

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Matter of : DOCKET NO. 990649-TP
: INVESTIGATION INTO PRICING OF:
5 UNBUNDLED NETWORK ELEMENTS :
:-----

* ELECTRONIC VERSIONS OF THIS TRANSCRIPT *
* ARE A CONVENIENCE COPY ONLY AND ARE NOT *
* THE OFFICIAL TRANSCRIPT OF THE HEARING *
* AND DO NOT INCLUDE PREFILED TESTIMONY. *
* *****

PROCEEDINGS: ORAL ARGUMENT

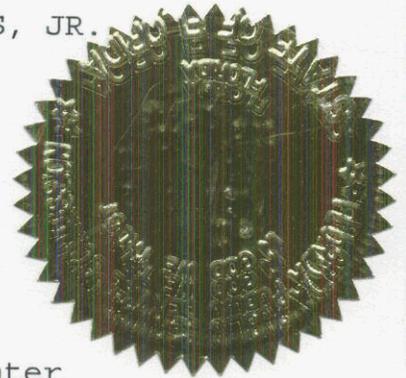
BEFORE: COMMISSIONER E. LEON JACOBS, JR.
Prehearing Officer

DATE: Friday, August 11, 2000

TIME: Commenced at 2:10 p.m.
Concluded at 3:19 p.m.

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

REPORTED BY: TRICIA DEMARTE
Official FPSC Reporter
(850) 413-6736



FLORIDA PUBLIC SERVICE COMMISSION

DOCUMENT NUMBER-DATE
09890 AUG 15 2000
FPSC-RECORDS/REPORTING
004904

1 APPEARANCES:

2 FLOYD SELF, Messer, Caparello & Self, 215 South
3 Monroe Street, Suite 701, Tallahassee, Florida 32301,
4 appearing on behalf of AT&T Communications of the Southern
5 States, Inc.

6 RICHARD MELSON, Hopping, Boyd, Green & Sams,
7 123 South Calhoun Street, Tallahassee, Florida 32301, on
8 behalf of MCI WorldCom and Rhythms Links, appearing
9 telephonically.

10 JOSEPH McGLOTHLIN, McWhirter Law Offices, 117 South
11 Gadsden Street, Tallahassee, Florida 32301, appearing on
12 behalf of FCCA.

13 MICHAEL GOGGIN, BellSouth Telecommunications, Inc.,
14 c/o Nancy Sims, 150 South Monroe Street, Suite 400,
15 Tallahassee, Florida 32301, appearing on behalf of
16 BellSouth Telecommunications, Inc.

17 KIMBERLY CASWELL, P. O. Box 110, FLTC0007, Tampa,
18 Florida 33601-0110, appearing on behalf of Verizon
19 Florida.

20 JEFFRY WAHLEN, Ausley & McMullen, 227 South Calhoun
21 Street, Tallahassee, Florida 32302, appearing on behalf of
22 ALLTEL.

23
24
25

1 APPEARANCES (Continued):

2 JOHN FONS, Ausley & McMullen, 227 South Calhoun
3 Street, Tallahassee, Florida 32301, appearing on behalf of
4 Sprint-Florida, Incorporated.

5 SCOTT SAPPERSTEIN, 3625 Queen Palm Drive, Tampa,
6 Florida 33619, on behalf of Intermedia Communications,
7 appearing telephonically.

8 KAREN CAMECHIS, Pennington Law Firm, 215 South
9 Monroe Street, Tallahassee, Florida 32302, on behalf of
10 Time Warner Telecom of Florida, appearing telephonically.

11 BETH KEATING and DIANA CALDWELL and WAYNE KNIGHT,
12 FPSC Division of Legal Services, 2540 Shumard Oak
13 Boulevard, Tallahassee, Florida 32399-0850, appearing on
14 behalf of the Commission Staff.

15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

1
2 COMMISSIONER JACOBS: Okay. We'll go on the
3 record and call this to order. Counsel, read the notice.

4 MS. KEATING: By notice issued August 4th, 2000,
5 this time and place have been set for an oral argument and
6 a status conference in Docket 990649. The purposes is set
7 forth in the notice.

8 COMMISSIONER JACOBS: We can take appearances.
9 I guess we can start on this end.

10 MR. GOGGIN: Michael Goggin with BellSouth
11 Telecommunications.

12 MS. CASWELL: Kim Caswell for Verizon Florida.

13 MR. SELF: Floyd Self of the Messer Law Firm on
14 behalf of AT&T.

15 MR. MCGLOTHLIN: Joe McGlothlin for the Florida
16 Competitive Carriers Association.

17 MR. FONS: John Fons with the Ausley Law Firm on
18 behalf of Sprint.

19 MR. WAHLEN: Jeff Wahlen on behalf of Alltel
20 Communications, Inc.

21 COMMISSIONER JACOBS: Okay.

22 MS. KEATING: There are some on the phone, as
23 well, Commissioner.

24 COMMISSIONER JACOBS: Okay. We'll take
25 appearances from the phone.

1 MR. MELSON: Rick Melson with the Hopping Law
2 Firm on behalf of WorldCom and Rhythms.

3 MR. SAPPERSTEIN: Scott Sapperstein on behalf of
4 Intermedia Communications.

5 COMMISSIONER JACOBS: Okay. There are others
6 participating by phone or monitoring by phone, as well?

7 MS. CAMECHIS: Yes. This is Karen Camechis with
8 Time Warner Telecom.

9 COMMISSIONER JACOBS: Okay. Very well.

10 MS. KEATING: And Beth Keating, Diana Caldwell,
11 and Wayne Knight for Commission Staff.

12 COMMISSIONER JACOBS: Thank you. I tried to
13 speed past that one. We're here on two motions, right,
14 one by Sprint and one by Verizon? And then also we're
15 going to take up, I assume, the request by BellSouth to
16 modify today. Essentially, let's go through both motions
17 first, and we'll do the parties' argument and the
18 responses to that. I don't want to keep them too long,
19 and then we'll cover BellSouth's position. Okay? So who
20 would like to go first? Verizon.

21 MS. CASWELL: I have probably about five
22 minutes. With its motion, Verizon has asked the
23 Commission for two things. First, it has requested a
24 bifurcation so that Verizon can go to hearing on a
25 separate track from BellSouth. This will allow the

1 Commission to go forward with the BellSouth hearing but to
2 delay Verizon's hearing. And I understand, no party
3 opposes that bifurcation request, so I don't need to say
4 anything more about that.

5 Verizon's second request is to suspend the
6 proceedings, again, only as to Verizon until the issue of
7 appropriate cost methodology is settled at the federal
8 level. As you know, the Eighth Circuit has overturned the
9 FCC's TELRIC methodology which underlies GTE's cost
10 studies and proposed rates in this case. In practical
11 terms, Verizon's suspension request would mean that
12 proceedings would be delayed for Verizon until the FCC
13 issues new pricing rules in the event that the Eighth
14 Circuit decision is upheld in any appeals.

15 While Verizon understands that no party opposes
16 a delay for Verizon, some of the ALECs at least have asked
17 the Commission to set a new schedule for Verizon and
18 probably for Sprint as well that would assure a decision
19 in their cases by the end of July 2001. Under this
20 approach, the Commission would proceed with the case and
21 render a decision regardless of whether the cost standard
22 was finally determined at the federal level. Verizon does
23 not think this is the best course. The company is now
24 reviewing its cost studies to determine how they should be
25 changed to conform to the Eighth Circuit's opinion, but we

1 do not know how long that process will take.

2 COMMISSIONER JACOBS: But you are undertaking
3 that analysis?

4 MS. CASWELL: Yes, we are analyzing them now,
5 but it will take, I think, a substantial period of time.
6 And, of course, we would comply with any Commission order
7 to submit new studies on a delayed schedule, if that's
8 what the Commission decides it wants to do. However, even
9 if Verizon revises its studies in light of the Eighth
10 Circuit's opinion, we will have to do that in absence of
11 any valid FCC pricing rules. So there's a good chance
12 that the Commission will go forward with the proceeding
13 only to have to turn around and do it again when the FCC
14 issues new pricing rules.

15 COMMISSIONER JACOBS: That's an interesting
16 point. As I've been thinking through this, and that point
17 being the relevance of the FCC's pricing rules --

18 MS. CASWELL: Right.

19 COMMISSIONER JACOBS: -- could we come up
20 with -- so long as you come up with a cost study that you
21 think comports with the issue of the hypothetical, do we
22 have to wait for the pricing rules?

23 MS. CASWELL: You don't have to wait. There's
24 no -- I don't think, at this point, there's any real
25 obligation for you to wait. The real issue is, what is

1 the most efficient thing for you to do? And I know the
2 Commission has been frustrated of late with regard to some
3 decisions at the federal level in the fact that it goes
4 through a whole proceeding and then has to turn around and
5 do it again at the end when the FCC rules.

6 And in this case, Verizon understands the
7 Commission's frustration with being hamstrung with the FCC
8 and federal court decisions. And, in fact, GTE went with
9 the states up to the Supreme Court last year and tried to
10 get a decision that the states could establish their own
11 cost methodologies. And, unfortunately, the FCC won that
12 battle. In its opinion of January of last year, the
13 Supreme Court affirmed the FCC's authority to implement
14 the local competition provisions in the Act. And with
15 specific regard to pricing methodology, the Court said
16 that, yes, the FCC can prescribe a requisite cost
17 methodology, and then the states need to take that and
18 establish the rates.

19 So in the end -- I mean, what's clear at this
20 point is that the FCC can establish the cost methodology,
21 and then you need to take that methodology and follow it.
22 So if we need to go forward now, there's no assurance that
23 what we do will ultimately comport with the FCC's ultimate
24 rules. And that -- you know, unfortunately, that's the
25 hand you've been dealt by federal regulators in the way

1 that they have interpreted the Act.

2 As I said, the CLECs oppose an indefinite
3 suspension and would have the Commission proceed with a
4 decision for Verizon and Sprint by July of next year. In
5 this regard, they argue that competition will not develop
6 in the absence of what FCCA calls correctly designed UNE
7 rates. And, again, I point out that we won't know with
8 any certainty how to correctly design UNE rates until we
9 know for sure what the ultimate rules will be at the
10 federal level. And more fundamentally, it's important to
11 recognize that there are UNE rates in place today and that
12 this Commission established those rates. They were not
13 unilaterally imposed on the CLECs. In addition, the
14 parties have stipulated to interim deaveraged loop rates.
15 Under Verizon's suggested approach, all of these rates
16 would remain in place until the pricing standard is clear
17 and the Commission can proceed with certainty.

18 Additionally, I need to point out something that
19 I think the parties may have overlooked. As a condition
20 of GTE's merger with Bell Atlantic, the FCC imposed
21 certain obligations designed to speed competition in
22 Verizon's state territories. Among these conditions are
23 promotional discounts on residential and advanced services
24 loops and the resale discount for residential loops. Let
25 me try to briefly explain these discounts which recently

1 took effect in Florida.

2 For resale of Verizon's telecommunications
3 services, this Commission has ordered a wholesale discount
4 of 13 percent. Under the FCC's merger order, however,
5 CLECs will get more than double that discount for
6 residential resold lines and associated services.
7 Specifically, instead of a 13 percent discount, they will
8 get a 32 percent discount off the retail rate. So that's
9 quite a bit deeper than this Commission has ordered.

10 For unbundled local loops used for residential
11 or advanced services, ALECs will get a 25 percent discount
12 off the established State rate. For example, this
13 Commission set a \$20 rate for the two-wire analog loop in
14 GTE's arbitrations with AT&T and MCI. The parties then
15 stipulated to deaveraged rates so that the rate for Zone
16 One for Verizon is now \$16.42. With the merger discount,
17 that rate will be taken down to just \$12.31. With rates
18 like that, I think it's extremely difficult to claim that
19 competition will be stymied if the Commission doesn't set
20 rates quickly.

21 To gain perspective on this discounted rate,
22 it's useful to look at the respective two-wire loop rates
23 Verizon and AT&T proposed in this proceeding. Verizon had
24 proposed a \$28.41 rate, while AT&T proposed a rate of
25 \$10.67. The \$12.31 rate is a whole lot closer to AT&T's

1 ideal than to Verizon's. There are various conditions as
2 to when the merger promotional windows will end, but all
3 of them are tied to competitive developments in Verizon's
4 area. For the resale and residential loop discount, the
5 default offering window is two years with the discount
6 itself lasting for three years.

7 The advanced services loop discount window won't
8 end until Verizon has deployed operation support system
9 interfaces to handle at least 75 percent of advanced
10 services preorder inquiries and orders. In short, these
11 discounts could well be in effect until the pricing
12 methodology question is settled at the federal level. So
13 in this interim period, the merger conditions assure rates
14 that are quite a bit lower for these key elements than the
15 existing rates the Commission has ordered.

16 Finally, I need to address a point made by FCCA
17 in its response to our motion. FCCA appears to believe
18 the Commission can force Verizon to continue to support
19 studies it filed before the Eighth Circuit issued its
20 decision. As a matter of fundamental due process, if
21 nothing else, that is incorrect. Verizon cannot be
22 compelled to advocate any particular position in this or
23 any other proceeding. It is very well known that Verizon
24 has always opposed the hypothetical network standard
25 embodied in the FCC rule that the Eighth Circuit has

1 overturned. And based on past arbitration decisions, I
2 don't think this Commission would have adhered to that
3 standard either if it had the choice.

4 GTE agreed to submit cost studies in accordance
5 with the FCC's pricing rule only with the explicit
6 understanding that that rule would remain in effect.
7 Since that is no longer the case, GTE is well within its
8 rights to withdraw those studies and to advocate an
9 alternative approach in keeping with the Eighth Circuit's
10 ruling.

11 In summary, GTE's preferred approach is a
12 suspension of this proceeding as to Verizon until we know
13 what cost standard is to be used to price UNEs. In the
14 meantime, GTE would withdraw its cost studies and proposed
15 prices, as well as the testimony associated with those
16 costs and prices. At the same time, we would ask that all
17 other parties' testimony addressing our studies and our
18 testimony would be withdrawn or would be stricken as well.
19 Verizon would not withdraw any of the testimony from the
20 hearing that was held last month on certain issues. While
21 Verizon would not present any witnesses in the BellSouth
22 phase of the proceeding, it would still remain a party to
23 this case and would file a posthearing statement on the
24 issues that were litigated last month.

25 As I stated earlier, Verizon's less preferred

1 alternative would be to go ahead in the absence of new
2 pricing rules by allowing the company an adequate period
3 to file new cost studies conforming to the Eighth
4 Circuit's ruling. And what we would suggest in this
5 regard is perhaps a status conference in a few months to
6 determine where we are in cost study development, and it
7 might also be possible to reserve some tentative hearing
8 dates toward the end of next year. Thank you.

9 COMMISSIONER JACOBS: Any responses to Verizon's
10 motion?

11 MR. MCGLOTHLIN: Commissioner, we filed a
12 response that addressed both motions, and if the other
13 parties think well of it, perhaps we could hear Sprint and
14 then respond.

15 COMMISSIONER JACOBS: Okay. Is that fine with
16 Sprint?

17 MR. FONS: That's fine, Commissioner. It may be
18 a little bit awkward because Sprint is going to be coming
19 at this a little bit differently than Verizon. As you
20 know, Sprint is participating in this proceeding both as
21 an ILEC and as an ALEC. Sprint is very sensitive of the
22 fact that we need to get pricing for unbundled network
23 elements accomplished soon, and they need to be deaveraged
24 to the greatest extent possible.

25 Sprint has approached this case from the very

1 beginning on a very balanced basis; that is, looking at
2 both sides of the equation, and have filed cost studies
3 and prices which we believe represent a fair, impartial,
4 and compensatory manner of pricing unbundled network
5 elements. This carefully balanced approach was capsized
6 in July when the Eighth Circuit threw out one of the
7 elements of the FCC's pricing methodology, and that is the
8 hypothetical network. Sprint's cost studies, in
9 particular, their loop cost study is based upon a
10 hypothetical network. If there's any ILEC in this
11 proceeding that has adhered to the FCC's rules and pricing
12 methodology, costing methodology, it's been Sprint.

13 Because of the use of the hypothetical network,
14 and since that's now been vacated by the Eighth Circuit,
15 Sprint is in a dilemma. Sprint feels that it cannot go
16 forward with its current cost studies with that rule being
17 vacated because that's the heart and soul of our costing
18 methodology. We could go forward, but as Ms. Caswell has
19 indicated, we're running a risk; that is, if we go forward
20 and the Eighth Circuit's decision is not stayed, or if it
21 is ultimately approved or upheld, I should say, and if the
22 FCC issues new rules, we have wasted an awful lot of time
23 and effort. The prices will not then be appropriate
24 prices, and we will have to go back to the drawing board.

25 It's Sprint's posture that we ought to wait and

1 see what happens, not indefinitely. Sprint has already
2 committed to coming up with new costing in the April to
3 June time frame with or without something final out of the
4 FCC. We don't know at this point in time what that is. I
5 mean, we're kind of just taking a step into the dark
6 because we don't know what will replace the hypothetical
7 network. If it's not a hypothetical network or a proxy,
8 we're not sure how you would do your costing for a local
9 loop.

10 So these are things that have to be worked on,
11 things that have to be studied, and therefore, we believe
12 that this proceeding ought to be bifurcated, and Sprint
13 ought to be able to step outside of it as the ILEC, and
14 then come back sometime next year and make a cost filing,
15 a pricing filing in the springtime of next year, maybe as
16 late as June, and then take it from there.

17 In the meantime, Sprint has on file an approved,
18 an effective tariff for all of its rates, and those are
19 not only unbundled network element rates, they are
20 deaveraged to the greatest extent possible. So there's
21 nothing that any ALEC can come and take those tariffed
22 rates from Sprint. So in the meantime, while we're
23 waiting through this, there's no disadvantage to any CLEC
24 coming in and doing business in Florida.

25 The other side of this is, as I indicated in the

1 beginning of my remarks, Sprint is also appearing as a
2 CLEC in this proceeding, and Sprint would like to continue
3 as a CLEC in this proceeding. Consequently, there is
4 testimony that Sprint has filed in this proceeding that is
5 interwoven with both ALEC and ILEC testimony, and we will
6 have to go through the process of taking out pieces of
7 that testimony, and Sprint is agreeable with working with
8 the parties to reach an accommodation on that. Indeed, I
9 have sent all of the parties and Staff a matrix of the
10 proposed changes that we would make to our testimony, the
11 testimony that's already been filed, the direct testimony
12 that was filed back in May, our rebuttal testimony in
13 Phase One which was filed in the end of June, as well as
14 the rebuttal testimony that we filed at the end of July.
15 We have proposed certain pieces be left in, some pieces be
16 taken out.

17 As far as the Phase One proceeding, except for
18 some specific pieces of testimony, Sprint will take out
19 all of that testimony, the cost of capital testimony. It
20 had very little depreciation testimony because Sprint was
21 going to adhere to the depreciation rates that the
22 Commission established in the USF proceeding a couple of
23 years ago. With regard to the rebuttal testimony that
24 Sprint filed on --

25 COMMISSIONER JACOBS: Let me make sure I'm

FLORIDA PUBLIC SERVICE COMMISSION

004919

1 clear. We covered most of those issues in the prior
2 hearing; right?

3 MR. FONS: In the Phase One, right, but we'll
4 withdraw that testimony. Sprint is not going to stand on
5 that testimony. We'll refile all of our testimony with
6 any cost study --

7 COMMISSIONER JACOBS: Does that cause us any
8 concerns with the procedure from that docket, if they
9 refile testimony on depreciation and cost of capital?

10 MS. KEATING: That is one of the questions that
11 Staff had --

12 COMMISSIONER JACOBS: Okay.

13 MS. KEATING: -- was exactly going to some of
14 the Phase One issues, whether there would be a need to
15 refresh the information if bifurcation does occur.

16 MR. FONS: Well, we'll refresh it entirely is
17 what our proposal is rather than trying to leave it in the
18 record.

19 MS. CASWELL: And, Commissioner, I would note
20 that we could go that way too. If Staff and the
21 Commission prefers that we withdraw that, we can do that
22 and refile.

23 COMMISSIONER JACOBS: Okay.

24 MR. FONS: The remaining piece is the rebuttal
25 testimony that we filed on July the 31st as an ILEC, I'm

1 sorry, as an ALEC. I'll get it straight one of these
2 days. But we filed rebuttal testimony on July the 31st as
3 an ALEC, and we're in the process right now of going
4 through that testimony and revising it in recognition of
5 the fact that we will in this -- if our motion is granted,
6 we will be withdrawing not only our testimony but also our
7 cost studies. And, therefore, there may be pieces of our
8 ALEC rebuttal testimony which relies upon the cost studies
9 and prices that will no longer be applicable, and so we'll
10 have to take that out if the Commission grants us leave to
11 do that. And that's where we are, Commissioner.

12 COMMISSIONER JACOBS: Very well, very well.

13 Mr. McGlothlin.

14 MR. MCGLOTHLIN: Commissioner Jacobs,
15 Joe McGlothlin for the FCCA. I would like to begin by
16 giving you the bottom line to our argument and position,
17 and then I'd like to explain how we got there because it's
18 important that you understand the reasons. They are far
19 different from the reasons that are given by the movants
20 here.

21 We believe there should be no delay in the
22 September 19th hearings as they relate to BellSouth. We
23 would agree with and consent to a limited delay in the
24 hearings as they relate to Verizon and Sprint but not
25 because we agree that the opinion of the Eighth Circuit

1 provides a justification or reason to delay. As a matter
2 of fact, we strongly disagree with that assertion. We
3 agree with a slight delay, because if we were to proceed
4 on September 19th with BellSouth and then, as appropriate,
5 set subsequent hearing dates for Verizon and Sprint, that
6 type of bifurcation, limited bifurcation, is in core with
7 our view of the most orderly procedure that would result
8 in the most thorough examination and the most informed
9 decision by the Commission in this important docket, but
10 at some point, that delay no longer because constructive.
11 It becomes injurious and prejudicial.

12 And the FCCA suggests that the outside date for
13 a final decision in this docket as it relates to Verizon
14 and Sprint would be a final decision no later than
15 July 31st of next year and that it would include a ruling
16 on any motions for reconsideration. We view that as
17 something that should be doable by the parties and
18 manageable from the standpoint of the Commission. But
19 beyond that, we're simply pushing too far into the future
20 for a decision that will help shape and define the nature
21 and extent of competition in the local market in Florida.

22 I think it's helpful to provide a little bit of
23 context here, take stock of exactly where we are in this
24 proceeding. This proceeding actually was initiated by a
25 petition that the FCCA and other parties filed in December

1 of 1998. In that petition, we asked the Commission to
2 address those aspects of the framework in Florida that, in
3 our view, were impeding the development of competition in
4 the local market. And we alleged then and we continue to
5 assert now that until the Commission revisits and
6 prescribes cost-based UNE rates, there will be no
7 meaningful competition in Florida in the local market.

8 In May 1999, the Staff recommended that this
9 docket specific to UNE pricing be opened. And since then,
10 despite efforts of parties to streamline the case where
11 there was a stipulation that had the effect of avoiding a
12 Phase One/Phase Two approach for the purpose of expediting
13 this decision, right now we're looking at an agenda
14 conference of February of next year before we have the
15 decision as it stands now. And if there's one thing that
16 the moving parties and the new entrants agreed with, it is
17 that if the Commission were to wait until all the dust
18 settles on this issue; that is, wait out until we have
19 answers as to whether there's going to be a stay or
20 whether there's going to be an appeal, whether there is
21 going to be a remand and lengthy rule proceedings, that
22 delay will probably measure in terms of three or four
23 years. And we simply think it's unacceptable to wait
24 until the outcome is settled, if the delay is that long,
25 if it means that we have to wait that period of time

1 before those things that are necessary to effective
2 competition are in place in Florida.

3 And I'd like to take this time to point out the
4 essential difference between the motions and our position.
5 Verizon maintains that the principal objective of the
6 Commission in this situation should be, avoid at all
7 costs, even if it means waiting four years, the necessity
8 of having a second ratemaking activity. We think the
9 priority is very different. We think that the Commission
10 in this situation should take all actions necessary to
11 address the UNE rates with the additional market
12 experience and with the better data that it has available
13 now and take measures to prescribe rates that will have
14 the effect of making competition possible. And then if in
15 three or four years, if this happens, there's a result
16 coming out of the court case and the FCC activities that
17 requires it, the Commission can adjust, make adjustments
18 at that point.

19 And what type of adjustments would those be?
20 I'd like to make the point now that in the Eighth Circuit
21 opinion, the essence of that opinion is a strong
22 validation by the Court of the forward-looking cost
23 methodology. One of the references is on Page 10 of the
24 decision. The Eighth Circuit said, "Forward-looking costs
25 have been recognized as promoting a competitive

1 environment which is one of the stated purposes of the
2 Act." And a little later in the same paragraph, "Here,
3 the FCC's use of a forward-looking cost methodology was
4 reasonable." So as I laid out in our written response,
5 what we're talking about here with respect to the impact
6 of the Eighth Circuit opinion on this proceeding is a
7 matter of detail and nuance. The Court approved the use
8 of a forward-looking cost methodology. TELRIC is one
9 example, and it's important that the Commission, among
10 other things, go to hearing and take the evidence on the
11 impact of the decision on its role in this case.

12 COMMISSIONER JACOBS: You bring up an
13 interesting point that I considered, and I'll ask the
14 ILECs to maybe respond to this. Would you then support
15 the idea that, number one, there are other costs and
16 methodologies, forward-looking costing methodologies, that
17 would not incorporate a hypothetical network that would be
18 available for use in a cost model?

19 MR. MCGLOTHLIN: I think within the universe of
20 available cost methodologies, there are variations on this
21 forward-looking theme; one of which would be to modify the
22 use of the hypothetical network in various degrees.

23 COMMISSIONER JACOBS: And that brings me to the
24 next point, because in TELRIC, my question is -- and I
25 guess you would answer it in the positive -- could you

1 modify the hypothetical issue in the TELRIC methodology so
2 as to overcome the Court's concerns?

3 MR. McGLOTHLIN: If the question is, can we do
4 that based on the submissions that have been made in this
5 docket at the September hearing, I don't think I'm
6 sufficiently well versed in the technical aspects of that
7 to give you an answer. But I would like to point this
8 out, we have sponsored testimony of our witness,
9 Joseph Gillan, who testifies in prefiled testimony,
10 rebuttal testimony, that the real impact of the Eighth
11 Circuit's decision in its disapproval of the specific
12 TELRIC methodology is to prescribe the upper bounds of the
13 UNE rates that can come out of this case because the
14 relationships are such that if you substitute this
15 different network for the hypothetical network involving
16 the TELRIC, the way the numbers fall out is that
17 necessarily the TELRIC is the highest of the possible
18 outcomes. And so that should give the Commission some
19 assurance that if it proceeds on the basis of the cost
20 studies that have been submitted to date, it is not
21 understating rates when it uses those tools. If anything,
22 it is at the upper limits of what should be permissible,
23 and it is the most conservative possible position to be
24 in. And for that --

25 COMMISSIONER JACOBS: Verizon says quite the

1 opposite in their -- that they would say this is quite
2 the -- it's exactly the reverse.

3 MR. MCGLOTHLIN: Yes. And we would be happy to
4 get into that with them during the hearing when that
5 arises as to who's right on that subject.

6 COMMISSIONER JACOBS: I'll let you respond.

7 MR. MCGLOTHLIN: So for these reasons, for the
8 reason that the Eighth Circuit, if nothing else, validated
9 the use of a forward-looking cost methodology, for the
10 reasons that we have been asserting since 1998,
11 Commissioner, that competition will not develop to any
12 meaningful extent until the Commission addresses UNE
13 rates, and because the alternative to a reasonable
14 schedule is to experience a delay of some three or four
15 years, we suggest that the best course of action is to
16 proceed on September 19th to take testimony on the cost
17 studies that BellSouth has submitted, and then in an
18 orderly but expeditious way, set dates that will allow the
19 Commission to treat Verizon and Sprint on a schedule that
20 ends no later than July 31st of next year.

21 COMMISSIONER JACOBS: Okay. Staff, did you want
22 to go and let the parties respond to FCCA first? Did you
23 have any points?

24 MR. MCGLOTHLIN: Before that, I would just like
25 to point out, I'm aware that Mr. Melson is on the phone

1 and Mr. Self, to my right, have some comments --

2 COMMISSIONER JACOBS: I'm sorry.

3 MR. MCGLOTHLIN: -- they may want to add to

4 my --

5 MS. KEATING: Yeah, I think there are some other
6 responses.

7 COMMISSIONER JACOBS: Okay. Mr. Self.

8 MR. SELF: I think Mr. Melson is going next.

9 COMMISSIONER JACOBS: Mr. Melson.

10 MR. MELSON: Thank you, Commissioner. I'll be
11 short. We, both WorldCom and Rhythms, essentially support
12 the FCCA position. We both believe very strongly that the
13 BellSouth portion of the hearing needs to go forward in
14 September, and are both willing to allow a bifurcation
15 provided that the GTE and Sprint cost studies come in on
16 some sort of timely fashion and don't get delayed
17 indefinitely as Verizon appears to suggest. Thank you.

18 COMMISSIONER JACOBS: Okay. Mr. Self.

19 MR. SELF: Thank you, Commissioner. AT&T also
20 agrees with the comments that Mr. Melson and
21 Mr. McGlothlin have made. And I'd just like to add a
22 couple of additional thoughts. Principally, going to the
23 issue of the timeliness and when do we have the subsequent
24 proceeding. The first thing I'd like to point out is, in
25 terms of the argument that the Eighth Circuit decision

1 isn't at least in part motivating the current situation,
2 the mandate has not yet issued on that, and it won't for
3 45 days. So we technically have not gotten to the point
4 where the rules have indeed legally been invalidated at
5 this juncture, and we won't be at that point until the
6 mandate issues. But even assuming the mandate does in
7 fact issue, which is what will happen unless there are
8 petitions for reconsideration, what we're motivated by in
9 terms of having the proceeding with respect to Verizon and
10 Sprint as soon as is reasonably possible is the fact that
11 the Act makes very clear in Section 252(d)(1) that it's
12 the State Commissions that are supposed to be setting the
13 rates in these matters.

14 And with respect to the Commission's decision,
15 excuse me, the Commission's obligation to set rates in
16 thinking about what it was that I would like to tell you
17 today, I was reminded of the Florida Supreme Court case in
18 US Sprint versus Marks, July 16th, 1987, and that was in
19 one of the toll monopoly area review cases. And in that
20 case, the issue was the permanence of the toll monopoly
21 areas. And for those that don't remember the case at that
22 time, the Commission had determined that pursuant to a
23 review that it had set several years earlier that the toll
24 monopoly areas would in fact continue. And the Supreme
25 Court affirmed that decision of this Commission. And part

1 of what they said was, and I'd like to quote from Page
2 1109 is, "Whether the TMAs are permanent or temporary must
3 be analyzed within the historical context in which the
4 Commission's actions here have been taken."

5 And it seems to me that the issue before you
6 today is a question of permanence versus temporary
7 actions. And part of the argument that's really being
8 made to you is, wait until we have permanent final rules
9 on this subject, which as Mr. McGlothlin says could be
10 two, three, or four years from now, and I think it is
11 very important for the Commission to keep in mind that
12 under the Doctrine of Administrative Finality, that the
13 Commission -- and this decision as well in the US Sprint
14 case -- that this Commission has the obligation to set
15 rates and to take action and to decide issues that are
16 presented before it. And, indeed, changed facts and
17 circumstances may occur; rules may change, statutes may
18 change, policy considerations may change, a multitude of
19 things may change downstream.

20 And under the Doctrine of Administrative
21 Finality, when you indeed have changed facts and
22 circumstances, that's your opportunity to come back and
23 deal with those changed facts and circumstances which may
24 or may not lead to a different decision at that time. But
25 the Florida Supreme Court and all of the cases on the

1 subject make it very clear that, to the extent that you
2 adopt a policy, you adopt something that looks like a
3 permanent action today that really in the administrative
4 grand scheme of things, that action is permanent only
5 until such time as there are changed facts and
6 circumstances.

7 This Commission has an obligation to set rates.
8 There are numerous carriers that either currently have
9 arbitrations underway or are in the process of negotiating
10 with these carriers and may inevitably end up before you
11 on arbitrations. To the extent that you can set rates
12 consistent with the Act, you have that obligation to do
13 that. And, really, what I believe all of the ALEC
14 carriers are urging you to do is to proceed on that basis
15 and to set those rates. And waiting as Verizon has
16 suggested for what could potentially be several years, and
17 even in the case of Sprint, the ILEC, waiting for what
18 could be late next year before you would have a hearing,
19 which would be sometime in the mid 2002 time frame
20 potentially before you have a final decision of this
21 Commission, is really too long.

22 This Commission should set the policy. This
23 Commission should set the rates. And if the FCC, the
24 United States Supreme Court, the Eighth Circuit, Congress,
25 or whomever at some point downstream to change the rules

1 of the road, the Commission can deal with that at the
2 time.

3 But these companies, these ALECs, are waiting
4 and wanting to move forward with their business plans.
5 And under the current price structure, they're effectively
6 unable to do that. And if you truly want competition to
7 occur, if you truly want to move forward in implementing
8 the Act, then you should grant the requests of Verizon and
9 Sprint for a bifurcation and a delay, but do not grant
10 their requests for the length of the delay, and instead,
11 as we've urged in the FCCA's document, get this matter
12 moving forward and have a final decision by the middle of
13 next year. Thank you.

14 COMMISSIONER JACOBS: Mr. Goggin, I'm sorry, you
15 had a response to one of the motions. Would you like to
16 be heard?

17 MR. GOGGIN: Yes, please. BellSouth, first of
18 all, has no objection to granting the motions to bifurcate
19 that were filed by Verizon and Sprint provided that it
20 would not in any way delay the proceedings with regard to
21 BellSouth. We're not aware of any party to this
22 proceeding that advocates delaying the proceedings with
23 regard to BellSouth, but if granting the motion to
24 bifurcate would result in such delay, then BellSouth would
25 reluctantly oppose the motions.

1 The other point that we wish to make, which is a
2 relatively narrow one, is we're somewhat concerned about
3 Sprint's apparent desire to rely in part on the cost
4 studies that it now claims it cannot defend in order to,
5 as an ALEC, attack BellSouth's cost studies. Sprint has
6 proposed providing revised versions of its rebuttal
7 testimony and redacted versions of other testimony, which
8 we understand would include information from its cost
9 studies, but it would be used in order to discuss
10 BellSouth's cost studies, and they have proposed that that
11 testimony be allowed unless it can be shown that the
12 inputs are hypothetical network based. And yet in its
13 motion, Sprint claims that its cost studies are based
14 entirely upon the TELRIC methodology, including the use of
15 a hypothetical network with the exception of two items,
16 vendor costs and labor rates. For that reason, BellSouth
17 requests that the Commission strike any testimony provided
18 by Sprint which relies upon the cost studies that Sprint
19 has asked to withdraw.

20 In the event that the Commission should not
21 condition the granting of Sprint's motion on the striking
22 of such testimony, BellSouth would like to reserve the
23 right to file additional rebuttal testimony after having
24 reviewed Sprint's revised rebuttal testimony, which is yet
25 to be filed, or to move to strike those portions of such

1 rebuttal testimony which we believe improperly rely on
2 withdrawn cost studies.

3 I guess there is one other observation that we
4 would like to make. You asked before the parties to
5 address whether other forward-looking methodologies may be
6 used. Our limited observation here, I have not read the
7 testimony of FCCA's witness at this time, but I understand
8 that he is arguing that TELRIC represents the upper bound
9 of cost-based prices and that the Eighth Circuit's
10 decision would result in, I guess, lower cost-based
11 prices. And that, to us, is rather surprising when one
12 considers that the CLECs argued that the TELRIC rates, the
13 TELRIC rules should be upheld because only through the use
14 of a hypothetical network could you get lower rates. They
15 were arguing at the time that the abandonment of the
16 TELRIC rules would certainly result in higher rates. So
17 if they are now arguing that the abandonment of the TELRIC
18 rules will necessarily result in lower rates, we find that
19 astonishing.

20 COMMISSIONER JACOBS: Very well. Mr. Wahlen.

21 MR. WAHLEN: I hate to interrupt the flow of all
22 of this, but I came with a long presentation for Alltel
23 which would require me to repeat everything that
24 Mr. McGlothlin and Self and Melson said, and so I won't do
25 that. But I will say that Alltel is not opposed to

1 bifurcation. They're not opposed to a reasonable delay,
2 and we think the schedule suggested by the FCCA is
3 reasonable, and then that's our piece in it.

4 COMMISSIONER JACOBS: Thank you. I'm sorry, I
5 probably get you out of order.

6 MR. WAHLEN: That's okay. No problem.

7 COMMISSIONER JACOBS: Okay. Staff.

8 MS. KEATING: I'm not sure if there are any
9 others on the phone that may have wished to respond.

10 COMMISSIONER JACOBS: Mr. Sapperstein, I think,
11 was on the phone. Did you want to respond,
12 Mr. Sapperstein?

13 MR. SAPPERSTEIN: I concur with the comments of
14 all of my colleagues.

15 COMMISSIONER JACOBS: And, I'm sorry, from Time
16 Warner.

17 MS. CAMECHIS: Commissioner Jacobs, this is
18 Karen Camechis with Time Warner Telecom. We also concur
19 with the FCCA and AT&T and would not oppose bifurcation as
20 long as Verizon and Sprint proceeded by the middle of
21 2001, with the hearing at the end of 2001.

22 COMMISSIONER JACOBS: Okay. That, I assume,
23 takes care of all of the parties' positions on the two
24 motions. Is there anyone else that needs to be heard on
25 that? Okay. Staff.

1 MS. KEATING: We've just got some clarification
2 questions, I think. It sounded to me like -- with regard
3 to the Phase One issues that the parties might be willing
4 to just defer consideration of all the Phase One issues
5 for Sprint and GTE to a later proceeding as well rather
6 than having them addressed.

7 MR. FONS: Go ahead.

8 MS. CASWELL: Go ahead. We could go either way,
9 but I would ask that, you know, if we do that later
10 treatment of the inputs in a different case, that we could
11 also rely on some of the testimony that's been submitted
12 in Phase One unless we're going to totally re-litigate the
13 issues. I guess I'm not sure how it would work.

14 MS. KEATING: Frankly, at this point, Staff
15 isn't either. But one of the concerns that we've had is
16 that if you do bifurcate for Sprint and GTE, just taking
17 up Phase Two issues later on could result in some of the
18 information that's been filed in Phase One being somewhat
19 stale.

20 COMMISSIONER JACOBS: So you'd follow the idea
21 that Mr. Fons proposed, you would be in favor with that?
22 Okay.

23 MS. CASWELL: And I think we would be fine with
24 that too, if you wanted to do it all over again. I mean,
25 I agree that some of it might be stale, but --

1 MR. FONS: Let's talk about the issues in Phase
2 One so that we make sure that we're on the same page here.
3 My recollection is that there were several issues. There
4 was Issue Five which talked about signaling networks and
5 call-related databases. There was Issue Six which says
6 under what circumstances, if any, is it appropriate to
7 recover nonrecurring costs through recurring rates.
8 Sprint filed testimony on that issue in Phase One, and
9 Sprint would like to continue maintaining that testimony
10 in this proceeding. That's an issue that's not going to
11 go away by Sprint withdrawing its cost studies and prices.

12 The only issues -- and there's another issue
13 having to do, subject of the standards of the FCC's third
14 report and order, should the Commission require ILECs to
15 unbundle any other elements or combinations of elements?
16 If so, what are they, and how should they be priced? We
17 believe that that particular issue should remain in this
18 proceeding, and Sprint is not prepared to withdraw its
19 testimony on that issue.

20 Then there's, finally, when should the recurring
21 and nonrecurring rates and charges take effect? We
22 believe that issue should stay in the proceeding, and
23 Sprint is not prepared to withdraw its testimony on that.
24 The only two issues Sprint is willing to withdraw its
25 testimony on, I should say three issues, is Issues 7B, C,

1 and D, and that is depreciation, cost of capital, and tax
2 rates. Sprint will withdraw its testimony on those three
3 issues that were set forth in Phase One.

4 MS. KEATING: And that's the position of both
5 Sprints?

6 MR. FONS: Well, in this case, it would be
7 the -- yes, it will be the position of both Sprints, but
8 it will only be applicable to Sprint, the ILEC, on the
9 issues that are withdrawn. The issues that are remaining
10 enter Sprint, the ALEC.

11 COMMISSIONER JACOBS: Touche. Do you have
12 any --

13 MS. KEATING: Let's see. Some of our other
14 questions were: With regard to the matrix specifically
15 that Sprint has filed, one of our concerns is that it may
16 just be a little bit confusing --

17 MR. FONS: It may be?

18 MS. KEATING: -- to pull some and not pull the
19 rest. And, frankly, I think it would be Staff's
20 preference if Sprint would just pull it all and then
21 refile what needed to be --

22 MR. FONS: We can do that. What was intended to
23 be, these are the pieces of testimony that would remain.
24 We can certainly refile them. It will take us a bit of
25 time to do the cut and paste that would be required to

1 refile them, but we will be prepared to -- we'll do that
2 if it's an accommodation of the Commission, of course.

3 But we wish to identify what we intended would
4 remain so that BellSouth would have a complete picture of
5 what we're doing because they appear to be the only party
6 that's raising any questions with regard to this.

7 MR. MCGLOTHLIN: Commissioner, taking these
8 items one at a time, I believe the FCCA would have no
9 objection considering the -- what has been referred to as
10 the Phase One issues of Verizon and Sprint in the
11 bifurcated case as long as the overall time schedule
12 remains acceptable.

13 COMMISSIONER JACOBS: Okay. It occurs to me
14 that I had said I would allow Sprint and Verizon to
15 respond to Mr. McGlothlin. I will do that after Staff is
16 done here, if that's okay.

17 MR. FONS: That's fine.

18 MS. CASWELL: Okay.

19 MS. KEATING: I think our greatest concern at
20 this point is just working out what dates, if any, would
21 be, you know, set for a future proceeding, and that would
22 be up to whether you decide to grant the bifurcation and
23 what openings there are on the Commission calendar.

24 COMMISSIONER JACOBS: Okay. Who would like to
25 go first? Since Verizon went first before --

1 MS. CASWELL: Yeah, just briefly. It's the
2 CLECs' position that an indefinite delay until we know
3 what the costing standard is would be injurious and
4 prejudicial to the CLECs and that competition would not be
5 possible in the interim. There are a couple of
6 assumptions there upon which that premise rests that we
7 would vigorously dispute. And the first one is that
8 competition can't develop in the interim because there
9 aren't rates set that are reasonable or cost-based. We
10 would dispute that.

11 We want to remind you once again that there are
12 existing UNE rates and that this Commission set those
13 rates. We didn't like them either. We think they are too
14 low, but the Commission believes they are reasonable, and
15 those rates are in place today. Those rates will become
16 even more favorable, and I would say much more favorable,
17 with the merger discounts that Verizon is obliged to give.
18 So, again, we dispute the premise that competition can't
19 develop in the interim.

20 I think also that the four-year time line --
21 while nobody knows how long it will take, I think four
22 years probably is a little extreme. And based on, you
23 know, past remands, it probably would be in the
24 neighborhood of two, maybe three years.

25 Secondly, the CLECs seem to assume that the

1 rates are going to go down, and I don't think anybody can
2 make that assumption at this point. Despite what
3 Mr. Gillan says, Verizon would echo the remarks that
4 Mr. Goggin made. We don't believe those rates -- we don't
5 believe his premise that the Eighth Circuit decision
6 prescribes the upper bounds of UNE rates. And
7 Mr. Gillan's testimony is counterintuitive as well as
8 contrary to some of the things CLECs have said in the
9 past. I also think Mr. Gillan's testimony downplays the
10 amount of work that would need to be done to the cost
11 studies and to the prices to conform them to the Eighth
12 Circuit's decision, and it appears to me that he believes
13 the Staff should do that work.

14 COMMISSIONER JACOBS: Let me touch on that for a
15 moment. You indicated that you are taking on the analysis
16 of what needs to be done to yours. Contrast what -- and
17 you're saying that you reviewed Mr. McGlothlin's analysis
18 and his is superficial, for lack of a better term.
19 Explain that to me, would you?

20 MS. CASWELL: Well, in terms of FCCA's
21 Mr. Gillan's testimony, I haven't studied that testimony
22 in any great detail. I did read it. We're still
23 analyzing that testimony, as well as the Eighth Circuit
24 decision, but it seems to me that the position that the
25 Eighth Circuit now prescribes the upper bounds of the UNE

1 rates is just not true. If anything, those rates are
2 going to go up, not down, because if we're not using a
3 hypothetical network, then we believe the rates will tend
4 to rise instead of fall. So, I mean, we would dispute
5 that basic premise that Mr. Gillan seems to be operating
6 under.

7 And also, you know, from reading his testimony,
8 I don't know who he thinks is going to do the revisions to
9 the studies or the prices, but it would appear that he
10 thinks Staff should do that, and I think he's downplaying
11 the amount of work that would need to be done to the
12 studies and the prices. So, you know, again, I think he's
13 sort of glossing over some very difficult issues that are
14 presented by the Eighth Circuit's opinion, and that's
15 about all that I have. Thank you.

16 MR. McGLOTHLIN: Well, I can't leave it that
17 Ms. Caswell suggesting that Mr. Gillan --

18 COMMISSIONER JACOBS: I'm going to allow
19 Mr. Fons to respond also. Do you want to wait until he's
20 done before you respond?

21 MR. McGLOTHLIN: All right.

22 MR. FONTS: No. Go ahead, let him respond. I
23 would like to have the last word on this. Yes, go ahead,
24 Mr. McGlothlin.

25 MR. McGLOTHLIN: No.

1 MR. FONS: I'll take my turn at bat, and then
2 we'll let it go at that, I hope. Going back to where we
3 started from, Sprint is in this proceeding both as an ILEC
4 and a CLEC, and the cost studies that Sprint has proposed
5 and has filed in this proceeding are cost studies that
6 looked at both sides of the equation and relied entirely
7 upon the FCC's rules and orders and used a hypothetical
8 network.

9 That hypothetical network doesn't exist in
10 reality. It depends upon the use of state of the art in a
11 configured network that takes advantage of suddenly a
12 network falling out of the sky. It's not the way a
13 network is normally built, and that is incrementally over
14 time. I'm not going to get into the issue of whether
15 TELRIC will produce prices that are higher or lower. What
16 I'm going to -- what I want to say is that to try to come
17 up with the cost of providing a local loop without using
18 some kind of surrogate, some kind of proxy is very, very
19 difficult.

20 I've been in this business for more years than
21 I care to admit and never has the local exchange industry
22 or any industry been able to tell anybody what it costs to
23 provide a particular service or product. That's why you
24 use total service long-run incremental costs, you look
25 into the future, but in order to do that, you've got to

1 have some investment that you've got to look at. And it's
2 that whole question, where do you come up with the amount
3 of dollars that you've got to spend to provide your
4 network? Are you going to look at what's on the books?
5 If you do that, then the CLECs say, no, you're using
6 embedded costs. Well, if you don't use embedded costs and
7 can't use the books, then what do you do?

8 All I'm saying is that this is not a simple
9 process. This is not something for us to just look at
10 what the FCC rules required, the studies that were done
11 pursuant to those rules, and then turn around and say,
12 well, we'll do it the other way. There is no, quote,
13 other way that we can do it right at this moment. We are
14 searching for that. Hopefully, we can come up with
15 something that will make that available to us. So to say
16 that we can do this in the blink of an eye or come up with
17 a schedule that says, well, within the next three weeks
18 come up with a new cost study, or three months, certainly
19 not three years. The best estimate we can give you at
20 this point in time is the estimate that we set forth in
21 our motion, and that is maybe in the April to June time
22 frame we can come up with another cost study.

23 And it may be in that interim time we'll find
24 out more about what is going to happen to the Eighth
25 Circuit decision, and it may be that in the April to June

1 time frame, or even in an earlier time frame, we may find
2 out that we can use the hypothetical network again, which
3 will make things very easy, then we refile our study. But
4 if we don't have the hypothetical network, we're kind of
5 groping in the dark to say what is it that we can do, and
6 ultimately will it past muster? Will it pass the muster
7 of this Commission and of the FCC under whatever rules it
8 might give out?

9 So it's not as Mr. Gillan -- and with all due
10 respect to Mr. Gillan, he's entitled to his opinion. It
11 can't work that way. It's a much more difficult process.

12 COMMISSIONER JACOBS: Do you agree that there
13 were two issues: One is to whether or not there is some
14 way to arrive at an imputation, if you will, into the
15 present models, something that can be imputed in the
16 present models that will overcome this issue of the
17 hypothetical network?

18 MR. FONS: I'm not sure that it can because what
19 the hypothetical network does is gives you the amount of
20 investment that's required to provide all of these
21 facilities and all of these services. And unless you can
22 come up with some quick and dirty way of doing that, it's
23 a difficult chore when we've got to come up with a process
24 that will pass muster.

25 COMMISSIONER JACOBS: Mr. McGlothlin. First of

1 all, let me make sure, he's going first again.

2 MR. FONS: I have one more point to make --

3 COMMISSIONER JACOBS: I'm sorry.

4 MR. FONS: -- and that's with regard to what
5 Mr. Self talked about, administrative finality. With all
6 due respect, I think he's turned administrative finality
7 on its head. Administrative finality is a rule of law
8 that applies to when the Commission must give up control
9 over an item so that it can ultimately be appealed to the
10 courts.

11 COMMISSIONER JACOBS: Okay. Mr. McGlothlin.

12 MR. MCGLOTHLIN: I'm going to be very brief and
13 very narrow on my last remarks. I just wanted to point
14 out, it's fine for Verizon and for Sprint to dispute
15 Mr. Gillan's assertions, and that is an evidentiary matter
16 that will be played out at the appropriate time, but it is
17 unfair and unwarranted to suggest that Mr. Gillan has but
18 through his testimony imposed some huge additional burden
19 on the Staff because it's nowhere in his testimony, and if
20 there's anything to be gleaned from the testimony, it is
21 that in his view the Eighth Circuit validated the
22 forward-looking cost methodology, which means that the
23 Commission can go forward now and, if necessary, adjust
24 later and is far better than waiting three years, even if
25 Kim is right on the outside projections, before we get

1 into this necessary business of designing rates.

2 COMMISSIONER JACOBS: Anything else, Mr. Wahlen,
3 Mr. Self? Mr. Melson?

4 MR. MELSON: No.

5 COMMISSIONER JACOBS: And Mr. Sapperstein and
6 Ms. Camechis?

7 MR. SAPPERSTEIN: No, Commissioner.

8 COMMISSIONER JACOBS: Nothing else. Staff,
9 anything else?

10 MS. KEATING: We don't have any more questions
11 on the motions.

12 COMMISSIONER JACOBS: Okay. It sounds that no
13 one has really disputed that all of the models do rely on
14 the hypothetical, and so that can be taken as a given.
15 And it can be taken -- and the Court's decision speaks for
16 itself as to the continual legal validity of that
17 approach. I'm very interested in to what extent the
18 studies as filed have any validity, for the arguments I've
19 heard today seem to indicate is that as filed, they all
20 rely on the hypothetical and, therefore, have no or at
21 best very limited validity. That's about all I think we
22 can -- we have clarity on at this point.

23 I will not render a ruling from the bench today,
24 but we will have one forthcoming very quickly. We'll rule
25 on the motions for bifurcation and for suspension and

1 BellSouth's motion to strike, which, I guess, was raised
2 today here.

3 MS. KEATING: I think it was a hypothetical
4 motion to strike.

5 COMMISSIONER JACOBS: It depends on the ruling
6 of Sprint's -- regards to Sprint's motion.

7 MS. KEATING: And I would suggest waiting until
8 there's an actual filing.

9 COMMISSIONER JACOBS: Okay.

10 MS. CASWELL: Commissioner, can I just also ask
11 for clarification? In your ruling, you also rule on
12 the -- whether the Phase One testimony remains in or out.
13 Would that be a part of the --

14 COMMISSIONER JACOBS: Yes.

15 MS. KEATING: I think that should be a part of
16 that.

17 MS. CASWELL: Okay. And I think the testimony
18 dates are coming up pretty quickly, and I know you said a
19 ruling would issue quickly. Would we be able to expect
20 that sometime maybe -- would you estimate early next week
21 or later next week?

22 COMMISSIONER JACOBS: At minimum, by the middle
23 of the week, I would think, unless we're -- unless
24 something out of the ordinary comes up.

25 MS. CASWELL: Okay. Thank you.

1 COMMISSIONER JACOBS: Okay. Having heard
2 arguments on the motions, we will now turn to
3 BellSouth's -- I guess this is a motion to modify your
4 testimony. You can go forward, Mr. Goggin.

5 MR. GOGGIN: Commissioner, I'm at a bit of a
6 loss. I didn't realize the notice for today's emergency
7 oral argument did not encompass this issue. I note that
8 in the order of modifying procedure issued July 24th,
9 BellSouth was ordered to file status reports on the
10 modifications of its cost studies on July 26th and
11 August 1st, along with a final list of changes BellSouth
12 intends to make on August 7th and to submit the changes to
13 its cost model on August 16th.

14 BellSouth has filed the status reports and the
15 final list of changes it intends to make, and intends to
16 file the changes to its cost model on August 16th in
17 compliance with the Commission's order. Also, in the
18 order of modifying procedure --

19 COMMISSIONER JACOBS: Hold on just a second.
20 Staff.

21 MS. KEATING: I just wanted to clarify, there is
22 not a motion on the table from BellSouth, but this was
23 noticed also not only as oral argument but as a status
24 conference --

25 COMMISSIONER JACOBS: Okay.

1 MS. KEATING: -- with the idea being that we
2 would be checking on the status of --

3 COMMISSIONER JACOBS: Okay. So we can approach
4 it from that perspective.

5 MR. GOGGIN: That's what I was attempting, is to
6 give the status, which is we -- in conformance with the
7 modified procedural order intend to file the modifications
8 on the 16th as we have been ordered to do and to comply
9 with the other time lines and rulings that were made in
10 that order.

11 COMMISSIONER JACOBS: Okay.

12 MR. SELF: Commissioner Jacobs, can I comment on
13 the status too?

14 COMMISSIONER JACOBS: Go right ahead.

15 MR. SELF: I have no objection to what
16 Mr. Goggin has said, and I'm at a slight disadvantage also
17 because I've not been that intimately involved in this
18 issue, but I have participated in a couple of conference
19 calls regarding these things. And it's my understanding
20 that some of the changes based upon the preliminary review
21 at least that the -- some of the AT&T witnesses have had
22 of the status reports that BellSouth has been filing, that
23 some of the items being changed go beyond the matters that
24 had been the subject of some discussions with AT&T and
25 BellSouth, which my understanding is, that was part of or

1 at least the original motivation for some of these
2 changes.

3 And our witnesses are very concerned that given
4 the fact that this information is going to be produced on
5 the 16th, which is Wednesday of next week, and then given
6 the fact that your order, I believe, talks about testimony
7 being filed a week after that, that that may be extremely
8 difficult to meet. To some extent, how quickly we can
9 respond is going to be dependent upon the full and
10 complete content of the filings. Part of our problem is,
11 even if we get the stuff electronically on Wednesday and
12 get it conveyed out, rerunning the model in some
13 instances -- I understand that our process of doing that,
14 changing the inputs and those sorts of things, that it may
15 take as much as a week in order to do those kinds of
16 manipulations.

17 So I'm not here asking for anything today, but
18 rather simply to state for the record that based upon the
19 preliminary review that some of our folks have had of the
20 filings that BellSouth has been making, it may be very
21 difficult in order for us to provide any testimony, let
22 alone anything meaningful, within the current time
23 schedule. And I just wanted to put you on notice that it
24 may be necessary for us to ask for a couple of more days
25 after we have had a chance to see what it is that they

1 have fully and completely filed.

2 COMMISSIONER JACOBS: Anyone else want to
3 comment?

4 MR. GOGGIN: For BellSouth, I don't anticipate
5 that the modifications that would be filed would require
6 more time than is set forth in the order for the other
7 parties to respond, but certainly if they felt that they
8 needed more time and the additional time asked for is not
9 unreasonable, I don't anticipate that BellSouth would have
10 any objection to that.

11 COMMISSIONER JACOBS: Go ahead.

12 MS. KEATING: Can we ask just a couple of
13 questions? One of the things Staff is curious about is,
14 who exactly for BellSouth is going to be filing revised
15 testimony?

16 MR. GOGGIN: Are you talking about revised
17 testimony in connection with the revised testimony that
18 has yet to be filed by Sprint?

19 MS. KEATING: Correct.

20 MR. GOGGIN: I don't know that any revised
21 testimony would necessarily be filed. Not having seen the
22 testimony that Sprint intends to file, though, we would
23 like to reserve the right to do so in light of the fact
24 that the original schedule was set up so that the ALECs
25 would file on the 31st and we would file later in August

1 on the 21st.

2 MS. KEATING: Okay. I'm sorry. I spoke too
3 quickly --

4 MR. GOGGIN: I'm sorry. Go ahead.

5 MS. KEATING: -- without actually listening to
6 your response. I'm sorry. Who is going to be filing
7 revised testimony for BellSouth to support the revisions
8 to the cost study?

9 MR. GOGGIN: The witnesses who supported the
10 cost studies that are modified I anticipate would be the
11 ones filing testimony in support of their revisions to
12 those.

13 MS. KEATING: But you don't know exactly who
14 that is at this point in time?

15 MR. GOGGIN: No, I'm afraid I don't.

16 MS. KEATING: Do you have any idea of how
17 extensive the revised filing and revised testimony is
18 going to be?

19 MR. GOGGIN: First of all, let me say, I'm at a
20 bit of a disadvantage. I'm returning from vacation, and
21 the attorneys who have been primarily responsible for this
22 case are on vacation.

23 MS. KEATING: We have no pity.

24 MR. GOGGIN: I know you have no pity.

25 COMMISSIONER JACOBS: She's in rare form.

1 MR. GOGGIN: This is by way of explanation
2 rather than a plea for pity. Of course, any pity that you
3 should gratuitously send our way, we would gladly accept.
4 I will get that information to you as soon as possible,
5 and if you think it appropriate, we will share it with all
6 the parties.

7 MS. KEATING: I think that would be helpful,
8 particularly for Staff. We have just one other thing that
9 we have had kind of a concern about. Because of the
10 Court's decision with regard to the models and the
11 hypothetical network, if the Commission does proceed with
12 BellSouth, we're concerned as to whether the Commission is
13 required to consider the Eighth Circuit's decision in
14 rendering its final determination with regard to
15 BellSouth. So would the parties be, I guess, essentially
16 stipulating that we can proceed with BellSouth, and that
17 as the Eighth Circuit's decision applies to BellSouth,
18 that would not be a contested issue?

19 COMMISSIONER JACOBS: I'd like to get some
20 assurance of that. Of course, we can never force you to
21 waive unless you were voluntarily doing it, but --

22 MS. KEATING: I mean, it just seems pointless to
23 go ahead in that direction and then that be the
24 first point on appeal, you know, if the parties are really
25 looking to go forward at this point in time, including

1 BellSouth.

2 MR. GOGGIN: I guess our position on this would
3 be that certainly to the extent that the Eighth Circuit's
4 decision becomes final in the sense that the mandate
5 issues, that would effectively vacate the FCC's pricing
6 rules. We believe that the cost studies that we have
7 submitted comport with those rules. In the absence of
8 pricing rules from the FCC, we think there would still be
9 an obligation on the part of the Commission to establish
10 cost-based rates much in the same way that the Commission
11 was required to establish cost-based rates in arbitrated
12 proceedings when the pricing rules had been vacated
13 before.

14 So we believe that the Eighth Circuit's decision
15 certainly would apply in the sense that the FCC's rules
16 would no longer be operable, but we do not view that as an
17 impediment to having this Commission hear this matter and
18 make determinations and establish rates.

19 MS. KEATING: And so?

20 MR. GOGGIN: Let me give a very concrete
21 example. To the extent that the decision that the mandate
22 issues and an objection is made to our cost studies on the
23 basis that they do not comport with the FCC's vacated
24 rules, I imagine that our response would be one that, yes,
25 they do; and, two, that even if they didn't, that would

1 not prevent the Commission from, nevertheless,
2 establishing the rates that we have sought because that is
3 not a basis for rejecting them. Now, the Commission
4 itself might decide for other reasons to reject them, but
5 we would not view that as a basis for rejecting --

6 COMMISSIONER JACOBS: I think that's the bottom
7 line. You're going to support your position and your
8 testimony on that, and once we make a decision be it based
9 on that, you know, it speaks for itself. And if we wind
10 up in front of a court and the Eighth Circuit decision
11 comes in -- is brought in to challenge our decision, then
12 we will have to deal with that at that time, but it sounds
13 like we're moving forward, and you're going to support
14 your testimony --

15 MR. GOGGIN: Yes.

16 COMMISSIONER JACOBS: -- in this proceeding.

17 MS. KEATING: I just want to let the other
18 parties -- whether they had a different view of it.

19 MR. McGLOTHLIN: May I try to address your
20 question? FCC's position is as follows: The Commission
21 is not legally prohibited from proceeding now. While the
22 status of the Eighth Circuit's opinion is in play with
23 respect to rehearings and mandates and remands and as a
24 technical matter the validation of the forward-looking
25 cost methodology means that the Commission has the tools,

1 we're supposed to go forward now, and it should go forward
2 now and make a decision. And in the event that ultimately
3 the FCC prescribes different rules that require tension,
4 the Commission can adjust at that time.

5 COMMISSIONER JACOBS: Let me ask a question to
6 you. Let's say the FCC does come out with some
7 methodology that differs from what they have now. Again,
8 in search of a forward-looking costing methodology and
9 what we have here has that same objective; i.e., based on
10 this hypothetical issue, wouldn't we -- would it -- it
11 would appear to me that we could come back and look at our
12 proceeding and make some assessment as to what extent we
13 differ on remand. I would argue for that.

14 MR. MCGLOTHLIN: Yes. I'm not suggesting that
15 it's going to be automatic, that we're going to do
16 anything differently, but at that time, you would make
17 that assessment.

18 COMMISSIONER JACOBS: The thing that troubles
19 me, of course, is that what I hear here today is that
20 there is no rescue for such a cost study; that if the cost
21 study was based on the hypothetical, anything different
22 would require a total redo. And I guess that's what we
23 have to -- that -- quite frankly, I don't know whether I
24 want to or not, but I'm more and more inclined that we may
25 want to get some kind of analysis of that in this

1 proceeding, I mean, just kind of dig into that question a
2 little bit. And it sounds like Mr. Gillan has to some
3 extent.

4 I can tell you that I would be very interested
5 in what that would be and what it means and how we assess
6 that, but I can't prejudge it, of course, but it sounds
7 like a very interesting point that we may want to address
8 here.

9 MR. MELSON: Commissioner Jacobs, if I might,
10 this is Rick Melson for WorldCom and Rhythms. I think
11 part of our position was that BellSouth's cost study as
12 filed never complied with the FCC's TELRIC rules to begin
13 with. So while I think Sprint's study is more clearly
14 based on a hypothetical network, I'm not sure we would
15 agree with the basic premise that Mr. Goggin set out that
16 his study complied with the former rules. Be that as it
17 may, I think we agree with the FCCA and the other parties
18 that we can go forward at this point and that the
19 uncertainty created by the Eighth Circuit decision will
20 get resolved at some point. That's something that need
21 not trouble us particularly in September.

22 COMMISSIONER JACOBS: Now -- thank you,
23 Mr. Melson. One point I wanted to go back to as to
24 BellSouth, your recommendations. There is a standard --
25 and I assume that these are being proposed basically to --

1 as either errors or omissions to your testimony that
2 you're going to just supplement your existing model and
3 testimony that supports it. That was, I think, the gist
4 of Ms. Keating's question to you.

5 The concern I have is to what extent it may
6 cross over the line a bit and act as bolstering or
7 additional testimony. I don't have the wherewithal to
8 make that determination, but I'm going encourage that that
9 analysis be made. And I'm sure the parties will, but I
10 want to make sure that we're very clear on that as to
11 these changes. And that probably will have to be done by
12 the time you file -- I mean, by next week when you file
13 your study.

14 But I'm sure your position would be that none of
15 it is, but what I'm saying here is, you know, that's an
16 issue that I will be looking to have resolved, I guess is
17 what I'm saying. I'd like to get that issue resolved.

18 MR. GOGGIN: I anticipate that the testimony
19 will be -- the revised testimony, to the extent that it's
20 submitted, will be submitted for the purpose of explaining
21 the modifications rather than bolstering any argumentative
22 testimony that may have been submitted before.

23 COMMISSIONER JACOBS: Okay.

24 MR. GOGGIN: I am confident that to the extent
25 that we inadvertently overstepped those bounds, our ALEC

1 friends will promptly point that out.

2 COMMISSIONER JACOBS: Very well. Now, so are
3 we -- it sounds like, Mr. Self, if there are any
4 additional concerns, you will raise those in terms of
5 timing and so forth?

6 MR. SELF: I would assume -- I would hope by the
7 end of next week, we would let you know where we are on
8 that.

9 COMMISSIONER JACOBS: Okay. So we don't really
10 have an order that needs to come out with regard to these
11 modifications at this point. Very well. Anything else to
12 come before us today?

13 MS. KEATING: None that we're aware of.

14 COMMISSIONER JACOBS: Okay. Well, we should
15 have an order before you by the middle of next week, and
16 we'll proceed from there. Thank you. The hearing is
17 adjourned.

18 (orally concluded at 3:19 p.m.)

19 - - - - -

20

21

22

23

24

25

1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4
5 I, TRICIA DeMARTE, Official FPSC Commission Reporter, do
6 hereby certify that the hearing in Docket No. 990649-TP
7 was heard by Commissioner E. Leon Jacobs, Jr., Prehearing
8 Officer, at the time and place herein stated.

9 It is further certified that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 57 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a
16 relative or employee of any of the parties' attorney or
17 counsel connected with the action, nor am I financially
18 interested in the action.

19 DATED this 15th day of August, 2000.

20

21

Tricia DeMarte

TRICIA DeMARTE

22

FPSC Official Commission Reporter

23

(850) 413-6736

24

25

FLORIDA PUBLIC SERVICE COMMISSION

004961