
5 think the Commission's Fresh Look rules would be  
6 beneficial?

7 A I think the rule would be beneficial in two  
8 ways.

9 One for consumers and the other for  
10 competition.

11 In terms of consumers, it would provide  
12 consumers alternatives that they may not have had when  
13 they entered into their contracts with the incumbent  
14 local change carriers.

15 Probably one of the most important things to  
16 note about the Fresh Look rule is that it is not  
17 invoked until the customer invokes it. This rule does  
18 not mandate that the ILECs turn over their contracts to  
19 the ALECs. In fact, it's only if a customer says they  
20 would like to have a competitive alternative that the  
21 customer, in fact, invokes the Fresh Look rule.

22 From that perspective, we think that's good  
23 for competition. It forces the ILECs to compete head  
24 to head with the ALECs for these services. And from  
25 that perspective we submit that a lot of the contracts

1 that were entered into to date were entered into before  
2 the ALECs were actually out there knocking on the  
3 doors; it was in anticipation of competition, not  
4 actual competition.

5 But what we are saying what this Fresh Look  
6 rule will do is give actual competition, go head to  
7 head, ALEC to ILEC, may the best man win. Ultimately  
8 the person who will win will be the consumer.

9 MS. BROWN: Thank you, Ms. Marek. I have no  
10 further questions. I tender the witness for cross  
11 examination.

12 CROSS EXAMINATION

13 BY MS. CASWELL:

14 Q Good afternoon, Ms. Marek. I believe you  
15 stated that Time Warner began operations in Tampa the  
16 first quarter of 1998?

17 A We began serving customers really more in  
18 the late summer of '97.

19 Q Summer of 1997.

20 A I am sorry, in Tampa or Orlando?

21 Q Let's start for Florida. You began  
22 operations in February of 1997; is that right?

23 A Yes, in Orlando.

24 Q In Orlando, and then you moved to Tampa in  
25 1998?

1           A     Correct.

2           Q     Okay.  So from the time -- let me ask  
3 something different.

4                     Even before Time Warner began operating, it  
5 was soliciting customers, wasn't it, in those  
6 locations?

7           A     We may have been letting customers know that  
8 we were going to be there at some point.  But as a  
9 facilities-based carrier, first you have to negotiate  
10 an interconnection agreement.  Then you have to buy a  
11 \$5 million central office switch.  Then you actually  
12 have to go out and get customers.  Then you have to put  
13 facilities in the ground or purchase some services from  
14 the ILECs.  So it does not happen overnight.

15          Q     I am not sure that answered my question.

16                     Did Time Warner offer proposals to provide  
17 service in advance of the date on which they began  
18 service in February 1997?

19          A     I don't know that.  I don't have specific  
20 knowledge of that.  I assume we did.

21          Q     Do you remember being asked that same  
22 question by Mr. Goggin at the hearing on May of 12,  
23 1999?

24          A     I don't remember the specific question.

25          Q     Can I show you this transcript?

1 A Sure.

2 Q Page 18 --

3 THE COURT: Either counsel need to approach?

4 MS. CASWELL: It's the May 12, '99, hearing  
5 transcript at page 19.

6 A My remark was, I am certain they did meaning  
7 I am sure they did. Yeah. That's what I just said  
8 here. I guess I am assuming they had, although I am  
9 not -- I don't have any of the documents. That's not  
10 my job. I am regulatory affairs, not sales.

11 BY MS. CASWELL:

12 Q Okay. And Time Warner does win some of the  
13 customers it solicits; is that right?

14 A Absolutely.

15 Q And ALECs retain some customers, too?

16 A Right, absolutely.

17 Q I think you mentioned that the Fresh Look  
18 rule would force ILECs to compete head to head with the  
19 ALECs. I want to explore that a little bit.

20 Isn't it possible that Time Warner solicited  
21 a GTE customer say in March of 1999, and GTE won and  
22 retained that customer, the customer did not leave GTE?

23 A Are you asking me to speculate? You just  
24 gave me a hypothetical.

25 Q Yes, it's a hypothetical. Is it possible?

1           A     I am certain that could be possible.

2           Q     So that if that customer entered a  
3 three-year contract at that time with GTE, Time Warner  
4 would get a crack at that customer now and that  
5 contract with the Fresh Look rule goes into effect; is  
6 that right?

7           A     That's one scenario. Equally that customer  
8 could have entered into that contract with no  
9 competitor at their door, and that customer would have  
10 the same opportunity as well to open it up on a  
11 one-time basis to explore what competitive alternatives  
12 there are available to them.

13          Q     But in that particular hypothetical that I  
14 gave you, Time Warner would get a second chance at a  
15 customer it failed to obtain the first time around?

16          A     The customer would get a second chance, yes.  
17                Again, the customer invokes it, not Time  
18 Warner.

19          Q     I think you mentioned a 12.2 percent number  
20 as the number of percentage of business lines, business  
21 access lines that competitors in Florida had according  
22 to the Commission's 1999 Competition In  
23 Telecommunications Markets in Florida report; is that  
24 correct?

25          A     Yes.

1 Q Is that 12.2 percent an average of all the  
2 Florida exchanges?

3 A I believe it is.

4 Q Would you agree that certain of those  
5 exchanges are more competitive in terms of business  
6 lines gained by competitors than others?

7 A Yes.

8 Q And in some exchanges competitors have  
9 obtained up to 50 percent of the business lines?

10 A Up to how many?

11 Q 50?

12 A I am not aware of that.

13 Q Okay.

14 MS. CASWELL: Martha, can I show her the  
15 report? This is the 1999 competition report.

16 MS. BROWN: I was going to say this might be  
17 the time.

18 MR. GOGGIN: I will hand out copies.

19 MS. BROWN: And Your Honor, it's my  
20 understanding that BellSouth and GTE were going to  
21 introduce the competition reports into the record.

22 THE COURT: Is there something you want  
23 marked for identification before you tender to the  
24 witness?

25 MS. BROWN: Yes, and it is a stipulated

1 exhibit.

2 THE COURT: All right. Let's use whatever  
3 it is that's going into evidence to be presented  
4 to the witness.

5 MS. BROWN: Yes, I would appreciate that.

6 MR. GOGGIN: With Your Honor's leave, there  
7 are four competition reports, one for each year of  
8 1996 through 1999. Without objection from the  
9 other parties, and I know it's out of order at  
10 this point, but I would offer all four of them.

11 THE COURT: How about if we mark them?

12 MR. GOGGIN: We will mark them.

13 (BellSouth Exhibit Nos. 1 through 4 marked  
14 for identification.)

15 THE COURT: I have been tendered on behalf  
16 of BellSouth --

17 MR. GOGGIN: Yes.

18 THE COURT: -- BellSouth -- to be marked for  
19 identification at this time BellSouth 1, a 12-96,  
20 may I call this marketing report?

21 MS. BROWN: Report to the legislature on the  
22 status of competition, does that work?

23 THE COURT: Ma'am, if you dictated it to me,  
24 I will write that down, too. I usually use a  
25 shorthand version, it's easier to identify when I

1 read these things at a later date, but you tell me  
2 what you want it called and if Mr. Goggin agrees,  
3 we're fine.

4 MS. BROWN: Commission's legislative report  
5 on competition.

6 MR. GOGGIN: That's fine.

7 THE COURT: 12-96 report on competition, is  
8 that what you all agreed on?

9 MS. BROWN: Yes, Your Honor. That's fine.

10 THE COURT: BellSouth 2 for identification  
11 only at this time a 12-97 PSC report on  
12 competition.

13 For identification also, BellSouth 3, a  
14 12-98 PSC report on competition.

15 And also BellSouth 4, a 12-99, PSC report on  
16 competition.

17 Do I understand there is no objection?

18 MS. BROWN: There is no objection.

19 THE COURT: Very well. These are marked.  
20 They are admitted. Let us use the ones that have  
21 been marked and admitted.

22 (BellSouth Exhibit Nos. 1 through 4 received  
23 in evidence.)

24 THE COURT: In case a page is missing, I  
25 want to be certain we know it before the witness

1 leaves the stand. That's the reason for using the  
2 real thing as in any circuit proceeding.

3 BY MS. CASWELL:

4 Q Can you look at the entries for north Key  
5 Largo, last column, number of business access lines  
6 provided by ALEC providers and tell me what the  
7 percentage is.

8 THE COURT: Wait a minute.

9 MS. CASWELL: That's BellSouth Exhibit 4.  
10 That's the December '99 competition report.

11 THE COURT: You have that, ma'am?

12 A I do. It's 45 to 50 percent.

13 BY MS. CASWELL:

14 Q In Sugar Loaf Key?

15 A It's 45 to 50 percent.

16 Q Would you agree that Orlando is a large  
17 urban center?

18 A Yes, I would. However, to point out those  
19 two changes grossly mischaracterizes this report.  
20 There are several -- I would love to be able to count  
21 them, but if we would like to take the time, I would  
22 love to do that.

23 The vast majority of these entries either  
24 have no ALEC provider or zero to 1 percent. There are  
25 only those two exchanges. And we are just talking

1 about an exchange, not a whole area. So there is just  
2 those two exchanges have 45 to 50 percent.

3 I don't even know how many -- it's a  
4 percentage, so I don't know how many lines or how many  
5 numbers are actually in that exchange. Because  
6 obviously if there is only 10 numbers in the exchange  
7 and half of them are served by ALEC, that would be 50  
8 percent.

9 So just to take a look at those two isolated  
10 exchanges in that context may mischaracterize what this  
11 report is stating.

12 Q Can you tell me what percentage of lines  
13 competitors have gained in Orlando?

14 A In the Orlando exchange?

15 Q That's correct.

16 A 15 to 20 percent.

17 Q In west Kissimmee, which I believe is near  
18 Orlando; is it not?

19 A I think it is, but I am not absolutely  
20 certain. West Kissimmee has 20 to 25 percent.

21 Q Now, the Fresh Look rule doesn't make any  
22 distinction as between exchanges that are more  
23 competitive as opposed to exchanges where there might  
24 only be zero to 1 percent lines gained by competitors?

25 A It does not. It gives all consumers across

1 Florida the same opportunity to invoke the Fresh Look  
2 rule.

3 Q That would be regardless of when competition  
4 arose in a particular exchange, correct?

5 A That's correct. Again, the initial petition  
6 was filed in February of 1998. So at that point in  
7 time when we looked at the '97 report and '98 report,  
8 there was a story to be told in terms of the time frame  
9 that the petition was filed.

10 THE COURT: Excuse me. If the witness would  
11 confine herself, please, to answering the  
12 questions asked, I am sure that's something else  
13 may be developed on redirect.

14 BY MS. CASWELL:

15 Q Does Time Warner use termination liability  
16 provisions in its contracts?

17 MS. BROWN: Your Honor, I object to the  
18 question. It's outside the scope of Ms. Marek's  
19 testimony.

20 THE COURT: Overruled. You may answer.

21 A I believe we do. Yes, I have seen a  
22 contract before. Again, contracts are not my area.  
23 They are in the sales department. But I am aware that  
24 we have termination liabilities.

25 BY MS. CASWELL:

1 Q Do you recall calling the ILECs' termination  
2 liabilities exorbitant?

3 A Yes.

4 Q Did you ever review the ILECs' contracts  
5 during the hearing to determine if that were true?

6 A That was hearsay from my sales folks.

7 Q Are your termination liability provisions,  
8 to your knowledge, similar to GTE's and BellSouth's and  
9 Sprint's?

10 A I don't know.

11 Q I believe Ms. Brown asked you if the market  
12 was fully competitive. How do you define fully  
13 competitive?

14 A When one competitor does not have power over  
15 another competitor's destiny.

16 Q Is that some kind of economic definition?

17 A I am not an economist. That's -- you asked  
18 my definition, that's my definition.

19 Q So you would not define competition in terms  
20 of market power?

21 A That's one way to. Again, I am not an  
22 economist, but you asked for my definition. That's how  
23 I would define it.

24 MS. CASWELL: That's all I have. Thank you.

25 CROSS EXAMINATION

1 BY MR. GOGGIN:

2 Q Ms. Marek, I won't have too many more  
3 questions.

4 You mentioned that Time Warner began  
5 operating in Orlando in 1997; is that correct?

6 A That's correct.

7 Q If you would, please, turn to the document  
8 that's been marked BellSouth Exhibit Number 1, the 1996  
9 competition report, pages 40 through 43.

10 In particular I would like to draw your  
11 attention to page 43.

12 A Okay.

13 Q In this section Time Warner is listed as an  
14 ALEC providing service as of September 30, 1996; isn't  
15 that correct?

16 A Underneath number 6? On page 43? I don't  
17 know where your reference is.

18 Q The heading for the section, I believe, is  
19 on page 40.

20 A I may not have the right document. I am  
21 sorry, Mr. Goggin, if you can direct me one more time.  
22 I have the report dated December 1996.

23 Q Yes.

24 A What page?

25 THE COURT: That would be BellSouth 1?

1 MR. GOGGIN: Yes.

2 A Okay.

3 BY MR. GOGGIN:

4 Q I am looking at page number 43.

5 A Okay.

6 Q The section that I am looking at is headed  
7 B3, the heading is on page 40, ALECs providing service  
8 as of September 30, 1996.

9 A I got you. In fact, I think the difference  
10 is that this is -- it does say we provide private line  
11 services. My response to the question was that we were  
12 providing ALEC services in '97. We were an alternative  
13 access vendor prior to that date providing private line  
14 services.

15 Q The services were offered in competition  
16 with whom?

17 A The ALEC services or AAV services.

18 Q The private line services.

19 A They were in competition to the ILECs.

20 Q ILECs?

21 A Being GTE, BellSouth, and Sprint.

22 Q Do you know whether any of the customers to  
23 whom Time Warner was offering such private line  
24 services in 1996 were offered contract service  
25 arrangements by ILECs?

1           A     I don't know.

2           Q     When Time Warner began to offer switch  
3 access services in 1997, weren't MCI, Intermedia and  
4 Sprint already offering the facilities-based switch  
5 access services in Orlando by that time?

6           A     I am not certain when they entered the  
7 market. I could probably look at this report and  
8 deduce something, but I don't have actual knowledge.

9           Q     If you will allow me to pose a hypothetical.  
10                If MCI Metro, for example, were offering  
11 service in Orlando at the time Time Warner entered the  
12 market and had managed to sign an attractive business  
13 customer to a four-year contract subject to termination  
14 liability, wouldn't that MCI Metro contract present the  
15 same sorts of issues for Time Warner as a BellSouth  
16 contract the same customer might?

17          A     It might. I don't know if I should  
18 elaborate or not. I don't know if I can explain that  
19 answer.

20          Q     Did you have any role in preparing the  
21 petition for Time Warner that initiated this  
22 rule-making proceeding?

23          A     Yes, I did.

24          Q     The rule proposal that Time Warner submitted  
25 did not include contracts entered into with carriers

1 other than BellSouth, Sprint, and GTE; is that correct?

2 A That's correct.

3 Q Can you tell us why it did not include  
4 contracts entered into with other carriers?

5 A They can't control my destiny and the ILECs  
6 can.

7 Q From a customer's perspective, if  
8 hypothetically MCI Intermedia and Sprint are competing  
9 for the customers' business in Orlando as of the time  
10 Time Warner enters the market in 1997, would Time  
11 Warner consider that customer to lack competitive  
12 alternatives?

13 A The customer -- if the customer had an  
14 opportunity to have other competitive alternatives,  
15 that may have been the case. I guess what we are  
16 trying to say is instead of trying to look at each  
17 individual customer situation, the Fresh Look rule was  
18 to give customers an consumers an opportunity, now that  
19 other competitors were coming on board, to avail  
20 themselves of the various competitive alternatives that  
21 are just emerging now.

22 I am not sure if I quite understand the  
23 question or if I understood your question. If I  
24 didn't, please rephrase it.

25 Q Assume a market in which there are 100

1 customers and 95 of them have contracts with BellSouth,  
2 5 of them have contracts with ALECs.

3 Assume that the ALECs market their services  
4 to each of the 95 customers at the termination of their  
5 contract and all of them agree instead to sign a  
6 contract with BellSouth.

7 Under those circumstances the market share  
8 would not change one iota; would it?

9 A No, it would not.

10 Q Would you argue that the 95 customers who  
11 decided to sign with BellSouth lacked competitive  
12 alternatives from which to choose when they signed the  
13 contract with BellSouth?

14 A Given that hypothetical, no.

15 Q So strictly from a citation of market  
16 shares, one cannot discern whether, in fact, customers  
17 have competitive alternatives from which to choose;  
18 isn't that correct?

19 A That's correct. I didn't limit it to market  
20 share.

21 Q In fact, all market shares show is the  
22 result of customer choices; isn't that correct?

23 A It can show -- it can be very misleading.  
24 It can show that, it can show other things. That was  
25 my point about these market share numbers that I was

1 asked the question by Ms. Caswell.

2 Q You mentioned the term essential facilities  
3 before. Do you have an understanding of what the  
4 essential facilities doctrine is?

5 A No. I didn't mean it in a legal context. I  
6 meant it in a functional, practical context. Those are  
7 facilities that are essential to my doing business. I  
8 may have used a term that has legal connotation without  
9 realizing it.

10 Q You stated that it's Time Warner's business  
11 plan to service predominantly through its own  
12 facilities; is that correct?

13 A Yes.

14 Q Wouldn't it have been possible for Time  
15 Warner to have decided to offer services strictly as a  
16 resale?

17 A Could have.

18 Q Or to offer service partly through its own  
19 facilities or partly through elements of the network  
20 purchased at wholesale from BellSouth?

21 A That's why I said, there were three forms,  
22 we chose facilities-based.

23 Q From a customer's perspective, if you were  
24 reselling BellSouth service, wouldn't that be a  
25 competitive alternative?

1           A     I don't think that resale is true  
2 competition. All it's doing is taking an existing  
3 service and repackaging it or remarketing it.

4           The reason Time Warner Telecom chose to  
5 become a facilities-based provider is that we felt that  
6 that was the only true form of competition where you  
7 are actually getting diverse, a different path or  
8 different piece of fiber in most cases from the  
9 incumbent local exchange carrier. So we cannot only  
10 better control our profit margins, we can also better  
11 control our service.

12           Case in point, when we have to order some  
13 facilities from BellSouth, we get put into pending  
14 facilities delays, all kind of issues that we have,  
15 trying to get the services in.

16           Q     Excuse me just a moment. I think what I  
17 asked was is resale a competing alternative?

18           A     It can --

19           Q     I think your answer was no; is that correct?

20           A     Resale is an alternative. Again I think I  
21 answered before, but there are three forms of  
22 competition, resale being one of them.

23           It has not been viable for Time Warner  
24 Telecom as an alternative.

25           Q     Understood.

1           From a customer's perspective, though, if  
2 the customer can have the exact same service at a lower  
3 price for the same terms and conditions, wouldn't that  
4 represent a competing alternative to customers?

5           A       That's what I was --

6           MS. BROWN:  Objection.  I am not sure  
7 Ms. Marek can speculate on the customer's  
8 perspective.  She is not testifying for that  
9 purpose.

10          MR. GOGGIN:  I think Ms. Marek testified  
11 already she was the author of the petition that  
12 began this rule making, or at least participated  
13 in authoring the petition that began the  
14 rule-making proceeding.  She also had something to  
15 say about the reasons why such a rule making would  
16 be justified, and has been asked to talk about  
17 whether the market is fully competitive and what  
18 are the ramifications.

19          THE COURT:  Overruled.  You may answer.

20          A       I would love to answer it.  The point being  
21 is that from a resale perspective, if a customer gets a  
22 better price, I guess there is some latitude about  
23 competition.

24                 But from customers that we have chosen to  
25 serve, that we felt that resale not only did not give

1 them enough competitive -- did not offer them enough  
2 competitive advantages because we wanted to also offer  
3 service and quality, and so forth, but also truly a  
4 different facility, that's what I think is true  
5 competition.

6 BY MR. GOGGIN:

7 Q You mentioned at the beginning of your  
8 testimony that one of Time Warner's motivations for  
9 proposing the rule was to permit it to compete for  
10 customers locked into long-term contracts with ILECs;  
11 is that correct?

12 A Right.

13 Q Wouldn't resale provide a means for Time  
14 Warner to obtain that customer's business?

15 A No, absolutely not. At the very beginning  
16 of this whole thing, I said we had, in order to set up  
17 resale, you have to go through a lot of back office  
18 operations in order to do that. That's not cost  
19 effective.

20 We have one Time Warner's subsidiaries, Time  
21 Warner Connect, we tried to actually do resale and  
22 profit margins weren't high enough. They have gone out  
23 of business; they have gone out of the resale  
24 business.

25 So we again, we decided to go in to be a

1 facility-based because we could not realize profit  
2 margins we needed to for our stakeholders.

3 Q In 1996, when Time Warner was anticipating  
4 entering the market as a facilities-based provider, in  
5 early 1997, wouldn't it have made sense for Time Warner  
6 to have attempted to obtain the business of these  
7 customers by resale?

8 A We looked at that, and we absolutely decided  
9 from a business case perspective that there was not  
10 enough profit margin, that we could not afford to do  
11 that.

12 Q Is Time Warner aware of any other companies  
13 that operate as resellers in Florida?

14 A I know there are resellers.

15 Q So it's not your contention, is it, that  
16 reselling telephone service is not the same as offering  
17 service to that customer, or that it is impossible to  
18 do business as a reseller?

19 A I didn't say it was impossible. I said that  
20 Time Warner Telecom made the decision that there was  
21 not enough profit margin nor did it give the customers  
22 the advantages and benefits of competition that we  
23 wanted to give to our customers.

24 Q Do you, as regulatory manager, have any  
25 knowledge of Commission orders that permit the resale

1 of CSAs and tariff term plans?

2 A I have become aware of them through these  
3 proceedings, that there is a resale requirement for  
4 CSAs.

5 Q At the time Time Warner was developing its  
6 business plan for entry into the market in Florida, did  
7 Time Warner consider reselling CSAs and tariff term  
8 plans?

9 A This is the third time I have answered this  
10 question. We looked at it. We decided it was not  
11 profitable. We are not in that business and our  
12 salespeople actually come back to us periodically and  
13 say can't we resale it, and we have to set up a whole  
14 back office to --

15 Q I apologize for asking the question again.  
16 My purpose in asking the questions was the answer to my  
17 previous question was that you had not been aware of  
18 the opportunity to resale these contracts before today.  
19 So I wanted to clarify.

20 A The resale requirement. Generally for  
21 resale, we were aware of resale in total of that being  
22 one competitive strategy to enter the marketplace and  
23 we decided not to do that.

24 Since then, I have become the resale  
25 requirement on CSAs; and some of our salespeople asked

1 us if they could use the resale requirement. And the  
2 management team made a decision that it is too costly,  
3 at least at this point, to try and set up a back office  
4 operation strictly to resale contracts when we are not  
5 reselling any other services.

6 And again, the profit margins are not  
7 significant enough for us to do business.

8 Q But those conclusions about whether the  
9 profit margins are significant enough relate strictly  
10 to Time Warner's --

11 A Our business strategy.

12 Q You mentioned that the rules would only come  
13 into play if the customer invoked them.

14 A Correct. The policy will be there, but in  
15 order for us to be able to have Fresh Look, a customer  
16 has to say we would like to look at competitive  
17 alternatives.

18 Q You also mentioned Time Warner uses  
19 long-term contracts with termination liability; isn't  
20 that correct?

21 A That's correct.

22 Q Time Warner has been doing business since  
23 1997?

24 A Yes.

25 Q If this rule were applicable to Time Warner,

1 there would be roughly two and a half years' worth of  
2 contracts, virtually all of Time Warner's contracts, I  
3 would imagine, that would be subject to such a rule?

4 A We began operating in 1997. We weren't  
5 ubiquitous overnight nor are we ubiquitous now. So we  
6 started serving customers, but you can't wave a magic  
7 wand when you are doing facilities.

8 So we didn't have the customer base now that  
9 we did then even.

10 Q By definition, anyone who signed a contract  
11 with Time Warner had competing alternatives from which  
12 to choose; isn't that correct?

13 A Yes.

14 Q Is there any reason from the perspective of  
15 another ALEC operating in the same markets as Time  
16 Warner why Time Warner's contracts would present less  
17 of an obstacle to competing for your customer than  
18 BellSouth's contracts present in terms of competing for  
19 our customer?

20 A Can you say that one more time?

21 Q You have testified that customers are locked  
22 into long-term contracts with ILECs; isn't that  
23 correct?

24 A Right.

25 Q At that this impairs Time Warner's ability

1 to compete for the business of those customers; isn't  
2 that correct?

3 A Yes.

4 Q Time Warner also has long-term contracts  
5 with tariff -- with termination liabilities; isn't that  
6 correct?

7 A Yes.

8 Q Why wouldn't Time Warner's contracts present  
9 the same obstacles to an ALEC that a BellSouth contract  
10 would present?

11 A Well, my contract obviously is not going to  
12 present an obstacle to me, but another ALEC's contract,  
13 I bring you back to the point about another ALEC does  
14 not have control over my destiny, which is why our  
15 contracts aren't at issue in here.

16 We are trying to say that this opportunity  
17 would -- Fresh Look would jump start facilities-based  
18 competition, and that BellSouth went in anticipation of  
19 competition and locked those customers into contracts.

20 We are not afraid to compete. We love to  
21 compete. We would like to compete with other ALECs, we  
22 would like to compete with you all.

23 But we would like to have an opportunity to  
24 compete for those contracts that were locked into  
25 before the customer had those alternatives.

1           Q     So you would advocate a rule that would  
2 apply only to contracts that were entered into prior to  
3 a time that a customer had a competing alternative from  
4 which to chose?

5           A     I don't think we have that latitude here.  
6 There is a regular rule that's been established, and so  
7 that's the rule that we are trying to say should it be  
8 invoked or not? And that's the rule that -- right,  
9 wrong, or indifferent, I might tweak it, you might  
10 tweak, but that's the rule.

11          Q     The Commission has proposed a rule that  
12 would cover contracts entered into prior to June 30,  
13 1999?

14          A     Correct.

15          Q     Would it be accurate to say that customers  
16 in Orlando where Time Warner operates lacked  
17 competitive alternatives from which to choose prior to  
18 June 30, 1999?

19          A     I believe they lacked sufficient competitive  
20 alternatives. Case in point again, if the customer  
21 felt -- if the customer is happy and they went through  
22 a competitive process, that's not an easy process for a  
23 large customer to go through, the competitive bid  
24 process. If they went through a competitive bid  
25 process and they are happy, there is not a mandate

1 ILECs hand over the contract to ALECs.

2 It's when the customer says I didn't have an  
3 opportunity or I am not happy with my contract and I  
4 would like another chance to seek another alternative.  
5 That's when the Fresh Look rule would apply.

6 Q If BellSouth were to make a competing offer  
7 to a customer contracted by Time Warner last month for  
8 three years, if BellSouth were today to offer better  
9 terms, lower prices, no termination liability, and the  
10 customer sought to terminate its contract with Time  
11 Warner, what would be Time Warner's response?

12 A The customer would have -- first of all, we  
13 would try to see why the customer is not happy because  
14 customer service is what we hang our hat on.

15 But the customer would either have a  
16 termination liability or the termination liability  
17 might be waived if, in fact, we are really trying to  
18 work with the customer and make the customer happy.

19 It's totally irrelevant in this context,  
20 however, because it doesn't have anything to do with  
21 our contracts. This Fresh Look proceeding is looking  
22 at the incumbents' contracts because they were the ones  
23 who could control the destiny of not only themselves  
24 but of the other ALECs.

25 Q Without referring you to specific page

1 numbers, if I might, would you just agree that the  
2 competition reports published by the Commission show a  
3 steadily increasing market share among business access  
4 and lines for ALECs?

5 A Yes.

6 Q Have you read the reports?

7 A I have. It's been some time ago, but I did  
8 read through them.

9 Q If I were to say that the market share for  
10 ALECs business access lines went from 1.4 percent to  
11 12.2 percent in two years, would you disagree with  
12 that?

13 A No.

14 Q Do you agree with Ms. Simmons that the  
15 purpose of the rule is to benefit customers?

16 A Yes. And competition. I said both.

17 Q Is it competition when another ALEC competes  
18 for your customers?

19 A That is part of competition. That's one  
20 form of it, ALEC-to-ALEC competition.

21 Q Is it competition when BellSouth competes  
22 for your customers?

23 A Absolutely. It's also competition when I  
24 compete for your customers.

25 Q Understood. Apart from business plan

1 reasons, are you aware of any obstacle that has  
2 prevented Time Warner from reselling BellSouth CSAs or  
3 tariff term lives?

4 A No, except for the financial reasons behind  
5 that and potential quality. When I resale your  
6 contract, you are the one providing the service, I am  
7 just putting my name on the contract and offering it as  
8 slightly lower cost than which you would. Other than  
9 that, no.

10 Q I suppose we would retort that if they chose  
11 our services in the first place, they must be pretty  
12 reasonable.

13 MS. BROWN: Objection.

14 MR. GOGGIN: I withdraw the question.

15 BY MR. GOGGIN:

16 Q Are you aware of any reason that would  
17 prevent Time Warner from competing for the business of  
18 a brand-new startup business with no prior relationship  
19 with BellSouth?

20 A No. We do that all the time.

21 Q Are you aware of anything that would prevent  
22 Time Warner from competing for additional business from  
23 an existing BellSouth customer, for example, additional  
24 lines, different services?

25 A No, we do that, too.

1           Q     Are you aware of anything that would prevent  
2 Time Warner from competing for the services of a  
3 BellSouth customer who is subject to a long-term  
4 contract?

5           A     Can you say that one more time? I am sorry.

6           Q     Assume a BellSouth customer, perhaps an  
7 Internet service provider, who is receiving service  
8 from BellSouth under a long-term contract. Are you  
9 aware of anything that would prevent Time Warner from  
10 competing for the business of that Internet service  
11 provider and offering services that were a substitute  
12 for the contract services?

13          A     What prohibits me is the contract itself or  
14 the terms of the contract.

15                   Customers perceive that it is an obstacle to  
16 over -- and a significant obstacle to overcome, thus  
17 the use of the word exorbitant termination liabilities.  
18 Those -- that's stuff I hear from the salespeople,  
19 that the termination liabilities are so exorbitant as  
20 to be an obstacle to compete for those contracts.

21                   Yes, those services that are already in the  
22 contract.

23          Q     Would you disagree with the statement that  
24 the customer could choose to terminate the contract  
25 notwithstanding the termination liability?

1           A     Customer could choose to do that.

2           Q     Is there anything that would prevent Time  
3 Warner from competing with customers whose contracts  
4 expired?

5           A     No. No. The customer -- when the contract  
6 expires, we are absolutely happy to be in there  
7 competing.

8           MR. GOGGIN: I have no further questions.

9           THE COURT: Redirect?

10          MS. BROWN: Just one minor explanatory  
11 question on redirect.

12                         REDIRECT EXAMINATION

13 BY MS. BROWN:

14          Q     There was discussion about the competition  
15 reports and the charts that divided the numbers of  
16 ALECs providing service by exchange. Just for the  
17 record, would you explain what an exchange is?

18          A     The exchange is a serving area that -- it's  
19 one of those terms we use all the time but is sort of  
20 hard to define.

21                         The central office is broken up into many  
22 exchanges, and they are little subsections or little  
23 serving areas. It could be a neighborhood, it could be  
24 some defined geographic territory. And within -- and  
25 they are fairly -- they are not necessarily consistent,

1 it's not like every exchange has 100 numbers or 100  
2 customers, and then it's all broken up into a little  
3 exact cookie cutter scenario.

4           Instead, an exchange could, one exchange  
5 would be populated with thousands of numbers and  
6 another exchange might in a rural area may have a very  
7 few number of -- the exchange may have very few numbers  
8 in it. So just looking at the percentages, it's  
9 sometimes hard.

10           MS. BROWN: Thank you. No further  
11 questions.

12           THE COURT: You may step down.

13           (Witness excused.)

14           THE COURT: Let's take a 10-minute recess  
15 and you will have another witness in the box when  
16 we get back?

17           MS. BROWN: We will.

18           (Brief recess taken at 2:06 p.m.)

19           THE COURT: Is this Mr. Larsen?

20           Did you hear my prior explanation concerning  
21 oath or affirmation?

22           THE WITNESS: Yes, I did.

23           THE COURT: Do you have a religious  
24 objection to swearing?

25           THE WITNESS: No.

1 Thereupon,

2

ERIC R. LARSEN

3 was called as a witness, having been first duly sworn,  
4 was examined and testified as follows:

5

THE COURT: You may inquire.

6

DIRECT EXAMINATION

7

BY MS. HELTON:

8

Q If you could please state your name and  
9 business address for the record.

10

A Eric R. Larsen. My business address is 1367  
11 Mahan Drive, or could be Tennessee Street. There is  
12 some confusion over that address.

13

Q By whom are you employed and in what  
14 capacity?

15

A My main job is with the IRS. I am a manager  
16 of the local examination group here. I also have an  
17 Internet service provider business, and I have an ALEC  
18 certificate that I really haven't used much. I am just  
19 recently starting to try to do something with it.

20

Q And what is the purpose of your testimony in  
21 this case?

22

A I guess I am here to testify as to how the  
23 Fresh Look would -- Fresh Look rule would benefit my  
24 particular circumstances.

25

Q And what's the name of your Internet

1 provider service?

2 A Internet Services of Tallahassee.

3 Q And how many customers do you serve in this  
4 area?

5 A Approximately 1600 in the local calling  
6 area.

7 Q And how many employees do you have?

8 A I have got two full-time employees and one  
9 part-time employee.

10 Q What types of services do you offer your  
11 customers?

12 A Most of the business, in excess of 90  
13 percent of the business is dial-up access, either ISDN  
14 or via modem to the Internet. There is also web site  
15 hosting service, mail service, virtual site hosting for  
16 corporations where you can offer them a range of  
17 services.

18 Q What is dial-up service?

19 A That's where customers in their homes dial  
20 up to the Internet using their phone lines.

21 Q And you are the intermediary between the  
22 two?

23 A Yes, I am. I go ahead and contract with  
24 Sprint for lines, and those lines are used to connect  
25 to my equipment, and my equipment is then connected to

1 the Internet.

2 Q When did you start your business?

3 A It was started in the fall of 1996.

4 Q How big was it when you started?

5 A When I started, it was -- there was -- I  
6 actually didn't have any customers when I first  
7 started. But within say six months, it had grown to  
8 about 200 customers. What happened then is that was in  
9 mid 1997. That's when 56K came out and I had to go to  
10 T1 connections, channelized T1 or PRI lines.

11 Q For those of us who aren't  
12 telecommunications gurus, could you explain what the  
13 56K, T1, and PRI lines are?

14 A 56K when it first came out, there was two  
15 flavors of it. It was basically the way people  
16 connected with their modems and the speed they  
17 connected their modems with over the phone lines.  
18 There were various standards the modems used, they  
19 started out 14-4 was the highest, and then it went to  
20 28-8 and 33-6; then it went to 56K on the download  
21 side, or up to 56K, actually up to 56K, nobody actually  
22 ever got that that I am aware. But that's what it was  
23 advertised at.

24 And there were two flavors, 56K flex and X2.  
25 That's from the consumer side of it, and that's how

1 fast they will dial into our service.

2 The PRI lines and the T1 is basically -- a  
3 T1 is basically the amount of band width you get over a  
4 line. What they do with the lines, network lines, is  
5 they go ahead and divide them up into channels, so you  
6 can get up to 24 lines on a channelized T1, just like  
7 having 24 separate phone lines on a network line. Each  
8 one of the lines allows you to have 24 simultaneous  
9 telephone connections.

10 Q And you said that you purchased these lines  
11 from Sprint; is that correct?

12 A That's correct.

13 Q Could you explain how you do that, what  
14 method do you use to purchase your service from Sprint?

15 A I used -- under contract, it was term  
16 agreements with Sprint, they were over three years.

17 MS. HELTON: Your Honor, could I approach  
18 the witness?

19 THE COURT: Yes.

20 MS. HELTON: If I could have this marked for  
21 identification. You want to give him that one,  
22 right?

23 THE COURT: I want the item marked for  
24 identification to be tendered to the witness.

25 MS. HELTON: Okay. I think I did that

1 wrong. Mr. Larsen.

2 THE COURT: I appreciate everyone wanting to  
3 use multiple copies, but let me explain to you  
4 what happens if we don't use the correct copies.

5 When you go to writing your proposed final  
6 orders, you may have a complete copy and the copy  
7 I have which has been admitted in evidence may not  
8 be complete. And at that point it delays you  
9 having an answer in this case. This is just one  
10 of those reasons we use the evidence code and  
11 common methods of presentation in the courtroom.  
12 You want this marked as Agency 1?

13 MS. HELTON: That's fine.

14 THE COURT: Agency 1, how may I designate  
15 it?

16 MS. HELTON: Mr. Larsen's contracts with  
17 Sprint.

18 THE WITNESS: Actually Internet Services of  
19 Tallahassee. I am acting as president.

20 MS. HELTON: I misspoke.

21 THE COURT: How do you want it done?

22 MS. HELTON: Internet Services.

23 THE COURT: Internet Services contract?

24 MS. HELTON: That's correct.

25 (Agency Exhibit No. 1 marked for

1 identification.)

2 THE COURT: And I will tender it to

3 Mr. Larsen.

4 BY MS. HELTON:

5 Q Could you tell us, please, what these --  
6 what's been marked as -- identify for us what's been  
7 marked as Agency Number 1?

8 A These are private lines service term  
9 contract agreements with Sprint, between Sprint and  
10 Internet Services of Tallahassee, Incorporated.

11 Q How many -- do these represent all of the  
12 contracts that you have with Sprint; do you know?

13 A I don't know. I presently have eight PRI  
14 lines with Sprint, and I am not sure if I found them  
15 all, so this might be missing one or two. Might be  
16 missing one or something, because I believe it's --

17 Q Essentially it's most of the contracts?

18 A Yes.

19 Q If not all; is that correct?

20 A That's correct.

21 Q Why do you have so many separate contracts  
22 with Sprint?

23 A When you add more customers, the lines fill  
24 up. Generally in the Internet business you get about  
25 eight and a half customers per line. It depends on

1 whether you are using PRI lines or channelized T1s.

2           You get 23 lines out of a PRI line, which is  
3 actually a little bit better line because it allows  
4 customer to use ISDN, and 24 channels out of a  
5 channelized T1, but irrespective of all that, you get  
6 about 8 and a half customers per line, so when you  
7 reach a certain point, people start getting busy  
8 signals and you have to add another line.

9           So it was my experience with my company, my  
10 rate of growth, that every three to five months I would  
11 have to add another T1 line.

12           Q     So were all these contracts executed at the  
13 same time?

14           A     No, they were executed over a period of a  
15 couple of years.

16           Q     And did you sign each of these contracts?

17           A     I believe I signed most of them. I think  
18 there is one that was signed by my wife as  
19 vice-president, and I signed the rest as president.

20           Q     Do the contracts have the same term?

21           A     No. All the contracts have different terms.  
22 Excuse me, there were some contracts that I converted  
23 from T1s to PRIs. So in that case there was three  
24 contracts that I channelized T1s, I converted to PRIs,  
25 so there are a couple of contracts in that group

1 whenever I renewed contracts that had been renewed to  
2 PRI lines, but most of them have varying terms.

3 Q Are there other providers in Tallahassee  
4 today that you could purchase these types of lines  
5 from?

6 A Yes, there are.

7 There is KMC Telecom and I -- KMC and ITC  
8 Telecom.

9 Q Why are all your contracts with Sprint?

10 A When I first started offering service,  
11 Sprint was the only provider in town that offered this  
12 type of service. Therefore I didn't have a choice, I  
13 had to go with Sprint.

14 And as you progress, you add more contracts.  
15 ISPs have to offer one phone number which is a part of  
16 a hunt group. And you are locked in, you advertise  
17 that number and you are locked into that number.

18 So basically, you have to -- if you were to  
19 renegotiate the contracts, you would have to  
20 renegotiate all your contracts as one group and keep  
21 that same number.

22 So you couldn't convert easily to another  
23 set of contracts, nor could you set up two different  
24 hunt groups because of unused capacity. If you had two  
25 different hunt groups, they wouldn't roll over to

1 another set of numbers.

2 Q Could you explain what a hunt group is?

3 A Hunt group for purposes of -- I guess a hunt  
4 group could be used for any type of service, but  
5 basically it's a number of different phone lines  
6 assigned the same number. If one gets busy, it goes to  
7 the next unused line.

8 Q I believe it was Mr. Goggin that asked a  
9 question this morning whether a company or -- whether  
10 you could -- an ALEC could purchase a PBX and replicate  
11 someone else's hunt group. Do you know the answer to  
12 that question?

13 A A PBX -- to answer your question about PBXs,  
14 I don't know much about PBXs but you are mixing apples  
15 with oranges in terms of my services.

16 For one thing, a PBX works through ISTN  
17 lines. You'd also have to purchase ISDN lines. The  
18 purpose of PBX is to aggregate a lot of lines in a  
19 business for phones that aren't being used. So say,  
20 for instance, you have a large business with thousand  
21 people, and you only have one outgoing line per every  
22 12 people, you can save a lot of money by just  
23 contracting with the phone company for the number of  
24 lines you are actually using to go to the outside  
25 world.

1           As well, PBXs don't have any intelligence.  
2 They are not part of the intelligence network the phone  
3 companies use called the SS7 signaling network. They  
4 don't have any intelligence to connect to that network  
5 in themselves. So you would have to contract to get  
6 the outside lines, which are the PRI lines, as well  
7 you would to have to buy expensive equipment, and that  
8 doesn't -- not everybody uses PBX equipment because  
9 it's expensive equipment that's used by large  
10 organizations with a lot of employees.

11           So it doesn't necessarily apply to all  
12 different types of businesses. It certainly wouldn't  
13 apply to my type business.

14           Q     Are your contracts short-term or long-term?

15           A     They are all three-year contracts. So I  
16 guess they are long-term.

17           Q     Can you cancel your contracts with Sprint or  
18 terminate them?

19           A     No, not without paying a penalty.

20           Q     What kind of penalty would you have to pay?

21           A     It's in the contract. I believe they are  
22 all the same. I think what it says, if you cancel in  
23 the first 12 months, you owe the remaining amount at  
24 the monthly rate.

25                    Whatever the monthly rate is for the

1 remainder of the term of the contract. You cancel  
2 after 12 months which is 12 to 36 months, then it's 50  
3 percent of what you would have owed for the entire  
4 term, the remaining amount you would have owed for the  
5 term of the contract.

6 Q Why didn't you sign any short-term contracts  
7 with Sprint?

8 A The difference between the short-term rate  
9 and long-term rate was so high that you wouldn't have  
10 been competitive in the industry if you had done such a  
11 thing. You would have had to pay too much of a  
12 difference.

13 Q You mentioned that there are two other  
14 competitors, two competitors here in town to Sprint  
15 that you could purchase services from. Are they  
16 providing services that you would like to be able to  
17 purchase? Are those attractive services to you?

18 A I would consider them to be -- if the  
19 quality of service issues could be laid down in a  
20 contract, I would -- then you would get down to pricing  
21 and you would consider them to be at least as  
22 attractive, depending on the price.

23 Q You may have answered this question but let  
24 me ask you just in an abundance of caution in case you  
25 haven't.

1           Could you offer -- purchase service from  
2 Sprint and a competitor, meaning could you have two LEC  
3 providers of service, an ALEC and an ILEC?

4           A     No, because you have one phone number with  
5 one hunt group and you can't intermingle those two. It  
6 all has to be from one person to keep the same hunt  
7 group and the same number. So you can't go to two  
8 different people.

9           As I indicated earlier, if you went to  
10 another purchaser, you would have to have a different  
11 hunt group, another provider, excuse me. If you went  
12 to another provider, you would have to have a different  
13 hunt group. And then you would get into issues of  
14 unused capacity.

15           In other words, during peak times you might  
16 have a number of lines open to prevent busy signals at  
17 any given time, so you wouldn't want to keep a lot of  
18 unused lines open on two different hunt groups because  
19 it would cost you a lot of money to do that.

20           Q     How would the Fresh Look rules that have  
21 been proposed benefit you and your business?

22           A     It would allow me to renegotiate these  
23 contracts that I am locked into under favorable terms.

24           MS. HELTON: I don't know if this is an  
25 appropriate time to move the contracts into

1 evidence.

2 THE COURT: Any objection?

3 MR. GOGGIN: No objection.

4 THE COURT: Hearing none, it is admitted.

5 (Agency Exhibit No. 1 Exhibit received in  
6 evidence.)

7 MS. HELTON: We tender the witness for cross  
8 examination.

9 THE COURT: He may need this.

10 MR. GOGGIN: With Ms. Caswell's consent, I  
11 will take a first stab at this.

12 THE COURT: Very well, BellSouth.

13 CROSS EXAMINATION

14 BY MR. GOGGIN:

15 Q Good afternoon, Mr. Larsen. You mentioned  
16 Sprint has been providing services since the fall of  
17 1996. The first of these contracts is from October of  
18 1997, is that correct, these contracts that were  
19 produced today?

20 A I don't believe so. I think there is one  
21 for around June of 97, somewhere. That's when I bought  
22 my first piece of equipment that used network services.

23 Q So as of June this year, this contract will  
24 expire by its own terms; correct?

25 A Did you say June of this year?

1 Q Yes. It is a three-year contract; is that  
2 correct?

3 A That's not correct, because I renegotiated  
4 that particular contract.

5 Q Renegotiated how?

6 A I converted it to a PRI line. I am not sure  
7 which one it is. I would have to get the circuits and  
8 figure it out, but it was in the beginning of 1999, it  
9 was converted to a PRI line. It was a channelized T1.

10 Q Okay. You mentioned that -- you were asked  
11 to explain -- I think you did a pretty good job of  
12 explaining channelized T1 service. Can you explain a  
13 little bit more about what PRI is?

14 A PRI is primary rate interface. It uses --  
15 it's distinguished between channelized T1 because it  
16 uses an out-of-band signaling versus a channelized T1  
17 that has 24 channels that use in-band signaling.

18 And the SS7 networking system is an  
19 intelligent network system that is set up as a tandem  
20 to the data transfer in a telephone network. So it  
21 ties into the SS7 and carries the information for the  
22 intelligence part of the connection. It enables you to  
23 have different calling features that you wouldn't  
24 otherwise, I guess, have.

25 Q Do you know whether -- if a business had a

1 PBX, it could order a PBX trunk in the form of PRI  
2 service to connect the PBX to the tandem switch in the  
3 manner you described?

4 A Would you repeat that again?

5 Q You indicated earlier that you felt one of  
6 the differences between a PBX and the service what was  
7 provided by Sprint was that the signaling, SS7  
8 signaling that's available in the PRI service that you  
9 purchased would not be available.

10 Do you know whether a PBX user could order a  
11 PBX connection between his PBX and the phone company's  
12 and tandem switch that would be a PRI connection  
13 providing this SS7 signal?

14 A Yes, there would be signaling on what they  
15 call a D channel so it would provide it. However, it's  
16 only going to have as much capability as the switch  
17 it's connecting to, and the reason for that is they  
18 won't let a PBX tie into a SS7 network for security  
19 reasons.

20 Q Is PBX a switch?

21 A Yes, it is.

22 Q Have you contacted any providers of  
23 PBX-based services?

24 A No, I am not in that business. I wouldn't  
25 -- you mean to use a PBX?

1 Q Yes.

2 A I don't see how it would apply to me. Maybe  
3 you could tell me how it would apply to me because I am  
4 not sure how it would even apply.

5 Q So you have not ever sat down with someone  
6 who markets PBX-based services?

7 A No, sir.

8 Q You mentioned there were other providers who  
9 had been providing service in Tallahassee for at least  
10 now -- Deltacom and KMC?

11 A That's correct.

12 Q To your knowledge, are they facilities-based  
13 providers, facilities-based meaning they use their own  
14 facilities at least in part to provide the service?

15 A I believe they are both facilities-based  
16 providers. I don't know to what extent.

17 Q Assuming that service quality were the same,  
18 would it matter to you whether they are  
19 facilities-based or not?

20 A Well, I guess it wouldn't matter as long as  
21 the service was the same. It would be a price issue at  
22 that point.

23 Q If someone, a telecommunications provider  
24 were to come to you and offer to sell you precisely  
25 what you contracted for under the Sprint agreement,

1 using Sprint's facilities, precisely the same services  
2 that Sprint has offered, but at a lower price, would  
3 that attractive to you?

4 A It depends on the terms of the contract. In  
5 other words, if they had you in a long-term contract,  
6 it might not be because you would be thinking down the  
7 road you might be able to change your service at a  
8 later point in time to get a better deal.

9 So it would depend on the length of the  
10 contract and the amount of money. But you are right,  
11 it would be, if the amount of services are the same,  
12 that's correct, I would agree.

13 Q You are in the Internet service provider  
14 business; is that correct?

15 A That is correct.

16 Q One of your largest competitors would be  
17 America Online; is that correct?

18 A That's correct.

19 Q I am, as a BellSouth employee, embarrassed  
20 to say I am an America Online customer. And America  
21 Online offers us more than one local number to call in  
22 order to get dial-up access.

23 Are you aware of any other Internet service  
24 providers that offer more than one number?

25 A There is probably a number of different

1 Internet service providers that offer more than one  
2 number. I am not sure how it would tie into hunt  
3 groups. I guess you would have to know what's going on  
4 behind the scenes to know how it relates to what's  
5 going on.

6 I don't see -- the numbers they tie is what  
7 is important, I mean the phone lines they are tying  
8 into is the actual important part of it.

9 Q Are you aware that under current law, a  
10 customer can switch providers and keep the same  
11 telephone number?

12 A Yes.

13 Q Correct. Are there circumstances under  
14 which it would be come possible or even necessary for  
15 you to provide more than one telephone number to your  
16 customer base?

17 A If you wanted to distinguish different class  
18 of customers, yes, you would. Or if you wanted to go  
19 ahead and do what they call virtual POP, virtual point  
20 of presence, then you would do that. In other words,  
21 you would subcontract out your service to other  
22 providers.

23 Q All right. Do you know whether there were  
24 any alternative local exchange companies reselling  
25 service in Tallahassee in 1997?

1 A No, I am not aware.

2 Q You have been in the ISP business since the  
3 fall of '96; is that right?

4 A That's correct.

5 Q Were you aware at that time of the passage  
6 of the Telecommunications Act?

7 A I don't believe I was. Remembering back a  
8 long ways, but if I read something about it at that  
9 time, I wouldn't remember it now anyway. It wasn't  
10 something that was probably on my mind at that point.

11 Q Did you know what a PBX was at the time?

12 A Probably not.

13 Q Do you know whether the contracts that you  
14 have signed here would be subject to the rules?

15 A Excuse me, again?

16 Q Do you know whether these contracts that you  
17 have signed would be affected by the adoption of the  
18 rules at issue?

19 A I believe they would.

20 Q Do you know?

21 A Except for one that was signed after the  
22 effective date.

23 Q If hypothetically you had eight staggered  
24 three-year contracts for precisely the same services  
25 with Deltacom, and you decided to switch to KMC,

1 wouldn't you face the same difficulty in switching to  
2 KMC from Deltacom that you currently would face if you  
3 wanted to switch from Sprint to KMC?

4 A That's a two-part question, and I think it  
5 assumes I know something about the rule.

6 Q Well, no.

7 A More than I do because I am not --

8 Q From your perspective as a business person,  
9 does it matter that Sprint is the other part of these  
10 contracts?

11 In other words, if KMC were the other party  
12 to these contracts and Sprint made a better offer, but  
13 except for changing the name Sprint to KMC everything  
14 else in the contract were the same, wouldn't you have  
15 the same issue in terms of your difficulty in switching  
16 providers that you have today?

17 A Yes, I would.

18 MR. GOGGIN: I have no further questions.

19 Thank you.

20 THE COURT: Ms. Caswell?

21 CROSS EXAMINATION

22 BY MS. CASWELL:

23 Q I just have a few questions, Mr. Larsen.

24 I think I heard you say that the Fresh Look  
25 rule would benefit you because it would allow you to

1 renegotiate your contracts with Sprint; is that right?

2 A That's correct. Not necessarily with Sprint  
3 but with whoever.

4 Q Okay. Right. And I think you may have made  
5 the exception of this one contract that was signed on  
6 August 28, 1999, would that be right?

7 A That's correct.

8 Q And just so we are clear, Fresh Look  
9 wouldn't apply to that, correct, because Fresh Look  
10 only applies to contracts executed before June 30,  
11 1999?

12 A I think it was before July 1.

13 Q Right. Now, as I understand your testimony,  
14 and the nature of your business is such that you need  
15 to keep all your lines with one provider, you either  
16 have got to stay with Sprint or take them all to  
17 somebody else; isn't that right?

18 A That's correct.

19 Q So if some of your lines are subject to a  
20 contract for which Fresh Look is not available, even if  
21 the Fresh Look rule is upheld, that's not going to help  
22 your situation; is it?

23 A I think it would because I think somebody  
24 could take over that one contract, and they wouldn't be  
25 hung by as much bad contracts as they would --

1 obviously if you can turn over some of the bad  
2 contracts that have really poisoned you from converting  
3 over, then you could go ahead and they could possibly  
4 take one and -- one bad contract and still negotiate a  
5 better rate.

6 Q Just to make sure I understand, so it's not  
7 true that all of your contracts have to remain with one  
8 provider for you to do business?

9 A Well --

10 Q You can separate some of the contracts and  
11 give some to one provider and some to another provider;  
12 is that right?

13 A No. That's not what I was saying. I was  
14 saying whoever took over the contracts, if Fresh Look  
15 were to extinguish seven out of eight of my contracts,  
16 for example, I think is what your scenario was, and I  
17 would be stuck with one contract remaining, then that  
18 person could also take the one bad contract and I would  
19 still be able to negotiate a better price than I would  
20 if he had to take eight bad contracts that had higher  
21 prices on them.

22 Q I think I may not understand your answer.

23 I thought you agreed that this contract in  
24 August was not subject to renegotiation under the  
25 proposed Fresh Look rule.

1           A     That's correct.

2           Q     And I thought I also understood that all of  
3 your contracts had to remain with one provider.

4           A     That's correct.

5           Q     Okay. So if you can't renegotiate this one,  
6 then what good is a Fresh Look rule to you for taking  
7 your service elsewhere?

8           MS. BROWN: I think he answered that  
9 question twice.

10          MS. CASWELL: Maybe I didn't understand him  
11 because I thought I got conflicting answers.

12          THE COURT: It appears to me she is entitled  
13 to ask. Do you understand what she is asking?

14          THE WITNESS: I think I am understanding  
15 what she is asking is, but I think there is an  
16 assumption in there that that somebody else can't  
17 take this contract, this one contract.

18 BY MS. CASWELL:

19          Q     Correct.

20          A     -- that's dated in August of '99 after the  
21 Fresh Look rule. And my answer was that yes, they  
22 could take that one contract and extinguish the rest of  
23 the contract, and they would have to bite the bullet on  
24 that one contract.

25                 In other words, they could take the contract

1 and make the payments on the contract.

2 Q Oh, you are saying that a competing ALEC --

3 A Whoever took the contract.

4 Q -- could pay the termination liability?

5 A They could either pay the termination  
6 liability or I guess just take over the payments of the  
7 contract.

8 Q Okay. So that would be something that a  
9 competing ALEC may or may not choose to offer you if he  
10 comes and solicits your business; is that right?

11 A That is correct.

12 MS. CASWELL: Okay. Thank you, Mr. Larsen.

13 I am done.

14 REDIRECT EXAMINATION

15 BY MS. HELTON:

16 Q Do you have any recollection of when you  
17 became aware of the two ALECs that are here in town,  
18 KMC and Delta -- I can't remember the name of the other  
19 one. ITC Deltacom?

20 A In the summer of 1998, we set up a booth at  
21 -- Internet Services of Tallahassee set up a booth in  
22 the parking lot at the Tallahassee Mall when they had  
23 an outdoor garage sale, and KMC set up a booth right  
24 next to us and I got the impression from talking to one  
25 of the gentlemen there, one of their sales

1 representatives just moved to town, in the summer of  
2 1998.

3           And I first became aware of ITC Deltacom  
4 because my next-door neighbor works for them and he  
5 drives a truck and that just happened in the last few  
6 months.

7           So that's my only knowledge of it. So I am  
8 not really sure when they came, but I believe KMC came  
9 in the summer of 1998.

10           Q     Has anyone ever offered to resell you the  
11 same service that you receive from Sprint?

12           A     Yes, they have. That was KMC Deltacom. I  
13 was talking to them in the latter part of 1998 after  
14 having met one of their sales reps.

15           Q     Why didn't you -- I guess nothing came out  
16 of those conversations with them?

17           A     Nothing came out at that point with them.  
18 They wanted to offer me -- I guess they were going to  
19 go ahead and take over an offer of 8 percent discount  
20 over what Sprint was charging, but they wanted to lock  
21 me into three-year contracts again, and I would be in  
22 the same -- basically the same position I was with  
23 Sprint.

24                     And then what happened is you might see some  
25 of these contracts have been renegotiated. Sprint came

1 out and lowered their PRI line rates with a competitive  
2 rate, and I heard this term kicked around, I think it's  
3 ICB rate, I am not really sure what it is, but I  
4 thought it was an anti-competitive rate, and they came  
5 out with a competitive rate for their PRI lines and I  
6 converted some of these contracts to PRI lines at that  
7 time. That was in the first part of 1999.

8 Q Ms. Caswell asked you, I think, a  
9 hypothetical question about if you had your contracts  
10 with KMC instead of Sprint, wouldn't you be in the same  
11 situation that you are in now.

12 If there had been an alternate competitor at  
13 the time you first started signing contracts with  
14 Sprint, would you have gotten into the situation that  
15 you are in now as far as staggered term contracts go?

16 A Could you repeat that one more time?

17 Q If there had been a viable competitor at the  
18 time you started your Internet service provider  
19 business, in your opinion, would you have gotten into  
20 the situation that you are in now, as far as having a  
21 string of staggered term contracts with one provider?

22 A If there had been a viable competitor, I  
23 think I might have been in the same situation. If  
24 there had been a difference -- that assumes a few  
25 things, what the term -- what the contract terms would

1 have been, whether you'd get better terms for shorter  
2 term contracts, you might want to have -- you might  
3 have had wanted to go ahead and elect shorter term  
4 contracts, you wouldn't be locked in, you could  
5 renegotiate.

6 The other thing is if there was more  
7 competition I don't think the prices would have been  
8 nearly as high as they were.

9 MS. HELTON: We have no further questions.

10 THE COURT: You may step down.

11 (Witness excused.)

12 MS. BROWN: The Commission calls Anne Marsh.

13 THE COURT: Ms. Marsh, you heard my  
14 instructions to prior witnesses. Do you have a  
15 religious objection to swearing?

16 THE WITNESS: No.

17 Thereupon,

18 ANNE MARSH

19 was called as a witness, having been first duly sworn,  
20 was examined and testified as follows:

21 THE COURT: You may inquire.

22 DIRECT EXAMINATION

23 BY MS. BROWN:

24 Q State your name and business address for the  
25 record, please.

1           A     My name is Anne Marsh, Anne with an E. 2540  
2 Shumard Oak Boulevard, Tallahassee, Florida 32399.

3           Q     By whom are you employed?

4           A     I am employed by the Florida Public Service  
5 Commission.

6           Q     What is your position with the Florida  
7 Public Service Commission?

8           A     I am an economic analyst.

9           Q     How long have you been with employed with  
10 the Commission?

11          A     For 11 and a half years.

12          Q     How long have you been involved in  
13 telecommunications regulation?

14          A     For 9 and a half of the 11 and a half. I  
15 worked for two years in water and waste water.

16          Q     What is your educational background?

17          A     I have a Bachelor's degree and a Master's  
18 degree in accounting from Florida State University.

19          Q     What is the purpose of your testimony here  
20 today?

21          A     My testimony is to discuss the way in which  
22 the Commission made the determinations it did in  
23 arriving at the current Fresh Look rule the way it is  
24 currently framed.

25          Q     Would you describe the specific provisions

1 of the current Fresh Look rule?

2 A The rule allows customers with very specific  
3 types of contract to opt out of those contracts with a  
4 lesser termination charge than they might otherwise  
5 pay.

6 Specifically those contracts are those that  
7 include dial tone services; that is something  
8 Ms. Simmons had addressed earlier today. The dial tone  
9 prior to January 1, 1996, could not be provided by  
10 anyone other than the incumbent local exchange company.

11 Q How long does the rule provide this option  
12 to opt out for?

13 A There is a Fresh Look window of one year  
14 that goes into effect 60 days after the effective date  
15 of the rule. And during that one-year window,  
16 contracts that meet certain other provisions can be  
17 opted out of.

18 Q Why has this rule been proposed by the  
19 Public Service Commission?

20 A It was initiated by a petition from Time  
21 Warner. If I recall correctly, I was not involved with  
22 the rule in that earlier part, I only came on it after  
23 it was set for hearing, but it arose because of the  
24 change in the statute that allowed competition in that  
25 very specific area.

1 Q What area was that again?

2 A That was the dial tone services?

3 A Yes.

4 Q Prior to the change in the Florida Statutes,  
5 did customers have a choice of service providers?

6 A Not for that type of service, no. They  
7 could choose private line, they had certainly choices  
8 in the long distance carriers. But competition has  
9 come in in different pieces of the industry, different  
10 services, over a period of at least 15 years or more.  
11 I mean, more like 20 years. But the dial tone services  
12 that this rule addresses were not available at all  
13 prior to the change in the statute.

14 Q And in your view, when the statute changed,  
15 were they immediately practically available?

16 A No. This came up in numerous dockets that I  
17 was involved in, and we heard from competitors that  
18 they would be providing services but it didn't happen  
19 instantly in 1996.

20 In fact, there are still areas that are not  
21 served today by competitors. And even where there is  
22 competition, there are still issues that are being  
23 ironed out between the parties. So it's been an  
24 evolving process even since the statute was passed.

25 Q And is it your view that this transitional

1 process is still going on?

2 A Yes, and will probably go on for many years  
3 to come.

4 Q BellSouth and GTE claim, and you may have  
5 answered this to some extent, that there were  
6 competitive alternatives in telecommunications long  
7 before 1995. Do you agree with that?

8 A I agree, but I don't believe that what they  
9 are talking about is the exact same thing we are  
10 talking about in this rule.

11 PBX has already been addressed at  
12 considerable length today, but that's one of the  
13 primary things that's being talked about.

14 There are contractual service arrangements  
15 that arose predominantly for competition in that  
16 service. And that service did not include the dial  
17 tone. It might have included, if the customer took an  
18 entire service from a local exchange company that  
19 included dial tone such as ESSX or CENTREX, it might be  
20 included in that sense, but no one could compete for  
21 that, so the actual PBX that prompted it is simply not  
22 the same thing.

23 Q As you used -- is PBX a customer-premised  
24 piece of equipment?

25 A Yes, it is.

1           Q     What is a customer -- how do you define  
2 customer-premised equipment?

3           A     It can be any type of equipment that the  
4 customer provides, and that's the key there. It's  
5 equipment. It's not the underlying phone service that  
6 you might necessarily get to connect to the outside  
7 world.

8                     Just for a very simple example of what  
9 customer-premised equipment is and how it might offer  
10 you some of the same functionalities that you get from  
11 the phone company, I have a phone at home that I can  
12 program to do speed dialing. I can push one button on  
13 it and it will speed dial a call. I can always buy  
14 that service from Sprint and pay 3- or \$4 a month for  
15 that service.

16                     I can also redial by pressing a button, it  
17 will redial the last call that I made using that phone.  
18 I could buy that from Sprint as well and pay another 3-  
19 or \$4 a month.

20                     The equipment that I own, the  
21 customer-premised equipment, provides these certain  
22 functions but I still have to have the dial tone  
23 service from the local exchange company to use it. And  
24 that's --

25           Q     Go ahead.

1           A       That's the difference in that particular  
2 type of competitive alternative.

3           Q       And it's your view that this Fresh Look rule  
4 addresses that service?

5           A       It addresses the dial tone, and specifically  
6 spelled out in the first part of the rule that we are  
7 talking about, dial tone switch-based services.

8           Q       Okay. Now, you stated earlier that it's  
9 your view that competition in the telecommunications  
10 market has come in phases?

11          A       Yes. I agree with the testimony earlier of  
12 Ms. Simmons that we first saw it in customer-premised  
13 equipment, we saw it in long distance, and then we also  
14 saw it in the AAV market, the alternative which was for  
15 private lines.

16                   And then the last phase we have seen so far  
17 has been for the local switch services.

18          Q       In each one of these phases of the  
19 development of competition, has the Commission taken  
20 similar action to what it proposes to take in this  
21 rule?

22          A       Sometimes similar and sometimes different.

23                   For example, we have already talked about  
24 the CPE and the contractual services arrangements. The  
25 contractual service arrangements largely were to allow

1 companies to compete, the local exchange companies to  
2 compete with the offerings of equipment.

3 So in that case, the Commission allowed the  
4 local exchange companies to contract for rates that  
5 were lower than what were in their tariff in order for  
6 them to compete in that particular area.

7 Later on we saw co-location in the AAV  
8 market and in that instance the Commission did adopt  
9 Fresh Look. It was done by order rather than by rule  
10 but there was a Fresh Look permitted.

11 It's different in certain of the details  
12 from the one we have before us today, but the general  
13 principle is the same.

14 Q And now we have competition in the switch  
15 service system?

16 A We have competition allowed and it's  
17 growing. It isn't everywhere yet, but it is permitted  
18 and is an ongoing process at this time.

19 Q And is the Commission taking a similar  
20 regulatory action under these circumstances?

21 A Yes, the adoption of this Fresh Look rule is  
22 the manner in which the Commission has addressed  
23 competition in that particular area of the market.

24 Q Is it the only manner in which it's  
25 addressed competition?

1           A     It's the only one I have been involved with.

2           Q     How does this rule in your view address  
3 competition and foster it?

4           A     The rule allows the customers to opt out of  
5 their contracts at a point where there is sufficient  
6 competition out there for it to make any sense.

7                     One thing I want to really emphasize is the  
8 word sufficient. You might use other words like  
9 meaningful. These words came up at the agenda  
10 conference when we discussed it with the Commission  
11 when they did adopt this current rule.

12                    You want to have sufficient competition out  
13 there for the customer to have some choice before they  
14 are allowed to opt out of the contract. Because what  
15 would happen if you had said in January 1, 1996, that  
16 you were going to allow Fresh Look, is there was no one  
17 offering anything yet.

18                    So at the point that this Fresh Look rule  
19 comes into play, it's been deemed that the competition  
20 is meaningful enough or sufficient enough to warrant  
21 it, but yet, it's not so widespread that that would  
22 render it useless.

23                    If there was competition everywhere and  
24 everyone had an opportunity all along, you wouldn't  
25 need the Fresh Look rule. So it's a balance and it's a

1 judgment call as to when that takes place.

2 Q What is the rationale behind requiring  
3 contracts have one year remaining before they would be  
4 eligible for Fresh Look?

5 A We wanted to ensure that we -- first of all,  
6 that we were talking about long-term contracts. And  
7 long-term contracts is something that we asked all the  
8 witnesses about in the hearing, and each witness gave  
9 their definition of what they thought long-term meant.

10 The range of answers was from six months to  
11 about four years. So we wanted to establish what  
12 long-term was and then ensure that that is the kind of  
13 contracts we were dealing with.

14 And the one-year was selected as basically a  
15 compromised position. It was between what the parties,  
16 the range of terms that the parties had used in  
17 describing what they thought it was. And I believe it  
18 also was the number that came up most frequently. So  
19 it was a compromise and a judgment call that the  
20 Commission selected the one-year date.

21 Q Does the Commission often have to make  
22 judgment calls like this?

23 A Yes. The parties never agree in a hearing.  
24 If they did, you wouldn't have a hearing. And the  
25 position, just as in the case of the length of the

1 contract, the positions will be all over the  
2 waterfront. And it's up to the Commission to weigh all  
3 the evidence and to determine what is the best solution  
4 given the disparity in the various responses of the  
5 parties.

6 So if the Commission couldn't make judgment  
7 calls of that nature, it simply wouldn't be able to do  
8 its job.

9 Q You testified earlier to the Fresh Look  
10 window provision that's in the rule, and you said that  
11 it would begin 60 days after the effective date. Do  
12 you remember that?

13 A Yes, I do.

14 Q What's the purpose of that 60 days?

15 A The 60 days is to allow the local exchange  
16 companies to do whatever they need to do to prepare to  
17 be ready with any -- could be computer programming or  
18 training their people, whatever administrative type  
19 things they need to do in order to be prepared.

20 Q At the hearing before the Commission, you  
21 were involved in that hearing; correct?

22 A Yes, I was.

23 Q Did the LECs recommend in their testimony  
24 that the Commission change the eligibility cutoff date  
25 to February 1996?

1           A     Yes, they did.

2           Q     Do you agree with that?

3           A     No, I don't agree with that. As I already  
4 discussed a little earlier in my testimony, it would  
5 not have made any sense. It would have simply been  
6 meaningless because there would have been no one for  
7 new customers to turn to.

8                     So I don't agree with that date at all.

9           Q     What about the cutoff date that the  
10 Commission did choose, the July 1, 1999, contracts, can  
11 you explain the rationale of that?

12          A     Yes, I can. It's been discussed at length  
13 today and I don't agree with anything about what's been  
14 discussed.

15                     It was not a date that represented that  
16 there was no competition before that date. At the  
17 agenda conference I discussed this at length with the  
18 Commissioners, and I know that I used terms and they  
19 used terms in describing the competition as meaningful  
20 competition and sufficient competition to warrant a  
21 Fresh Look rule.

22                     It was not designed to say that there had  
23 been no competition and no alternatives prior to that  
24 date. But rather it was a balance, a point at which  
25 there was enough to warrant a little extra boost to

1 competition, but it certainly recognized that  
2 competition was not everywhere at that time.

3 Q Was another change also made to the length  
4 of the Fresh Look window?

5 A Yes, and that was suggested in the hearing  
6 by the local exchange companies; although they did not  
7 support the rule, they suggested that certain things be  
8 changed if the rule was to go forward and that was one  
9 of the things.

10 The window had initially been proposed to be  
11 two years in length. And the local exchange companies,  
12 I believe, wanted 180 days. And the competitors wanted  
13 a much longer period, they wanted the longest period  
14 they could get.

15 I think even four years was proposed.

16 So we again made a judgment call and tried  
17 to balance the interests of the parties and have  
18 something in between. So we arrived at the one-year  
19 date.

20 I would also comment on the 180 days that  
21 was used in the earlier Fresh Look for the AAV  
22 co-location. There was a difference in that rule or  
23 that order and that window that is significant when you  
24 compare it to the one we have now. And that difference  
25 is that, if my recollection is correct, and I was on

1 that docket, that the Fresh Look started in a central  
2 office when there was competition in that central  
3 office. And so it could go on for a long period of  
4 time.

5 So the 180 days wasn't just 180 days. It  
6 was 180 days from a certain event happening.

7 We chose not to do that in this particular  
8 rule. For one thing, the parties didn't suggest it  
9 and the Commission does make its recommendations based  
10 on what's in the record.

11 And although a shorter window was discussed,  
12 the part of making it contingent upon a certain event  
13 happening, I don't recall ever being in the record.

14 So that's a difference here.

15 The one year being in between recognized --  
16 and we discussed it in our recommendation -- it  
17 recognized that competition was not everywhere, it came  
18 at different times to different central offices, to  
19 different areas, and it was a compromised position and  
20 it was the judgment made by the Commission to choose  
21 one year. So that was the change that we made.

22 Q Do you think the Commission was responsive  
23 to the concerns raised by the ILECs in the proceeding?

24 A Yes, in addition to the ones I already  
25 discussed, one of the things they asked for was that

1 repricing be done. And what that means is that if a  
2 contract was, say, a three-year contract, and one year  
3 had already been used up and the customer wanted to opt  
4 out, the contract would be repriced as if it had been a  
5 one-year contract all along, and that would be all that  
6 that customer owed.

7           Some 98 percent of the contracts we are  
8 talking about here are tariff term plans. And those  
9 are subject to repricing, and that was a change made to  
10 the rule as a result of the hearing and as a result the  
11 LECs' requests that repricing be used. So yes, I do  
12 believe we were responsive to their concerns.

13           Q     Do you think the Commission's actions in  
14 this rule proceeding were arbitrary and capricious?

15           A     No, I believe in each case that the  
16 Commission weighed the evidence, it had to balance  
17 between the opposing sides and what they testified to.  
18 And the Commission considered the testimony in the  
19 record. And it discussed various issues at length and  
20 made some judgment calls that are part of its job to  
21 make.

22                     And I don't believe that that's the same  
23 thing as being arbitrary and capricious.

24                     MS. BROWN: Thank you. No further  
25 questions. I tender the witness.

## CROSS EXAMINATION

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BY MR. GOGGIN:

Q Good afternoon, Ms. Marsh. Earlier in your testimony you mentioned that the Commission determined dial tone was not available from competitors prior to 1996?

A That's my understanding.

Q Yet, the Commission had authorized what were then monopoly providers in telecommunications services to enter into contract service arrangements prior to the end of 1995; isn't that right?

A Yes, they could enter into contract arrangements.

Q I believe your testimony was they were able to do so in order to meet competitive offers?

A For certain things they were. The companies had to petition the Commission and ask for each service that they wanted to offer a CSA for, they filed a request to be permitted and they had to state what type of competition that they were receiving.

And these were, for nondial tone type services, things like one that I worked on was for directory assistance services is a GTE tariff, and they wanted to have CSA authority for that. So there were a number of things. And in the case of something like

1 CENTREX or ESSX, I am not very familiar with those, but  
2 if I understand them correctly, that's a service that  
3 the PBX competes with in part.

4 So the LEC might offer that subject to a  
5 CSA, and even though it includes the dial tone part --  
6 if it, indeed, does, and I am not certain that it does  
7 -- it's not the dial tone part that's being competed  
8 with, it's the equipment part that's being competed  
9 with.

10 Q What does the equipment do, the equipment  
11 you are talking about?

12 A Provides certain functions that might  
13 otherwise be purchased from the local exchange company.  
14 Like the simpler answer that I gave earlier regarding  
15 some of the functions like redialing, and so forth, it  
16 also handles the internal intercom for the business or  
17 the entity has, some of the internal type things.

18 Q The way CENTREX are or ESSX might?

19 A Not exactly. I am not fully conversant on  
20 exactly how it does it. But in the one case you are  
21 buying it and it's being done by the company's switch.  
22 And the other the equipment is simply programmed to do  
23 certain of those functions. I mean, a switch is a  
24 computer basically, if I understand. At least these  
25 days they are.

1           And you can have a phone that's got computer  
2 chips in it that do certain functions. It's simply a  
3 programming function.

4           So I suppose in that sense you could say  
5 that it's a computer type thing, but it's not the same  
6 specifically. I am not sure if I am answering quite  
7 what you are asking.

8           Q     From a customer's perspective, if they are  
9 considering that as an alternative to switched access  
10 service receiving PBX services, whether by purchasing  
11 the CPE or purchasing just the service from someone  
12 like a shared tenant service provider, for example,  
13 wouldn't that constitute a substitute service?

14          A     The substitute is only for a part of it.

15          Q     Hasn't the Commission specifically found  
16 that CENTREX systems are in direct competition with PBX  
17 systems for medium to large size businesses?

18                 I don't want to hide the ball. I am  
19 referring to order number PSC 941286FOFTP. It's a 1994  
20 order in the investigation into local exchange company  
21 services into which services are effectively  
22 competitive in 1993.

23          A     I wasn't on that docket.

24          Q     Okay. But you were on the Fresh Look  
25 proceeding at that time?

1 A Yes.

2 Yeah.

3 MR. GOGGIN: Will you allow me to approach  
4 the witness?

5 THE COURT: Yes. If it is helpful for the  
6 counsel to view the document at the same time the  
7 witness reviews the document, you are free to do  
8 that. Sometimes we have to do this in order for  
9 you conduct your examination.

10 BY MR. GOGGIN:

11 Q If you could look at page 17 of the order at  
12 part E1. Could you read those two paragraphs under  
13 subheading (1)?

14 A It says: CENTREX systems are in direct  
15 competition with private branch exchange (PBX) systems  
16 for medium to large size business customers and key  
17 telephone systems for smaller businesses. The size  
18 threshold for these customers is generally 25 or more  
19 station lines. Either system can provide a number of  
20 features including attendant list, answering, automatic  
21 call distribution, queuing, voice mail access and  
22 direct numbers to stations. Although the exact list of  
23 services are not identical, the LECs and vendors agree  
24 that the features of each are sufficiently comparable  
25 to make them direct substitutes for one another.

1                   From this it appears that CENTREX, ESSX  
2 systems and PBXs are functionally equivalent.

3           Q       Do you disagree with the Commission's  
4 finding in that portion of the order?

5           A       I wouldn't say that I disagree with it. But  
6 I am not certain of the interpretation that should be  
7 put on it since I wasn't part of this docket. But it  
8 appears to me that there is emphasis on the features,  
9 and I would still maintain that the dial tone service  
10 was not offered at this time, the dial tone service  
11 that's the subject of this rule.

12                   And just based on my limited reading right  
13 here and the discussion of the features and the list of  
14 services, I am still not convinced we are talking about  
15 exactly the same thing.

16           Q       Do you have any reason to believe that any  
17 of the contract service arrangements entered into prior  
18 to the advent of switched-based competition, whatever  
19 that date might be, were not the product of a competing  
20 alternative having been offered to the customer?

21           A       Could you repeat that for me?

22           Q       Let me break it into pieces. You agree,  
23 would you not, that CSAs were authorized prior to the  
24 1995 act as a means to meet competition; correct?

25           A       In certain areas, yes.

1           Q     Do you have any reason to believe that any  
2 of the CSAs offered prior to the adoption of the price  
3 regulation statute in 1995 were not the product of a  
4 customer having received a competing offer?

5           A     Well, one of the requirements for a company  
6 to get authorization to offer CSA is it had some form  
7 of competition.

8                     So I would agree with you in that sense that  
9 there would have been some kind of competition  
10 available.

11                    It doesn't necessarily mean that the  
12 customer -- well, strike that last part.

13                    There had to be competition of some sort for  
14 the CSA to be offered at all for the company to have  
15 authority to do it.

16           Q     Assume for a moment the Fresh Look rule were  
17 adopted as proposed, and next year, a new provider of  
18 telecommunications services suggested that a new Fresh  
19 Look rule should be adopted because they were offering  
20 packet switched services over the Internet that were of  
21 the functional equivalent of the telecommunications  
22 services offered today over the circuit-switched  
23 network by ALECs and by ILECs.

24                    Would the offering of a substitute product  
25 via a technology that was previously not available as a

1 competing alternative justify Fresh Look in your view?

2 A As part of this rule, no. I mean it  
3 wouldn't -- it wouldn't cause us to reopen this rule  
4 and to offer Fresh Look again.

5 For one thing, we are talking about a  
6 service in your example here -- packet switching over  
7 the Internet -- which is unregulated, has never been  
8 regulated, I don't know if it will ever be regulated  
9 but it hasn't been heretofore. So it's simply not the  
10 same thing as we are talking about here.

11 Q Wouldn't the contracts that the package  
12 switch service providers would be asking you to effect  
13 be contracts entered into with carriers that you  
14 regulate, carriers who provide circuit switch  
15 telecommunications services?

16 A I think it's irrelevant for purposes of this  
17 rule.

18 Q So in other words, if a substitute for  
19 BellSouth's switched services were to be developed in  
20 the next year or two that was new, was different from  
21 the substitutes currently available, that would not  
22 justify, in your view, adopting a new and different  
23 Fresh Look rule?

24 MS. BROWN: That's the third time the  
25 question has been asked. Ms. Marsh answered it

1 twice. I object. It's been asked and answered.

2 THE COURT: I don't understand it as asked  
3 to be cumulative. Overruled. You may answer.

4 A This rule addresses something very specific  
5 for a very specific reason. It's that prior to 1996,  
6 January 1 of 1996 when the statute allowed competition  
7 for local switch services, that could not be offered by  
8 a competing telecommunications carrier. You are  
9 talking about something that's not even a  
10 telecommunications carrier necessarily. Internet  
11 services are not the same thing.

12 As far as invoking a Fresh Look rule, again,  
13 that was discussed in our recommendation. It was  
14 discussed in the context of the fact that competition  
15 wasn't everywhere, and maybe we would need to have a  
16 Fresh Look rule again. It was discussed at agenda and  
17 it was discussed in our recommendation.

18 And we specifically said that we would have  
19 a one-shot deal on this. It was for one year. And one  
20 of the main reasons for that was that to have ongoing  
21 Fresh Look or to have it again would inject a great  
22 deal of uncertainty in the market. And we believed  
23 that was an unfair thing to do to the local exchange  
24 companies.

25 So the idea that just because some other

1 service comes out, particularly a service that is not a  
2 regulated service and has never had anything to do with  
3 this docket, that that would invoke a Fresh Look rule  
4 again, I can't imagine why it would.

5 BY MR. GOGGIN:

6 Q If an unregulated service could be shown to  
7 be a substitute for a regulated service, would that  
8 enter into the Commission's analysis of whether what  
9 you referred to as meaningful competition existed for  
10 switched services?

11 A There have certainly been other instances  
12 where something was deregulated, unregulated -- CPE  
13 comes to mind, that was once a regulated service and it  
14 was deregulated.

15 That fact alone would not be the entire  
16 consideration, if it was ever regulated or not. What  
17 we are talking about here, again, is something very  
18 specific and the rule is very narrow.

19 That's the way I see the rule because that's  
20 what the rule says. It's for a specific type of  
21 service that was not heretofore allowed.

22 Q Did you participate on behalf of the staff  
23 in developing the rules prior to the final  
24 recommendation that was issued in November?

25 A I only took on that docket when it was set

1 for hearing, so I was not part of the previous actions  
2 that had been taken up to that point.

3 Q To your knowledge, prior to the time that  
4 the November 1999 recommendation was filed, I believe  
5 it's November 4, 1999, had you or anyone else on the  
6 Commission's staff formed any sort of investigation to  
7 determine whether customers that would be affected by  
8 the rule had competitive alternatives from which to  
9 choose at the time they entered into the contracts that  
10 would be effected?

11 A It was discussed in the record at length.  
12 There was considerable discussion of many of the things  
13 we heard here today.

14 I didn't independently conduct anything  
15 outside of that, but we considered that evidence in  
16 making a recommendation. There was talk about the  
17 alternatives, there was talk about the competition  
18 report, and that was in the record.

19 Q Did anyone ever ask any of the parties to  
20 these agreements other than the ILECs whether  
21 competitive alternatives existed for the services  
22 provided under those contracts at the time that  
23 contracts were signed?

24 A There were no customers testifying in the  
25 hearing at the time, so they certainly were not asked

1 during the hearing. Whether anything came up prior to  
2 that, I don't know, but they were not in the hearing  
3 and they didn't --

4 But I would point out that we already  
5 discussed the fact that there were competitive  
6 alternatives and there was competition. It's a  
7 question of how much and whether or not it's meaningful  
8 competition, sufficient competition that the Commission  
9 based its judgment on.

10 Q If a customer had -- a facilities-based ALEC  
11 offering similar services to the facilities-based  
12 services offered by an ILEC, is that meaningful  
13 competition from that customer's perspective?

14 A It might be for that customer. The problem  
15 in developing the rule is how do you address the fact  
16 that some customers have competition and other  
17 customers don't?

18 And as I already testified, that can be  
19 approached in different ways. It could have been  
20 approached in perhaps leaving out certain central  
21 offices that already had competition or certain areas  
22 that already had competition. There are others that  
23 didn't.

24 So there is a balance there.

25 Q Have you analyzed the development of

1 competition by ALECs?

2 A I have not analyzed it, no.

3 Q Would you agree with the proposition that  
4 ALECs typically locate first in areas that are densely  
5 populated?

6 A I would agree.

7 Q Would you also agree with the premise that  
8 businesses tend to be more densely located in areas  
9 that are densely populated?

10 A Perhaps some of them, I would agree that a  
11 number of them would be.

12 Q Are you familiar with the Commission's  
13 reports on competition that have been labeled BellSouth  
14 Exhibits 1 through 4?

15 A I have read Exhibit 4. I have not read the  
16 others specifically.

17 Q Had you read them at the time that you  
18 developed the recommendation or participated in the  
19 development of the recommendation that was issued on  
20 November 4, 1999?

21 A I read the testimony that was in the record  
22 about them. I don't recall if the one that I read was  
23 issued at the point that we went to hearing -- went to  
24 agenda. It would not have been issued at the point we  
25 went to hearing.

1           Q     But you had not read the reports that had  
2     been issued by that time, the '98, '97, and '96  
3     reports?

4           A     Not that I recall.  No, I relied on the  
5     evidence in the record.

6           Q     Was there any evidence in the record from a  
7     party to any of these contracts that indicated that the  
8     parties to the contracts lacked competing alternatives  
9     at the time the contracts were entered into?

10          A     Which parties are you referring to?  Your  
11     company is a party.

12          Q     Parties to the contracts that would be  
13     affected.

14          A     Are you talking about the ALECs or are you  
15     talking about customers?

16          Q     My understanding is that none of the ALEC  
17     customers would be affected by the proposed rules, so I  
18     am talking about the parties to the contracts that  
19     would be affected, the regulated parties, if you will.

20          A     Okay.  State the question again now that I  
21     understand what you are asking.

22          Q     You mentioned before that you had not  
23     reviewed the competition reports prior to writing the  
24     recommendation but instead had relied on the evidence  
25     in the record.

1           Was there any evidence in the record from  
2 the parties to the contracts that would be affected by  
3 this rule regarding the issues of whether competing  
4 alternatives existed at the time the contracts were  
5 entered into?

6           A     Are you asking me whether the local exchange  
7 companies testified about that subject, about the fact  
8 that there were alternatives?

9           There was considerable evidence in the  
10 record that there were alternatives. These arguments  
11 were heard by the Commission and were weighed. There  
12 was considerable evidence of that.

13          Q     Was there any evidence to refute the  
14 evidence provided by the local exchange companies by  
15 anyone with firsthand knowledge of the contracts?

16          A     Whether there were alternatives?

17          Q     Let me rephrase this.

18                 Would you agree that only the customer who  
19 is a party to the contract would be in a position to  
20 state whether competing alternatives were available to  
21 him or her at the time he or she entered into the  
22 agreement?

23          A     If you are talking about a specific  
24 contract, I would agree with that.

25          Q     Don't all the contracts that would be

1 affected by this rule have such a customer as a party  
2 to them?

3 A They all would have customers as a party to  
4 the contract. You wouldn't have a contract if there  
5 wasn't a customer. I am afraid I am not following  
6 where you are going with this.

7 Q Let me go back to a hypothetical I asked  
8 earlier.

9 Assuming there were a hundred customers and  
10 95 of them had long-term agreements with BellSouth and  
11 five had long-term agreements with ALECs, say Time  
12 Warner.

13 Six ALECs offer contracts to the 95  
14 customers who are BellSouth customers. BellSouth also  
15 offers contracts to the 95 customers who are BellSouth  
16 customers. All 95 of them sign up with BellSouth.

17 Under that hypothetical would there be any  
18 change in market share?

19 A If everybody stayed with the same company  
20 that they already had?

21 Q Right.

22 A No, there wouldn't be.

23 Q In your view, would the receipt of seven  
24 competing offers for service constitute meaningful  
25 competition in the perspective of the customer?

1           A     For that specific customer, yes.

2                     The question in my mind is whether all the  
3 customers who have contracts had meaningful competition  
4 before the date of the rule.

5           Q     Was that a question in your mind at the time  
6 you wrote the recommendation?

7           A     Yes, we addressed that. In my view, we did.  
8 We recognized that there was some competition and in  
9 other areas there was not.

10          Q     Was there ever any attempt made by the  
11 Commission to determine whether any of the contracts to  
12 be affected by the rule were entered into with business  
13 customers who were in the areas where competition was  
14 less prevalent, let's say?

15          A     I don't recall whether that specifically  
16 came up during the hearing or not as to actually  
17 specifically -- I don't recall one way or the other.

18          Q     Is it plausible that the exchanges that do  
19 not have ALECs offering businesses local exchange  
20 services may also be the exchanges that do not have  
21 many businesses in them?

22          A     That's possible, but in another context I  
23 had looked at the mixture of business and resident  
24 customers, and business customers are really  
25 everywhere.

1           There aren't that many areas that are going  
2 to be strictly residential, nonbusiness areas. So I am  
3 not sure I agree with that.

4           Q     Are you familiar with the concept of  
5 metropolitan statistical areas?

6           A     Somewhat.

7           Q     Do you know what sorts of factors are used  
8 to determine what is a metropolitan statistical area  
9 and what is not?

10           It's okay if you don't. I will move on.

11           In your review of the 1999 competitive  
12 report, did you notice any correlation between densely  
13 populated areas and higher market shares for ALECs?

14           A     There would be some. I didn't make specific  
15 note of -- tried to compare the market share to the  
16 density of the population, but I think earlier in your  
17 question you asked me a similar thing. And I agreed  
18 that companies would first go where the most dense  
19 businesses were.

20           Q     Did you participate in the preparation of  
21 any of the competition reports?

22           A     No.

23           Q     Do you have a copy of the number 4  
24 recommendation with you today?

25           A     I brought it today.

1 THE COURT: It's an exhibit. Perhaps we can  
2 refer to the number and tender to her the exhibit.

3 MS. BROWN: 57.

4 MR. GOGGIN: I would like to refer to  
5 stipulated Exhibit Number 57 for the next few  
6 questions.

7 THE COURT: Joint 57 has been tendered to  
8 the witness.

9 BY MR. GOGGIN:

10 Q I would like to refer you, please, to page  
11 2, Exhibit 57. In the fourth paragraph down, the  
12 second sentence states: Prior to ALEC competition,  
13 LECs entered into customer contracts covering local  
14 telecommunications services offered over the public  
15 switch network typically in response to PBS-based  
16 competition.

17 I am curious about the statement prior to  
18 ALEC competition. What was meant by that phrase, prior  
19 to the statute being adopted or prior to ALECs actually  
20 offering services?

21 A Either one would be correct. It was allowed  
22 back in the early '80s when neither the ALECs were  
23 there or the statute had been changed.

24 Q Further on in the paragraph the statement is  
25 made: ALECs are now offering switch-based substitutes

1 for local service.

2 The same statement was made by Time Warner  
3 in its original petition; isn't that right?

4 A I don't recall. This is a case background,  
5 and we would largely pull that from a variety of places  
6 and that could be one of them.

7 I also point out that a case background  
8 isn't necessarily the record, and the decision is made  
9 on the record. It's simply designed to introduce  
10 people to what the recommendation is about. It's not  
11 the actual recommendation.

12 Q Okay. Is the discussion of issues section  
13 the actual recommendation portion?

14 A Yes, it is.

15 Q You mentioned on pages 4 and 5 that the  
16 joint administrative procedures -- I am sorry, this  
17 isn't a portion that you had prepared. I withdraw that  
18 question.

19 Did you have any role in determining whether  
20 the Commission had adequate statutory authority to  
21 adopt the rules?

22 A I did not. I am not an attorney.

23 Q Okay. I know that you did not draft this  
24 portion of the report. There is a statement on page 5,  
25 the middle of the page, the sentence, first sentence in

1 the second paragraph states:

2 As described above, the Fresh Look provides  
3 customers of incumbent local exchange companies  
4 one-time opportunity of limited duration to opt out of  
5 their existing contracts without incurring high  
6 termination liability charges in order to avail  
7 themselves of competitive alternatives that did not  
8 exist at the time the existing contracts were entered  
9 into.

10 What is the basis, if you know, of the  
11 statement that competitive alternatives that did not  
12 exist at the time the existing contracts were entered  
13 into?

14 A I didn't write this. I would have written  
15 it a little differently.

16 Q Did you have any role in determining whether  
17 the proposed rule would retroactively affect the  
18 contracts?

19 A I am not sure what you mean by the word  
20 retroactive.

21 Q The next sentence states: The proposed rule  
22 operates on a going forward basis and does not  
23 retroactively affect the contracts.

24 Did you have any part in determining whether  
25 that was so?

1           A     Again, I didn't write this sentence.

2           Q     You mentioned the Fresh Look proceeding that  
3 occurred in 1994 with regard to return to access  
4 vendors, it's mentioned here in Exhibit 57 at the  
5 bottom of page 5 and top of page 6.

6                     To your knowledge, at that time in 1994 were  
7 the incumbent local exchange companies subject to rate  
8 of return regulation?

9           A     Yes, that would have been prior to the  
10 change which occurred in 1995. So yes, they would have  
11 been under rate of return regulation.

12          Q     Can you explain your understanding of rate  
13 of return regulation?

14          A     Rate of return regulation, rates are set in  
15 such a manner that a company is allowed to earn a  
16 reasonable rate of return on its investment. A revenue  
17 requirement is calculated and determined overall how a  
18 company -- how much money a company needs in order to  
19 accomplish that in order to have the opportunity to  
20 earn that rate of return on its investment, and rates  
21 are structured in such a way to target that revenue  
22 requirement, to meet that revenue requirement.

23          Q     Under rate of return regulation, if a  
24 company were able to reduce its costs and therefore  
25 increase its earnings, would that ordinarily result in

1 a rate reduction?

2 A It may or may not. If the earnings were  
3 increased and it was caught on the surveillance report,  
4 then there might be a number of proceedings happen, and  
5 I have been involved in several of these. There might  
6 simply be a one-time refund with no rate changes, and I  
7 have been on many that were done that way.

8 Q Would it be a fair comparison of the  
9 difference between rate regulation, rate of return  
10 regulation, I should say, and price regulation under  
11 the 1995 statute to say that under rate of return  
12 regulation, the Commission had the power and duty to  
13 determine just and reasonable rates and that under  
14 price regulation they do not?

15 A Certainly they did under rate of return  
16 regulation.

17 Under the price regulation, it's much more  
18 limited. The statute sets how the company may set its  
19 rates, what percentages it can raise certain rates, and  
20 the duty extends more to making sure that that's  
21 complied with.

22 Q Would you characterize it as a deregulation,  
23 the 1995 act, partial deregulation?

24 A I would characterize it as a partial  
25 deregulation, certainly isn't total.

1           Q     I would like to move to page 9 of the  
2 recommendation, the section regarding issue 2. There  
3 is a statement in the middle of the last paragraph,  
4 sentence that states: These customers truly are locked  
5 into long-term contracts without hope of taking  
6 advantage of competitive opportunities.

7                     Did you write this portion of the  
8 recommendation?

9           A     Yes, I did.

10          Q     Who are the customers you are referring to?

11          A     I am referring to customers specifically  
12 that had seven-year term plans that would expire after  
13 the year 2000.

14          Q     Did any of the customers in those seven-year  
15 plans indicate to you that they had no competitive  
16 opportunities to choose from when they entered into the  
17 agreements?

18          A     I think we discussed that before, we did not  
19 discuss it with the customers. It was my belief based  
20 on an analysis of the materials provided by the local  
21 exchange companies in viewing when the contracts were  
22 entered into and when they would expire that there were  
23 contracts entered into at a time when there was not an  
24 opportunity for customers to take dial tone service  
25 from anybody else.

1           Q     You note that many of the seven-year tariff  
2 term plans will expire after 2000, some 2004 and  
3 beyond. That would include contracts entered into in  
4 1997 and 1998; right?

5           A     There could be some, yes.

6           Q     It's your contention that there were no  
7 ALECs offering circuit-switched alternatives to  
8 BellSouth services at that time?

9           A     No, I already testified that in some areas  
10 there was competition and that there was sufficient  
11 competition or meaningful enough competition at the  
12 time the rule would be in effect to warrant a Fresh  
13 Look.

14           I haven't said there was no competition at  
15 all. But certainly there were many customers that I  
16 believed, based on the evidence that I was provided,  
17 that did not have an opportunity and they were  
18 certainly locked in.

19           Q     Do you know whether any customers to these  
20 seven-year term plans terminated them, notwithstanding  
21 the termination liabilities?

22           A     Are you asking if I know whether they  
23 terminated since the rule?

24           Q     Further down in the paragraph the statement  
25 is made: It appears reasonable to give ALECs the

1 opportunity to compete for this business without having  
2 to overcome the significant termination liability  
3 inherent in many LEC contracts.

4           What I am asking about is whether you have  
5 information that would relate to how significant an  
6 obstacle would be to overcome. And the question I  
7 asked was: Do you have any information that would  
8 indicate whether customers who are, as you put it,  
9 locked into these long-term contracts nevertheless  
10 terminate them upon receipt of competitive  
11 alternatives?

12           A     I don't recall at this point whether we had  
13 specific evidence about that or not.

14           Q     Do you have any evidence that suggests the  
15 contracts were not the result of competition with  
16 ALECs?

17           A     The contracts in this case are almost all  
18 tariff term plans. I believe 98 percent of the  
19 contracts in question are tariff term plans. That  
20 doesn't require any competitive showing by the local  
21 exchange company in order for them to offer those types  
22 of contracts.

23                   We heard from Ms. Simmons that tariff term  
24 plans might be entered into by companies for a number  
25 of reasons, including reducing the financial risks. So

1 there could be other reasons besides competition that  
2 would cause the LECs to offer these contracts.

3 Q Prior to 1995, were you working -- I believe  
4 you said you were with the communication bureau nine  
5 and a half years; is that right?

6 A Yes.

7 Q Prior to 1995 you were with the  
8 communications bureau?

9 A Well, part of that time I was in audit  
10 financial analysis in the telecommunications section.

11 Q Was it ever part of your responsibilities  
12 during the 1995 time frame to analyze tariff filings  
13 made by LECs?

14 A I have on many occasions.

15 Q Did you review any tariff filings regarding  
16 tariff term plans prior to 1995?

17 A I recall doing CSAs. I don't recall doing  
18 any tariff term plans.

19 Q There is a statement made on page 11 of the  
20 report, the end of what appears to be the third  
21 paragraph, if you count the indented section as a  
22 separate paragraph, just before the second indented  
23 portion.

24 The second-to-the-last sentence in that  
25 paragraph reads: Although the LECs argued that the

1 ALECs could always resell existing contracts, this  
2 avenue would not provide any benefit to the customer.

3 Is there any evidence to support that  
4 statement?

5 A Well, the next thing is the argument of  
6 KMC's witness.

7 Q Is KMC a customer?

8 A No, KMC is a competitor.

9 Q Didn't Mr. Larsen just suggest that KMC  
10 offered to resell BellSouth's contracts to him?

11 A No. Mr. Larsen is not a customer of  
12 BellSouth.

13 Q I am sorry, Sprint's contracts.

14 A He made a statement to that effect.

15 Q The bottom of page 11 the statement is made:  
16 Without Fresh Look, customers who are subject to  
17 long-term contracts will receive no benefit from  
18 competition for many years to come.

19 Would this also would be true of Time  
20 Warner's long-term customers?

21 A No. Time Warner's customers are already  
22 receiving the benefit of the competition. They are  
23 doing business with their competitor.

24 Q If Time Warner and BellSouth bid for a  
25 three-year contract in the spring of 1998 and Time

1 Warner won the bidding, then you would consider that  
2 customer to have benefitted from competition already?

3 A I think that would be the case, although  
4 that's not to say there wouldn't be further benefits  
5 from competition further down the line.

6 At least at that point, they had some  
7 opportunity.

8 Q If subsequent to spring of 1998 when this  
9 two-way bidding between BellSouth and Time Warner  
10 occurred three more facility-based ALECs entered the  
11 market, would the customer benefit more at that point  
12 if a Fresh Look rule allowed him to escape his  
13 termination liability under the Time Warner agreement?

14 A I think it's possible.

15 Q From the customer's perspective, would it  
16 matter if BellSouth had won that bid in the spring of  
17 1998? In other words, would they enjoy the benefits of  
18 competition to the same degree under that hypothetical?

19 A I am not sure I understand the question.

20 Q Going back to the beginning of the  
21 hypothetical, assume Time Warner and BellSouth compete  
22 for a customer's business in the spring of 1998. In  
23 this hypothetical BellSouth wins that bid.

24 Has that customer benefitted from  
25 competition to the same degree as the first customer

1 who chose Time Warner?

2 A Yes, I would say they did. They both  
3 benefitted. That's not to say there can't be more  
4 benefit later on.

5 Q Would the proposed rule cover the BellSouth  
6 contract in the second hypothetical?

7 A Yes, it would.

8 Q Would the proposed rule cover the Time  
9 Warner contract in the first hypothetical?

10 A No, it would not.

11 Q Can you explain why the two should be  
12 treated differently?

13 A They are treated differently in my view  
14 because the majority of the business has been held by  
15 the incumbent. The competitors are just getting  
16 started and the idea of the rule is to jump start  
17 competition.

18 And the specific example you gave, certainly  
19 that one customer had an opportunity at that point.  
20 But as I already explained, we are not denying there  
21 was competition. We aren't saying there was none. We  
22 aren't saying there was no alternative.

23 We are saying that competition is at a point  
24 where the Fresh Look rule makes some sense to go ahead  
25 and open up a market for a brief period.

1           Q     I would like to refer you, if I might, to  
2 Exhibit -- I believe it's Exhibit Number 67 or 68.  
3 It's the transcript from the November 11 -- November  
4 16, 1999.

5                     Ms. Marsh, did you appear on behalf of  
6 staff?

7           A     Yes, I did.

8           Q     And during the course of that agenda  
9 conference, the rule as proposed in your November 4  
10 recommendation was amended; was it not?

11          A     Yes, it was.

12          Q     Particularly, the date that defined which  
13 contracts would be subject to the rule was changed from  
14 the effective date of the rule to all contracts entered  
15 into before July 1, 1999; is that correct?

16          A     That's correct.

17          Q     During that agenda conference, I believe you  
18 stated that during the hearing, there was no date  
19 certain determined where people could say this is where  
20 competition started, is that -- I am sorry, I refer you  
21 to page 15 so you can review the transcript. I don't  
22 want to summarize your words.

23          A     Yes, that's correct.

24          Q     Do you know why the effective date in the  
25 rule was changed from the original recommendation that

1 it should apply to contracts prior to January 1, 1997,  
2 to contracts up to the effective date of the rule?

3 A No, I don't. When I came on the case, that  
4 was already the way the rule was framed.

5 Q Do you know why the effective date or the  
6 scope of the effective contract's date that determines  
7 the effective contract was changed from the effective  
8 date of the rule to July 1, 1999?

9 A Yes. That was discussed at some length and  
10 I participated in that discussion. There are a number  
11 of places, if you will let me refer here for a moment.

12 Q The discussion might begin on page 20.

13 A Thank you. Actually that wasn't the  
14 discussion I had in mind.

15 We discussed it at considerable length,  
16 whether there was meaningful competition. Several  
17 different words were used and I know at least one place  
18 I was one of the people that used one, I think, and I  
19 used the term meaningful competition.

20 In fact, I see it -- we are discussing it  
21 further down on page 15 here where you were talking  
22 about -- and we were talking about whether there was  
23 competition. We talked about the fact someplaces there  
24 still was no competition. And the selection of the  
25 date was basically to serve as a proxy for when there

1 was meaningful competition for purposes of this rule.

2 We recognized in that discussion that there  
3 were still places that didn't have competition, and we  
4 also recognized that there were places where customers  
5 had already had competition. But the question was the  
6 meaningful competition for purposes of the rule. And  
7 the date was selected to represent that.

8 Q Commissioner Clark was concerned during the  
9 agenda, was she not, that Fresh Look didn't need to  
10 apply to contracts entered into currently; is that  
11 correct?

12 A You are referring to someplace specifically?

13 Q Page 30, yes.

14 A Would you state the question again, now that  
15 I have reviewed this?

16 Q Would you agree that Commissioner Clark was  
17 concerned that the rule should not apply to contracts  
18 entered into currently?

19 A She states that here in the transcript  
20 statement.

21 Q She said, if I can read it: I certainly  
22 think that there has developed recently sufficient  
23 competition or awareness of competition that I don't  
24 think Fresh Look needs to apply to contracts that are  
25 entered into currently.

1 I would be willing to accept the date of  
2 June 30, 1999, which was covered in the recommendation,  
3 and that indicates roughly 40 percent of what is out  
4 there would be available for renegotiation.

5 Do you know what she is referring to when  
6 she says the date of June 30, 1999, is covered in the  
7 recommendation?

8 A We had tables in there that compiled data  
9 that we received from the local exchange companies, and  
10 the information we had was through at least some part  
11 of the second quarter in 1999. And that was how that  
12 date came about. It was to represent that second  
13 quarter for which we had information at least for a  
14 part of that quarter.

15 Q That data, that information that you  
16 suggested, that was data that indicated how many  
17 contracts would be affected under the rule?

18 A The data was -- the data request asked for  
19 information about the kind of contracts that we were  
20 talking about in the rule, and it asked when they were  
21 entered into and when they would expire.

22 I performed the analysis that showed which  
23 ones would be affected in the rule. So the data that  
24 we actually were provided wasn't exactly that. I took  
25 the data and put it into the table myself to show that

1 based on the way we recommended the rule.

2 Q But the June 30th date referred to the date  
3 through which -- let me rephrase that.

4 Wasn't the June 30 date the date of -- the  
5 last date of contracts, data for contracts that had  
6 been provided by the parties?

7 A Yes, I believe I said that.

8 Q Okay. And the request, as you said, did not  
9 ask for all contracts entered into prior to a time when  
10 competitive alternatives existed; did it?

11 A My recollection of what we asked for was for  
12 those that would be subject to a Fresh Look, the kinds  
13 of contracts that would be subject to it. I don't  
14 recall it asking anything about competitive  
15 alternatives in the data request. I don't recall it  
16 being phrased that way.

17 Q Based on Commissioner Clark's statement, do  
18 you think -- was it the Commission's intent to attempt  
19 to establish an effective date before which sufficient  
20 competition or awareness of competition did not exist?

21 A For purposes of the rule, sufficient  
22 competition. That doesn't mean that there was no  
23 competition.

24 The discussion throughout was about  
25 meaningful competition, and sufficient was one of the

1 words that was used.

2 So it was to represent a point where it was  
3 the Commission's judgment that that was an appropriate  
4 representation of when there was sufficient competition  
5 to invoke the rule.

6 Q Did the Commission ever define either in  
7 the recommendation or in the rule sufficient  
8 competition or meaningful competition?

9 A I don't recall a specific definition given  
10 anywhere. I think it can be gleaned from the  
11 discussion, the things that were discussed there as to  
12 what we were talking about. That was my understanding  
13 at the time of the discussion.

14 Q Just after lunch the parties agreed to  
15 stipulate to a number of issues and also agreed to  
16 stipulate to not object to the admission of a letter  
17 received by the Commission from the Joint  
18 Administrative Procedures Committee. Are you familiar  
19 with that letter at all?

20 A I read it at one time.

21 Q Do you recall when you read it?

22 A It hasn't been recently, but I have read it.

23 THE COURT: Has this been marked? You are  
24 talking about the JAPC letter?

25 MR. GOGGIN: Yes, at this time I would like

1 to request that the JAPC letter be marked for  
2 identification.

3 THE COURT: This will be BellSouth 5.

4 MR. GOGGIN: I think it's a joint stipulated  
5 exhibit.

6 MS. BROWN: Your Honor, I would also like to  
7 mention that Ms. Marsh didn't testify to anything  
8 regarding the JAPC letter in her direct testimony.  
9 And I think --

10 THE COURT: I can make them call her back in  
11 their case in chief if you think that -- if you  
12 want to stand on that objection.

13 MS. BROWN: The thing I am also concerned  
14 about is that we have stipulated to certain facts  
15 that I think are the material facts that will  
16 allow you to determine whether we have materially  
17 complied with the procedures of 120.

18 THE COURT: I don't know what they are going  
19 to ask her, ma'am, but right now we need to mark  
20 the exhibit. May I have the exhibit?

21 MR. GOGGIN: Yes.

22 (Joint Exhibit No. 70 marked for  
23 identification.)

24 THE COURT: Marked for identification and by  
25 agreement of the parties this will be admitted as

1 Joint Exhibit 70.

2 (Joint Exhibit No. 70 received in evidence.)

3 THE COURT: It is a 4-28-99 JAPC letter.

4 Now, Ms. Brown, does not object to the  
5 admission of the exhibit but which was stipulated  
6 to.

7 You object to any questions of this witness  
8 concerning the letter?

9 MS. BROWN: Probably not to basic questions  
10 about whether she read it or not, but the  
11 letter --

12 THE COURT: Perhaps, ma'am, perhaps you want  
13 to make your objection as the questions are asked.

14 MS. BROWN: Yes, I will do that, and I was  
15 intending to make it known that I would.

16 And I also want to bring to the court's  
17 attention the stipulations of fact that we had  
18 agreed to earlier to the parties --

19 Thank you. I will wait.

20 THE COURT: How do you want to bring those  
21 to my attention? They have been read into the  
22 record. Is there anything else that you feel is  
23 necessary?

24 MS. BROWN: No, Your Honor. It was in an  
25 abundance of caution, I wanted to make it clear

1           that any responses Ms. Marsh might make to any  
2           further --

3           THE COURT:   Ma'am, the reason I am  
4           interrupting you is I don't want you to telegraph  
5           to the witness what you want her answers to be.  
6           The only way -- I understand there is no intention  
7           to do that.  However, this is an evidentiary  
8           proceeding.  And I think it would be appropriate  
9           for you to make your objection between the  
10          question and the answer.

11          That will eliminate any possibility of  
12          telegraphing.

13          MS. BROWN:  Yes, Your Honor, I will.

14          THE COURT:  You want this exhibit tendered  
15          to the witness, Mr. Goggin?

16          MR. GOGGIN:  Yes.

17          THE COURT:  Ma'am.  Now, ma'am, in my  
18          abundance of caution and in respect to Ms. Brown's  
19          concern, please pause before answering the  
20          question so that I can find out what the objection  
21          is.  Okay?  Mr. Goggin.

22          BY MR. GOGGIN:

23                 Q       Ms. Marsh, is the exhibit that you have been  
24                 handed a copy of the letter you mentioned before that  
25                 you read?

1 A Yes, it is.

2 Q Do you recall how you became aware of the  
3 letter?

4 A No, I do not.

5 Q It wasn't addressed to you?

6 A No, it's addressed to Mr. Caldwell.

7 Q Can you tell me from your personal  
8 knowledge, is it unusual for the Commission to receive  
9 --

10 MS. BROWN: I object, Your Honor. I object.  
11 We have stipulated to the material facts that  
12 Mr. Goggin, I think was about to ask. Perhaps I  
13 am doing it too soon. I will wait until you  
14 finish.

15 THE COURT: I don't know what the legal  
16 nature of your objection is.

17 MS. BROWN: The legal nature of my  
18 objection, I think will have to wait until  
19 Mr. Goggin has finished his question. I  
20 apologize.

21 THE COURT: Okay.

22 BY MR. GOGGIN:

23 Q Is it unusual for the Commission to receive  
24 letters from the Joint Administrative Procedures  
25 Committee in connection with rule-making proceedings?

1           A       I wouldn't know. It's not addressed to me.

2           THE COURT: Just a minute, ma'am.

3           MS. BROWN: I object.

4           THE COURT: I can't hear.

5           MS. BROWN: I object, Your Honor. It's  
6 outside the scope of Ms. Marsh's testimony. And  
7 she is also not a lawyer and doesn't handle and  
8 has not testified that she handles Joint  
9 Administrative Procedures Committee matters in her  
10 testimony.

11           THE COURT: As I understand it, this is the  
12 witness who advised the Commission most in the  
13 course of its deliberations as to the nature of  
14 the rule, how the wording would be finalized for  
15 purposes of proposing it. Is that correct?

16           MS. BROWN: That is correct. She did not  
17 advise the Commission on any legal matters.

18           THE COURT: I think she testified she  
19 advised the Commission on wording. Have I missed  
20 something?

21           MS. BROWN: As we stipulated, Your Honor,  
22 the letter from the Joint Administrative  
23 Procedures Committee goes to legal questions  
24 and --

25           THE COURT: Yes, ma'am. The letter from

1 JAPC may mean any number of things. But what is  
2 the nature of the legal objection, simply that it  
3 is beyond the scope of direct?

4 MS. BROWN: And that it is --

5 THE COURT: I can make her available to them  
6 on their case in chief if that is what you plan to  
7 stand on. I would suggest to you, though, that in  
8 this type of proceeding, it may simply lengthen  
9 the proceeding for no good purpose. But you are  
10 certainly entitled to make that objection.

11 MS. BROWN: The other objection that I am  
12 making is that it is leading to request a legal  
13 opinion from Ms. Marsh, and that we have  
14 stipulated to the material facts necessary to  
15 address this matter.

16 And I am feeling that we have -- that  
17 BellSouth has gone beyond the nature of the  
18 agreement that we reached, which is that we would  
19 not need to address this matter at the hearing.

20 And the reason we reached that stipulation  
21 was that Your Honor brought it to our attention  
22 that we could stipulate to material facts with  
23 respect to the JAPC letter and would not need to  
24 take up hearing time on these matters, and that's  
25 the other reason I am objecting.

1 THE COURT: Your objection is to scope, and  
2 your objection is that you feel that this goes  
3 beyond the stipulations?

4 MS. BROWN: Yes.

5 THE COURT: There may be other testimony  
6 that they want beyond the stipulations. I can't  
7 guess what this question -- where this case is  
8 going.

9 Now, she seems to be the prime advisor to  
10 the Commission. They are entitled to test what  
11 went before the Commission.

12 I am going to overrule the objection and  
13 permit it. You want the question read back?

14 MR. GOGGIN: I think I can start over.

15 BY MR. GOGGIN:

16 Q Ms. Marsh, is it part of your -- from your  
17 personal knowledge, do you know whether the Commission  
18 ordinarily receives communications of this sort from  
19 the Joint Administrative Procedures Committee in  
20 connection with proposed rule making?

21 A I have no knowledge one way or the other.

22 Q In the context of this matter, do you know  
23 whether the Commission examined the issues that were  
24 raised by the letter?

25 A I know that the letter is specifically

1 mentioned in issue one of the recommendation, and I did  
2 not write that issue. Ms. Brown addressed that.

3 So I know that the letter was mentioned.

4 Q Are you aware of any rules or policies the  
5 Commission might have with regard to how such a letter  
6 should be handled by the Commission?

7 A I do not. I would rely on my counsel to  
8 determine that.

9 MR. GOGGIN: I have no more questions.

10 THE COURT: Very well.

11 CROSS EXAMINATION

12 BY MS. CASWELL:

13 Q Good afternoon, Ms. Marsh. As I understand  
14 your testimony, it was the Commission's judgment that  
15 June 30, 1999, represented the date after which there  
16 was meaningful or sufficient competition for the  
17 services we are talking about; is that right?

18 A For the purposes of the rule, yes.

19 Q And did the Commission ever do any economic  
20 analysis to determine whether competition was  
21 meaningful or sufficient for these services?

22 A What do you mean by analysis?

23 Q Are you familiar with the cases, one of them  
24 I think you have in front of you, in the early 1990s  
25 where the Commission did a series of analyses as to

1 whether particular ILEC services were effectively  
2 competitive?

3 A I was not involved with that docket.

4 Q Are you aware of those proceedings?

5 A I know there were proceedings.

6 Q Are you aware that the Commission did an  
7 economic analysis for each of the services as to  
8 whether they were effectively competitive?

9 A I don't know how they went about it.

10 Q Did the Commission do any analysis at all  
11 here as to whether competition was meaningful or  
12 effective?

13 A Again, I would ask what you mean  
14 specifically by analysis?

15 Q Did it look at, for instance,  
16 substitutability of services?

17 A It certainly was brought up in the record.  
18 The analysis that we had was basically what the parties  
19 provided us in their testimony and their exhibits.

20 Q Did it look at whether the ILECs had market  
21 power in these contract services?

22 A I don't recall that specific term.

23 Q Was the staff ever asked to perform an  
24 economic analysis of whether competition was meaningful  
25 or sufficient in these markets?

1           A     Not to perform one outside the scope of the  
2 hearing.

3           Q     And did the Commission ever define  
4 meaningful or sufficient competition?

5           A     As I already answered to that --

6           Q     I think your answer was no, was it not?

7           A     It was that it was not specifically defined,  
8 but throughout the discussion of it at agenda, it was  
9 certainly, I thought I had an understanding of what we  
10 were talking about for purposes of this rule. And that  
11 is that there was some competition sufficient to  
12 warrant having a rule, but that it wasn't necessarily  
13 everywhere for everyone, available for everyone and  
14 that's my understanding. But we discussed it in the  
15 agenda conference and it was discussed at some length.

16          Q     But the rule doesn't aim to address the fact  
17 there was not competition, it was not the same level of  
18 competition in all exchanges, does it?

19          A     It's not addressed per se. It was not  
20 addressed in the same way that it had been addressed in  
21 an earlier Fresh Look that we had with the AAVs where  
22 it was addressed by essentially allowing the window to  
23 be a rolling window based on when you had competition  
24 in that particular area.

25                     Rather than do that and have this prolonged

1 rule, we went with the LECs' suggestion of a shorter  
2 window. The LECs didn't propose having a rolling time  
3 period such as we did in that earlier proceeding  
4 either.

5 Q Do you recall if GTE cited to the Commission  
6 in its brief and there was discussion in the hearing as  
7 well to the New Hampshire and Ohio Fresh Look rules?

8 A I remember there was discussion of other  
9 states.

10 Q Do you know that those two states, and I  
11 believe your counsel has asked for official recognition  
12 of those decisions. Do you know that those two states  
13 do consider the fact that competition did not arise at  
14 the same time in every exchange?

15 A I don't have any personal recollection of  
16 what they said.

17 Q Okay. Are you familiar at all with the Ohio  
18 or New Hampshire Fresh Look rules?

19 A I am sure I have seen them to the extent  
20 that they were brought up in the record, but I don't  
21 have any recollection at this moment.

22 Q Do you know what the Fresh Look windows in  
23 those rules are?

24 A I believe there may have been testimony that  
25 they were shorter than ours, which was some of the

1 testimony that was the basis for us shortening the  
2 window that had originally been proposed.

3 Q You discussed contract repricing briefly in  
4 your testimony. That contract repricing provision in  
5 the rule doesn't apply to CSAs; does it?

6 A No, it does not.

7 Q And it wouldn't apply to ICBs which are  
8 individual case basis arrangements either; is that  
9 right?

10 A I am not sure how the ICBs work. If they  
11 work in the same way, then I would assume they would  
12 not. If they work like a CSA, I would assume it would  
13 not apply to them.

14 Q Doesn't the rule by its terms apply the  
15 repricing provision only to tariff term plans?

16 A Yes, it does, and that represents 98 percent  
17 of the contracts.

18 Q With regard to the reports on local  
19 competition that have been discussed in this  
20 proceeding, I think they are BellSouth Exhibits 1  
21 through 4, not all competitive carriers responded to  
22 the Commission's data requests for information on how  
23 many customers are lines that ALECs were serving; did  
24 they?

25 A I could only answer that based on my reading

1 of that report. I did not work on it. Based on what  
2 the report says, they did not always.

3 Q Are you aware the Commission doesn't have  
4 the records to indicate which carriers exactly  
5 responded in each of those years?

6 A I have no idea. I did not work on those and  
7 I have not seen the data requests, so I don't know.

8 Q Ms. Marsh, did you participate or help any  
9 -- have any role in formulating the staff's January 11,  
10 2000, recommendation to withdraw the Fresh Look rules?

11 A Yes, I did.

12 Q Why did staff recommend that withdrawal?

13 A We received a petition from Time Warner  
14 asking that it be withdrawn because of the fact that  
15 the appeal, and the effect of that would be to reduce  
16 the number of contracts that would be available for  
17 Fresh Look, so the delay that's resulting from this  
18 hearing and whatever may follow will eliminate many  
19 contracts that would have initially been subject to the  
20 rule.

21 Based on their discussion, we recommended  
22 that the Commission simply withdraw it.

23 Q If in the Commission's view the rule would  
24 benefit the customers, why would you have accepted Time  
25 Warner's view that the rule should be withdrawn?

1           A       Well, that's exactly what the Commission  
2 brought up, if I recall correctly. The reason they  
3 denied staff on that was because the rule was entered  
4 into to benefit the customers, not Time Warner, and so  
5 the Commission denied staff and went forward with this  
6 proceeding.

7           MS. CASWELL: That's all I have. Thank you  
8 Ms. Marsh.

9           MS. BROWN: No redirect.

10          THE COURT: Ma'am, pursuant to the evidence  
11 code I have a right to ask certain questions, so  
12 if you will please stay there with the exhibits in  
13 front of you.

14          Counsel, if any of you have any objections  
15 to my questions, and ma'am, I will ask you to  
16 pause before you answer so that if anyone feels I  
17 am going beyond clarification, you will have an  
18 opportunity to object.

19          But if I don't understand certain things at  
20 this point, chances are I am going to get lost  
21 later and that's the reason for the clarification.  
22 That is basically what I understand the code to  
23 permit.

24          You will each have an opportunity to ask  
25 additional questions if you feel it is necessary

1 solely as the result of mine.

2 You used a term AAV, I believe. Would you  
3 define what AAV stands for?

4 Any objections from anybody?

5 THE WITNESS: That's an alternative access  
6 vendor. They provide private line services which  
7 is a point-to-point service.

8 THE COURT: And I believe that you indicated  
9 that a previous Fresh Look rule addressed AAVs.

10 THE WITNESS: Yes.

11 THE COURT: Do you know the number of the  
12 rule? Is that in any of the exhibits?

13 THE WITNESS: I am sorry, I misspoke. It  
14 wasn't a rule, it was done by order. I don't know  
15 if that is in the exhibits or not. Counsel can  
16 tell you.

17 MS. BROWN: It is, Your Honor.

18 MR. GOGGIN: I believe it's in the  
19 stipulated orders that were stipulated for  
20 official recognition.

21 MS. BROWN: Yes.

22 THE COURT: Could someone refer me to that  
23 number because an order was presented to her and  
24 she did read from it.

25 MS. HELTON: You have my copy if I could go

1 up.

2 THE WITNESS: Could we clarify the order I  
3 read from is not that order?

4 MS. CASWELL: I can have copies of this  
5 order for everybody tomorrow.

6 MS. HELTON: It's in paragraph 3 of the  
7 official recognition, Commission's motion for  
8 official recognition.

9 THE COURT: Very well.

10 Ma'am, I think you referred to there being a  
11 Fresh Look rule prior to this one.

12 THE WITNESS: If I used the word rule, I  
13 have misspoken. It was done by order. And there  
14 was no rule at the Commission for that.

15 THE COURT: Well, are there any questions as  
16 a result of mine? Ms. Caswell?

17 MS. CASWELL: No.

18 THE COURT: Mr. Goggin?

19 MR. GOGGIN: No.

20 THE COURT: Ms. Brown?

21 MS. BROWN: No, Your Honor.

22 THE COURT: Well, now if you would, ma'am,  
23 hand the exhibits over to me and you may return to  
24 your seat.

25 The witness has provided back to me Joint

1 Exhibit 70 and Joint Exhibit 68 and there is a  
2 stipulated Exhibit 57.

3 (Witness excused.)

4 THE COURT: It's late in the day.  
5 Ms. Brown, do you think you can do your additional  
6 witnesses today or are we ready for a night's  
7 recess?

8 MS. BROWN: Well, Your Honor, I think we  
9 probably are ready for a night's recess. I would  
10 have said otherwise a little while ago because I  
11 thought we had reached some agreement on the scope  
12 of the testimony and the evidence that would be  
13 admitted into the record with respect to the  
14 statement of estimated regulatory cause.

15 THE COURT: So the answer is you are ready  
16 for a recess?

17 MS. BROWN: I think we are. I think we'll  
18 have to proceed with our full testimony on the  
19 service and we would need I think --

20 THE COURT: Mr. Goggin, are you ready for a  
21 recess?

22 MR. GOGGIN: I am ready to continue.

23 THE COURT: Very well. I think we have the  
24 room until 6 o'clock. Perhaps we can do one  
25 additional witness.

1 MS. HELTON: Commission calls Cathy Lewis.

2 THE COURT: You were in the room and heard  
3 my instructions to other witnesses. Do you have  
4 any religious objection to swearing?

5 THE WITNESS: No, I do not.

6 Thereupon,

7 CATHERINE LEWIS  
8 was called as a witness, having been first duly sworn,  
9 was examined and testified as follows:

10 THE COURT: You may inquire.

11 DIRECT EXAMINATION

12 BY MS. HELTON:

13 Q Could you give us your name and business  
14 address, please.

15 A Yes. My name is Katherine Doyle Lewis. The  
16 business address is 2540 Shumard Oak Boulevard,  
17 Tallahassee, Florida, 32399.

18 Q And by whom are you employed?

19 A Florida Public Service Commission.

20 Q And how long have you been employed by the  
21 Commission?

22 A 18 years.

23 Q What is your current job with the  
24 Commission?

25 A I work in the division of policy analysis

1 and intergovernmental liaison. I am a regulatory  
2 analyst.

3 Q And what was your prior job?

4 A Prior to that, let's see, I worked in that  
5 division since September '99; and prior to that I  
6 worked for about a month and a half in the division of  
7 water and waste water. That was a result of an  
8 assignment when my prior division, the division of  
9 research and regulatory review, was done away with  
10 during a Commission reorganization and I was part of  
11 the staff that moved to the division of water and waste  
12 water.

13 I worked there for like a month and a half,  
14 and then I was hired into the division of policy  
15 analysis. But before that, I had been in the division  
16 of research and regulatory review, also as regulatory  
17 analyst for three years.

18 Q And could you tell us what your primary job  
19 responsibilities were in the division of research and  
20 regulatory review?

21 A Right. My primary responsibilities were  
22 writing statements of estimated regulatory costs for  
23 rule making, particularly telecommunications rule  
24 making. I had some other duties as well that, I don't  
25 know if you want me to go into that.

1           Q     Have you held any other jobs while at the  
2 Commission?

3           A     Yes. Prior to the division of research and  
4 regulatory review where, as I said, I worked for three  
5 years, prior to that I worked in the division of  
6 telecommunications for about five years, also as a  
7 regulatory analyst, as an economist, and as a research  
8 assistant.

9           Q     What's your educational background?

10          A     My educational background, I have a bachelor  
11 of science in sociology from Florida State University.  
12 I am in the Master's program in the information studies  
13 department.

14          Q     For how long did you prepare statements of  
15 estimated regulatory costs for rule making while  
16 working in the division of research and regulatory  
17 review?

18          A     The entire time I was there, the three years  
19 that I worked there.

20          Q     And do you have any recollection of how many  
21 SERCs that you prepared?

22          A     Yes. I have done 11.

23          Q     In your opinion, what's the purpose of a  
24 SERC?

25          A     The statement of estimated regulatory costs,

1 the primary purpose is to inform the people who make  
2 the decision, in this case the Commissioners, of what  
3 the costs will be if the proposed rule goes forward.  
4 So if the rule that is being taken to the Commission is  
5 implemented, what will the costs be to the regulated  
6 entities, in this case the telecommunications industry,  
7 as well as all the parties that would be impacted.

8 But primarily it goes to the regulated  
9 entities that would be most affected by the rule  
10 because they would have to comply with it, what would  
11 it cost them to comply with it.

12 Q Does the Commission prepare a SERC in every  
13 instance or do you know whether it's the Commission's  
14 policy to have a SERC prepared for every rule making  
15 that goes forward?

16 A It's the policy to make a determination as  
17 to whether one is needed and if there is any doubt,  
18 there is one prepared. Otherwise, there is also  
19 something written up saying we believe one is not  
20 needed.

21 Q Do you remember when you became involved in  
22 the rule-making proceeding for the Fresh Look rules?

23 A I believe it was in April '98 at the  
24 workshop, the first workshop.

25 Q And --

1           A     Rule-making workshop.

2           Q     Was that before or -- I guess had the  
3 petition to initiate rule making already been filed?

4           A     I believe it had been filed, and I believe  
5 it had gone to agenda. And the Commissioners had said  
6 go forward with the rule making, and that's how we got  
7 -- they said go forward with rule making, and that  
8 requires a rule-making workshop. That's the point that  
9 I got involved, just attending that workshop.

10          Q     Can you tell us a little bit about the  
11 process for rule making at the Commission as far as  
12 what steps staff internally takes to, I guess, kind of  
13 jump start the rule-making process or initiate the  
14 rule-making process?

15          A     Okay. The rule-making process or the  
16 statement in --

17          Q     Rule-making process.

18          A     Generally there is a rule-making workshop  
19 where the parties come in and the rule is discussed.  
20 Sometimes staff brings forward a rule that they had  
21 already drawn up. Other times they just talk about  
22 what type of rule is needed or whether one is needed at  
23 all.

24                     Then staff would hold meetings, they would  
25 discuss the rule, the costs of the rule, what type of

1 rule would be needed, what the parties had said at the  
2 workshop. There might be post workshop comments that  
3 are filed by the parties. Those would be looked at by  
4 the staff.

5 Q Does the staff do any material --  
6 information gathering, do you know, prior to having a  
7 workshop or when prior to having people assigned to --

8 A I can say how we used to do it when I was in  
9 communications but occasionally, yes, the technical  
10 staff that was assigned to the rule to develop the rule  
11 might send out a request or whatever to determine how  
12 they would write the rule.

13 They would prepare the rule-making request  
14 form that would go to the Division of Appeals. The  
15 rule-making request form is required, I guess, in the  
16 Commission's administrative procedures or whatever it's  
17 required because it states what the purpose of the rule  
18 is, why the rule is being proposed, and that's  
19 something that's prepared by what we used to call the  
20 technical division, Division of Communications, that  
21 goes to Division of Appeals.

22 At that point the appeals attorney would  
23 review it, and if it met with their requirements, it  
24 would be sent to the division of research and  
25 regulatory review which is where I worked at which

1 point I would become involve because it would become  
2 assigned to a staff person to do a cost study at some  
3 point or SERC.

4 Q And did you prepare a SERC for the Fresh  
5 Look rule?

6 A Yes, I did.

7 Q Do you remember when?

8 A November 18th, 1998, is the date of the  
9 statement of estimated regulatory costs that I  
10 prepared.

11 Q What procedure did you use to prepare the  
12 SERC?

13 A The procedure I used was, as I mentioned I  
14 had previously in April of 1998 been to a rule-making  
15 workshop, so I reviewed probably my notes from that  
16 workshop. I believe the docket file had already been  
17 established, I am sure I would have reviewed that. I  
18 reviewed the post workshop comments that would have  
19 been filed by the parties.

20 But primarily I looked over the rule-making  
21 request forms that staff prepared and the rule that  
22 they had sent up attached to that and decided who the  
23 affected parties would be. Then I prepared a data  
24 request with questions to the affected parties to  
25 attempt to determine what the cost impacts of the

1 proposed rule would be on the parties, and I sent that  
2 out to the parties.

3 Q Do you remember specifically who you sent it  
4 out to?

5 A Yes. May I -- I brought it up here with me  
6 so I could make sure.

7 Q What is that -- do you need to refresh your  
8 memory?

9 A I know who it was. I sent it to the three  
10 -- just in case I needed to refresh my memory, I sent  
11 it to the three incumbent local exchange companies,  
12 BellSouth, and GTE and Sprint. But also I sent it to  
13 the ALECs, I sent -- at the same time, on the same date  
14 I sent a separate, slightly different data request to  
15 the ALECs.

16 And the one that went to the ALECs also  
17 went, I think, to three associations that commonly  
18 attend our workshops just to keep everybody open in on  
19 the process.

20 Q And I assume everybody responded to the data  
21 request?

22 A Yes. Not everybody. Let me -- the three  
23 incumbent LECs, I believe, responded. At least I have  
24 some numbers in here, I assume that's where they came  
25 from.

1           The ALECs, some of the ALECs responded. I  
2 am sure not all, because I think it went to about 40  
3 and I would be real surprised if that many responded.

4           Q     Did you do any independent verification of  
5 the data request responses or any independent research  
6 about the rule or the impact of the rule?

7           A     Well, as I mentioned, I had reviewed post  
8 workshop comments and things like that as preparation  
9 to writing up the data requests to figure out what the  
10 costs would be, but also when the data request  
11 responses came in, I remember calling the incumbent  
12 LECs, the people that had prepared the data request  
13 responses, and I asked them some clarifying questions  
14 about their responses to make sure I understood what  
15 they had told me.

16           I also talked to technical staff in the  
17 Division of Communications. I pulled some of the  
18 quarterly reports, and once I found out that those  
19 contract service arrangements quarterly reports  
20 existed, I looked at those. I looked at tariffs just  
21 to get an idea of what the tariff term plans looked  
22 like. I pulled some of those and looked at those, so  
23 just to educate myself mainly.

24           Q     What did you determine in the SERC? What  
25 did you tell the Commission in the SERC?

1           A       Overall, what the SERC stated was the cost  
2 as reported by the incumbent LECs to me that they  
3 stated, for example, BellSouth stated they would have  
4 16.4 million in costs, I need to look --

5           Q       Do you want to look at your SERC?

6           A       I want to look at my SERC.

7           Q       I think we can figure out which exhibit  
8 number that is.

9           A       It's the SERC dated November 18, 1998.

10          Q       I think it's attached to what's been  
11 identified as stipulated Exhibit Number 22.

12                   MS. HELTON: Judge Davis, do you need me to  
13 get that out?

14                   THE COURT: If you would.

15          A       You don't want me to look at mine? You want  
16 me to look at that one?

17                   THE COURT: Yes, ma'am.

18 BY MS. HELTON:

19          Q       I am handing the witness what's been marked  
20 as stipulated Exhibit Number 22. It's the Commission  
21 staff's 3-4-99 recommendation to proposed Fresh Look  
22 rules. I guess your SERC is attached to that  
23 recommendation?

24          A       I am hoping. Yes. Same one. Okay. Good.  
25 Doing good so far.

1           Okay. Transactional cost, I wanted to make  
2           sure I correctly stated it the way that I reported it  
3           here because I did ask the three ILECs specific  
4           questions that go to costs.

5           I asked them to estimate the amount of  
6           contract termination charges that would not be  
7           recoverable under the proposed rule if all eligible  
8           contracts were terminated on a certain day, in this  
9           case December 31, 1998.

10           Remember, this is November '98 when I was  
11           doing this.

12           The purpose of this question was to  
13           determine costs under a worst case scenario. There was  
14           certainly no expectation all contracts are going to be  
15           cancelled on a given day.

16           And this was how BellSouth got to the number  
17           16.4 million being potentially unrecoverable.

18           And that is assuming that no unrecovered,  
19           nonrecurring costs exist, potentially worst case  
20           scenario, 16.4 million for BellSouth, GTE said 3.7  
21           million, and Sprint Florida 4 million would not be  
22           recoverable if all contract holders terminated their  
23           contracts on a given day.

24           Does that answer --

25           Q     I think so. Did you address lost revenues

1 in the SERC?

2 A Yes, I did. That is under reasonable  
3 alternative methods. We generally address that in all  
4 statements of estimated regulatory costs. They are  
5 pretty much a formula we go by. Each one is different,  
6 of course, but we always try to hit on reasonable  
7 alternative methods.

8 And in this case, the alternative of no rule  
9 had been proposed by both BellSouth and GTE. May I  
10 read from my SERC the statement that was made?

11 THE COURT: I don't have any objection.

12 A Both companies, BellSouth and GTE, believed  
13 no rule is necessary as the marketplace is effectively  
14 competitive. However, no evidence was provided to  
15 substantiate this. Collectively, ALECs serve only 1.8  
16 percent of the total access lines in Florida, according  
17 to the most recent survey conducted by the Division of  
18 Communications staff in its 1998 report on competition.

19 I believe that's one of the exhibits that  
20 has been filed.

21 BY MS. HELTON:

22 Q I think you are talking about the  
23 alternative of no rule. Does that -- is that the same  
24 thing as lost revenues?

25 A I am sorry. Okay. I misunderstood. Yes, I

1 was referring to the alternative of no rule.

2 Yes, I did mention lost revenues. Okay.  
3 That would be on page 4 of my SERC. It's page 13 of  
4 this exhibit. It's briefly mentioned that if a  
5 customer chooses to terminate a contract under the  
6 proposed rule, an ILEC would certainly lose the  
7 revenues it could would have earned from that customer  
8 had he not terminated his contract.

9 It guess on to say: However, the ILECs  
10 unrecovered, nonrecurring costs would be covered.

11 That's simply goes to what the rule states.  
12 So I mean, I think it's obvious on the face of the rule  
13 that if someone opts out of their contracts, the ILECs  
14 are going to lose the revenues that they would have  
15 earned on that contract had it stayed in force. I mean  
16 that's the purpose of the termination charges.

17 Q In your opinion -- in your knowledge of the  
18 rule while you were working on it, did anyone ever  
19 formally request a lower regulatory cost alternative?

20 A No, they did not.

21 Q You said something about BellSouth and GTE  
22 proposed the alternative of no rule. What did you mean  
23 by that?

24 A Yeah. I meant that that had been mentioned  
25 in their response to the Data request or probably in

1 the post workshop comments, that it was commonly known  
2 that that was one of their positions, that they did not  
3 want the rule, they did not believe it was necessary,  
4 that was said over and over. So that's why I addressed  
5 it.

6 Q I believe that you testified earlier that  
7 you did address the alternative of having no rule at  
8 all in the SERC?

9 A Yes.

10 Q I can't recall whether you said in your  
11 opinion whether the no rule alternative is a viable  
12 alternative.

13 A I don't believe that it is because it really  
14 would not accomplish the purpose of this proposed rule.  
15 What this rule is intended to accomplish would not be  
16 accomplished by no rule. That is to stimulate  
17 competition. Having no rule would not accomplish that.

18 Q In your opinion, why would no rule, having  
19 no rule promote -- strike that.

20 A It's getting late.

21 Q If there was no rule, how would that impact  
22 competition, the existence of competition or the  
23 furtherance of competition?

24 A I think having no rule would not accomplish  
25 the purposes of this proposed rule which is to

1 stimulate competition because the way this rule is  
2 supposed to work is you have a certain group of  
3 contracts, the contract service arrangements or the  
4 tariff term plans that exist anywhere from two to seven  
5 years.

6 So without a Fresh Look window, where the  
7 customers could opt out of those contracts, there is no  
8 potential pool of customers for the ALECs to market to.  
9 I mean, yes, they could mark to these customers that  
10 already locked into these contracts, but there is a  
11 substantial penalty for the customer to get out of the  
12 contract. So the customer could get out of the  
13 contract, but to me there is a barrier there that the  
14 customer is going to have to pay a lot of money to get  
15 out of the contract.

16 So he doesn't have the competitive  
17 opportunities that he would have if there was a  
18 Freshing Look rule. If there was a Fresh Look rule,  
19 there would be a window where the customer could get  
20 out of the contract with a reduced penalty. So it  
21 would have competitive opportunities that he would not  
22 have without the rule.

23 Q When you worked or when you wrote the SERC,  
24 were you aware of the status of competition in Florida  
25 for a local exchange service?

1           A     Somewhat.  It depends on what you mean.

2           Q     I guess for your -- for the purpose of the  
3 analysis of the SERC, what did you do to learn anything  
4 about the status of competition in Florida?

5           A     I think that portion of the SERC that I read  
6 mentioned I looked at the competition report, the 1998  
7 competition report, and mentioned the percentage of  
8 total access lines that were served by ALECs was 1.8  
9 percent at that time, of all total access lines, I  
10 believe.

11          Q     Are you aware of whether there are any more  
12 SERCs prepared for this rule?

13          A     Yes, I believe there was.

14          Q     Did you work on any other SERCs for this  
15 rule?

16          A     No, I did not write the other SERC.

17          Q     Why not?

18          A     Because I had, as I explained in the  
19 reorganization of the Commission, I had gone to the  
20 division of water and waste water, I believe, in July  
21 of 1999 and that was after the hearing on the Fresh  
22 Look rule, so the SERC was to be written after the  
23 hearing.  I was no longer preparing SERCs in July of  
24 1999.  I was in the division of water and waste water,  
25 so that was no longer part of my job responsibilities.

1 Q Did you participate at all in the drafting  
2 of the SERC?

3 A I provided all of the data that I had to  
4 Mr. Craig Hewitt, who I understood would be writing the  
5 next statement of estimated regulatory costs. And I  
6 may have discussed it in general with him at the time  
7 that I gave everything to him.

8 MS. HELTON: That concludes our testimony.

9 THE COURT: Okay.

10 MS. HELTON: Tender the witness.

11 CROSS EXAMINATION

12 BY MR. GOGGIN:

13 Q I apologize for keeping you late. I don't  
14 think we have too many questions for you. I don't  
15 anticipate it will be much longer.

16 You mentioned that you had no role in  
17 preparing the SERC that actually supports the rule as  
18 proposed; is that correct?

19 A Right.

20 Q You did have a role, however, in developing  
21 the data requests that were sent to the ILECs and  
22 ALECs?

23 A Which one are you referring to?

24 Q In preparation for the November 1998 SERC  
25 which you did prepare; correct?

1 A Uh-huh.

2 Q Were the ILECs asked to provide any  
3 information on the amount of revenues that might  
4 potentially be lost if the contracts were terminated?

5 A I believe the way the question was phrased  
6 did not go specifically to revenues. I have it here,  
7 if you will allow me, I will look and let you know.

8 Q Okay.

9 A The questions were asked, as I said earlier,  
10 to identify and estimate the amount of contract  
11 termination charges that would not be recoverable and  
12 also to identify and estimate costs to comply with each  
13 of the proposed rules, including all potential  
14 transactional costs.

15 So there is not one specifically about  
16 revenue.

17 Q Did you do any independent analysis of these  
18 contracts to determine whether the termination  
19 liability would be in all cases equivalent to the lost  
20 revenues that would result from termination?

21 A Let me think about that for a minute. I  
22 think my question to the ILECs and the data requests  
23 asked for that, yes. I would say yes.

24 Q Let me rephrase it. Do you know whether if  
25 a customer terminated one of the affected contracts

1 under the rule as it was proposed while you were  
2 analyzing it, whether the loss in termination  
3 liabilities would be equal to the loss in revenues? In  
4 other words, were the contracts written to enable the  
5 ILEC to recover all of its lost revenues in the event  
6 the contract were terminated?

7 A I don't know whether it would cover all of  
8 them. I would assume it would cover some.

9 Q So if the lost revenues were calculated,  
10 it's possible that amount might be greater than the --  
11 all things being equal, worst case -- that the total  
12 amount of lost revenue might be greater than the total  
13 amount of lost termination liability?

14 A I would say that could be possible. But  
15 also there are other considerations. For example, the  
16 ILEC might be able to retain the contract. Just  
17 because the Fresh Look window was open, the ILEC has  
18 the opportunity to still compete and keep the contract.

19 Q Right. We take that as a given, that number  
20 was a worst case and it probably wouldn't be as big.

21 A Okay.

22 Q At a later agenda conference, Mr. Hewitt,  
23 who I think did have a hand in the later SERC, said  
24 that while they didn't know exactly what the lost  
25 revenue might be, he said we know it's going to be

1 millions of dollars of lost revenues.

2 Do you disagree with that characterization?

3 A I don't think I would like to agree or  
4 disagree.

5 Q Okay. In the statute that relates to  
6 statements of estimated regulatory costs in the context  
7 of challenges, rule challenges, it states that the  
8 proposed or existing rule is an invalid exercise of  
9 delegated legislative authority. The rule imposes  
10 regulatory costs on the regulatory person, county, or  
11 city which could be reduced by the option of less  
12 costly alternatives that substantially accomplish the  
13 statutory objectives.

14 I am interested in that last portion of the  
15 provision, alternatives that substantially accomplish  
16 the statutory objectives.

17 MS. HELTON: Which?

18 MR. GOGGIN: I am at section 120.52,  
19 subparagraph (8)(g).

20 For what it's worth, it's the same language  
21 used in her statement of estimated regulatory costs.

22 BY MR. GOGGIN:

23 Q Does the Department of Research -- I am  
24 sorry, am I calling it right?

25 A Uh-huh.

1           Q     Do they perform an independent analysis of  
2 whether -- first of all, what the objectives of the  
3 rule are, and secondly whether they could be  
4 substantially accomplished through a less costly  
5 alternative, or is their analysis simply limited to a  
6 discussion of costs?

7           A     I am not sure what you mean by independent  
8 analysis. If you mean separate and apart from the  
9 SERC, no.

10                     The statement of estimated regulatory costs,  
11 our job is to prepare the statement of estimated  
12 regulatory costs to advise the Commissioners of what  
13 the cost of the proposed rule is -- that includes  
14 costs, benefits.

15           Q     Upon what sources do you rely to determine  
16 the objectives of the rule?

17           A     Primarily, as I stated, the rule-making  
18 request forms, the workshops that I attended.

19           Q     And for example, your statement that there  
20 was no evidence provided to substantiate the  
21 marketplace was effectively competitive, did you  
22 perform an independent analysis to determine whether or  
23 not certain facts exist if, in fact, they don't exist  
24 in the record?

25           A     You want me to explain the statement, is

1 that what you are --

2 Q No, I am asking in general.

3 A Are you referring to a specific statement in  
4 my SERC or what?

5 Q Yes. I am sorry, if I can refer you to page  
6 5 of your SERC, which in the exhibit, also has the page  
7 number 14 at the bottom.

8 A Right. I am there.

9 Q At the very top you noted that: BellSouth  
10 and GTE advocated no rule at all because they believed  
11 the marketplace was competitive.

12 And you state that no evidence was provided  
13 to substantiate this.

14 Had the Commission held a hearing on the  
15 rule making at the time this was written?

16 A No.

17 Q So no party had submitted testimony at this  
18 point?

19 A No, I don't believe so. I will be glad to  
20 explain the statement. It's simply --

21 Q What I am asking is in a situation like this  
22 where there is no hearing, there is no testimony, how  
23 in the ordinary course of performing your function  
24 would you make this determination about whether a less  
25 costly alternative would substantially accomplish the

1 same objectives?

2 A Okay. This is not meant to be an attorney's  
3 legal opinion. This is a statement where I am  
4 addressing the alternative of no rule as proposed in  
5 the response to that data request by BellSouth or GTE  
6 or suggested at the workshop, or at that point the only  
7 alternative that was floating around was the  
8 alternative of no rule.

9 I want to make an attempt to address any  
10 reasonable alternative method in the statement of  
11 estimated regulatory costs. So that's why the whole  
12 thing was brought up. It wasn't because anyone had  
13 filed a lower cost alternative; no one had.

14 In my attempt to do that, I thought -- I am  
15 going to say that no evidence was provided to  
16 substantiate that the marketplace was competitive or  
17 not. So what I did is try to go to my source that  
18 tells me about competition, that source is the Division  
19 of Communications 1998 report on competition, that's  
20 one source.

21 There are a lot of different ways to measure  
22 competition, and I would never try to pretend this is  
23 the definitive way to say that; nor would I say that --  
24 this says there was no evidence provided by the LECs to  
25 me at that point to substantiate that. They said, oh,

1 no rule would be great. That's what we want, but they  
2 didn't explain how will this accomplish the purpose of  
3 the proposed rule.

4 How will having no rule do what the  
5 Commission is trying to do with this rule? They didn't  
6 provide that, and that's all I was trying to say.

7 Q But to your knowledge, there had been no  
8 evidentiary hearing of any sort?

9 A No, there had not.

10 Q You mentioned before that you thought that  
11 the contracts might constitute barriers to customers or  
12 an ALEC. Upon what was that statement based, upon what  
13 evidence?

14 A The fact that there are substantial  
15 termination charges in these contracts that range from  
16 two to seven years. And that if a contract was entered  
17 into seven years ago, seven years in 1991, then that  
18 customer is going to have to pay a termination penalty  
19 or penalty of some sort to get out of the contract to  
20 take advantage of a competitive offer, and that that  
21 might be a barrier to an ALEC trying to compete or to  
22 the customer in getting out of the contract.

23 So I based it on the evidence of the  
24 contracts and tariff term plans, on the information  
25 that was provided by the ILECs when I asked them how

1 many contracts and tariff contract service arrangements  
2 and tariff term plans there were out there. There were  
3 thousands.

4 Q The only data, though, that you had to gauge  
5 the level of competition was the 1998 competition  
6 report?

7 A Well, if you want to make that the issue,  
8 but I don't think that that's what my statement of  
9 estimated regulatory costs was addressing. It was  
10 addressing the costs.

11 I didn't write the estimated regulatory  
12 costs to consider all the sources of whether there was  
13 competition. I don't think that was my role.

14 Q I am trying to get to the point that the  
15 statute requires about determining whether less costly  
16 alternatives -- in this case no rules -- could  
17 substantially accomplish the same statutory objectives.  
18 And in the case of this rule making, doesn't that  
19 necessarily involve a determination whether, as you put  
20 it, you could stimulate competition with no rule in  
21 substantially the same way you could stimulate  
22 competition with the rule?

23 A Ask your question again, please.

24 Q The statutory standard that you are  
25 addressing in this portion of the SERC, as I understand

1 it, is the question of whether a less costly  
2 alternative, in this case no rule at all, would  
3 substantially accomplish the same statutory objectives  
4 which I believe you identified earlier in your  
5 testimony as to stimulate competition.

6           Wouldn't a determination of whether no rule  
7 would substantially accomplish the same stimulation in  
8 competition involve some analysis of whether  
9 competition is, in fact, growing without the rule?

10           A     I guess we are -- we just think differently.  
11 In my opinion it's fairly black and white that if you  
12 got people locked into contracts as long as seven  
13 years, then, yes, competition increases a little bit  
14 every year. But if you are locked in for seven years,  
15 it doesn't matter, you are locked in.

16           And the only thing this rule will do is give  
17 a window when you could get out at a lesser penalty.  
18 You would still pay, but you would -- it would just be  
19 a lesser amount, and that is what would stimulate the  
20 competition.

21           So I am not saying there is no competition  
22 out there. I don't think that's necessary to prove  
23 that.

24           Q     Do you think that there should be, in making  
25 this analysis, any attempt to weigh the significance of

1 the costs against the marginal benefits of the rule, in  
2 this case additional competition versus substantial  
3 costs?

4 A I think -- I try to do that in the statement  
5 of estimated regulatory costs. I attempted to do that.

6 MR. GOGGIN: I have no further questions.

7 MS. CASWELL: I have no questions.

8 REDIRECT EXAMINATION

9 BY MS. HELTON:

10 Q There was some discussion about rule-making  
11 request forms, I think you talked about it when I was  
12 asking you questions and you also talked about it when  
13 Mr. Goggin was asking you questions. Could you explain  
14 what a rule-making request form is?

15 A Yes. It's a memo essentially prepared by  
16 the Division of Communications, the staff that wrote  
17 the rule, that is sent up to the Division of Appeals.  
18 It's a request to go forward with the rule. It has a  
19 copy of the rule attached. It quotes the statutory  
20 authority for the rule, the reason the rule is being  
21 proposed.

22 I believe it also has a section that  
23 discusses reasonable alternative methods that must be  
24 considered. So it's something that's thought about in  
25 the beginning stages of the rule making.

1 MS. HELTON: No further questions.

2 THE COURT: You may step down.

3 (Witness excused.)

4 THE COURT: You are releasing this witness?

5 Everyone is releasing this witness?

6 Very well.

7 MS. HELTON: May we take a three-minute  
8 break to visit the --

9 THE COURT: Let me ask you this. You have  
10 one additional witness?

11 MS. HELTON: We have one additional witness.

12 THE COURT: You think you can complete all  
13 of that person's testimony between now and 6  
14 o'clock?

15 MR. GOGGIN: I do not.

16 THE COURT: What I am getting at, ma'am, is  
17 I don't mind going until 6 o'clock. Had I known  
18 you were really going to push this, I would have  
19 made arrangements for us to meet beyond the normal  
20 closing time.

21 My concern is that there is sometimes a  
22 perceived prejudiced if you only get through  
23 direct and they have an opportunity overnight to  
24 prepare their cross or they get to cross and you  
25 have overnight to prepare your redirect. I am

1           trying to put everybody on a level playing field.

2

3           If you can't complete this witness in total  
4           today, it would seem to me it's to everyone's  
5           advantage to begin with this witness tomorrow  
6           morning.

7           MS. HELTON: That would be fine with me. I  
8           have no objections to that.

9           THE COURT: Ms. Caswell?

10          MS. CASWELL: That's fine.

11          MR. GOGGIN: Fine.

12          THE COURT: Very well. If we begin at 9  
13          a.m. tomorrow, let me explore that with you.  
14          First off, I think that you're relatively safe in  
15          leaving all your papers, et cetera, here.  
16          However, I would not leave anything that is a  
17          laptop or other electronic device or something of  
18          value.

19          This room is reserved for the entire four  
20          days, so I think you are safe with papers, but I  
21          would not leave anything else of value.

22          Additionally, I normally begin at 9:30 in  
23          this building because of the traffic patterns of  
24          Tallahassee. I think you can spend an hour  
25          getting here at 9 o'clock and 15 minutes getting

1 here at 9:30. But if you folks ask me to start at  
2 9 o'clock or 8 o'clock, I will be happy to do  
3 that.

4 What's your feeling, Ms. Helton or  
5 Ms. Brown?

6 MS. BROWN: I think we are more ahead of  
7 schedule than we thought we would be. We have  
8 only one more witness and simply to the second  
9 SERC tomorrow. And then there are only --

10 THE COURT: Is your answer 9:30?

11 MS. BROWN: 9:30 would be fine.

12 THE COURT: Is that acceptable?

13 MS. CASWELL: Yes.

14 MR. GOGGIN: Yes.

15 MS. BROWN: If I might add one thing. I  
16 think we will be finished sooner even than  
17 Wednesday. That's my projection. I just wanted  
18 to mention that to you because you mentioned  
19 earlier that you had something to do.

20 MR. GOGGIN: Tomorrow is Wednesday.

21 MS. BROWN: Or Thursday, we may finish  
22 tomorrow.

23 THE COURT: I appreciate all these extra  
24 advices, folks, but let me explain your transcript  
25 is costing an awful lot of money for these various

1           representations.  If it has something to do with  
2           housekeeping, I am glad to have it.

3                   I just am concerned because you are spending  
4           your client's money and I am trying to save that  
5           for you wherever I can.

6                   Very well.  Let us be certain that I have  
7           all of the exhibits.  And otherwise, we will  
8           reconvene at 9:30 in the morning.

9                   (Proceedings concluded at 5:20 p.m.)

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