

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030643-TP

In the Matter of:

PETITION OF VERIZON FLORIDA INC.
(f/k/a GTE FLORIDA INC.) AGAINST
TELEPORT COMMUNICATIONS GROUP, INC.
AND TCG SOUTH FLORIDA FOR REVIEW OF
DECISION BY THE AMERICAN ARBITRATION
ASSOCIATION, IN ACCORDANCE WITH
ATTACHMENT 1 SECTION 11.2(a) OF
INTERCONNECTION AGREEMENT BETWEEN GTE
FLORIDA INC. AND TCG SOUTH FLORIDA.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 3

BEFORE: CHAIRMAN BRAULIO L. BAEZ
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER LILA A. JABER
 COMMISSIONER RUDOLPH "RUDY" BRADLEY
 COMMISSIONER CHARLES M. DAVIDSON

DATE: Tuesday, July 6, 2004

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

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3 Florida Inc.

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5 Communications Group, Inc.

6 FELICIA BANKS, ESQUIRE, representing the Florida
7 Public Service Commission Staff.

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P R O C E E D I N G S

CHAIRMAN BAEZ: Item 3.

MS. BANKS: Commissioners, Item Number 3 is staff's recommendation in Docket Number 030643, which is a petition, Verizon Florida against TCG for review of decision by the American Arbitration Association.

At the May 3rd, 2004 agenda conference, among other things, the Commission voted to allow parties to file briefs addressing the Commission's jurisdiction and whether the Commission should agree to hear this case. Specifically the Commission requested that parties identify the specific factual, legal, and policy issues for which review is sought, address the reasons that the Commission should or should not agree to hear the arbitrator's decision on each issue identified, specify the type of proceeding that should be held on each issue, and identify the applicable standard of review for each issue.

Staff's recommendation addresses the briefs filed by the parties and TCG's motion to dismiss. There are two substantive issues for the Commission's consideration. Issue 1 addresses the Commission's jurisdiction in this case, and Issue 2 addresses whether the Commission should agree to hear this case and the type of review, if any. While staff believes that the Commission does have jurisdiction to hear this case, staff believes that if the Commission takes up Issue 2 first and

1 votes on -- votes not to hear this case, the Commission would
2 have to vote on Issue 1 regarding the Commission's
3 jurisdiction. However, if inclined to accept this case, the
4 Commission would have to assert or determine its jurisdiction
5 first by voting on Issue 1.

6 CHAIRMAN BAEZ: Ms. Banks, can you clarify exactly
7 what we've got before us? And with particular -- I think the
8 motion -- and before you answer or clarify, the motion to
9 dismiss -- the recommendation says the motion to dismiss is
10 before us today, and I'm trying to remember whether we had
11 argument on it prior.

12 MS. BANKS: Yes, Mr. Chairman, we did take argument
13 at the May 3rd agenda conference.

14 CHAIRMAN BAEZ: Okay. Thank you. Go ahead,
15 Commissioner.

16 COMMISSIONER JABER: The part I didn't understand,
17 Mr. Chairman, was in your introduction you said if we agree
18 with staff's recommendation in Issue 2, we don't need to reach
19 the issue -- an Issue 1; is that -- I just didn't understand
20 your introduction.

21 MS. BANKS: The introduction was basically saying if
22 you decide to take up Issue 2 first, which is whether or not
23 the Commission should agree to hear this case, that's of course
24 your discretion. If you decide not to hear the case, then
25 staff does believe that you have to address the Issue 1 of

1 jurisdiction.

2 COMMISSIONER JABER: Staff does not believe --

3 MS. BANKS: **That's** correct, if you take up Issue 2
4 and decline to hear the case.

5 COMMISSIONER BRADLEY: Mr. Chairman.

6 CHAIRMAN BAEZ: Commissioner Bradley.

7 COMMISSIONER BRADLEY: Just for a question of staff
8 or a question or two. This matter involves arbitration; is
9 that correct?

10 MS. BANKS: Yes, sir.

11 COMMISSIONER BRADLEY: What was the -- when the two
12 parties agreed to get involved in the process of arbitration,
13 what was the agreement? Was it binding or nonbinding?

14 MS. BANKS: Well, Commissioner, by virtue of what the
15 parties agreed to, if you look at Section 11.2 of the parties'
16 agreement, it provides that the decision of the AAA may be
17 appealed if a party appeals it, if the Commission agrees to
18 hear the case, and if it's within its jurisdiction. And so the
19 posture in which this case has come before us today, arguably
20 it could be considered something other than binding because
21 there is a provision that a party may appeal this decision.

22 COMMISSIONER BRADLEY: Who may they appeal it to?

23 MS. BANKS: The agreement provides in Section 11.2
24 that a party may appeal the decision to the FCC or the
25 Commission. And I'm looking at actually Page 4 of staff's

1 recommendation at the top portion that delineates or sets out
2 Section 11.2 of the parties' agreement.

3 COMMISSIONER BRADLEY: One other question and I'll be
4 finished. Is this a generic issue with respect to it being
5 generic in other states, or is this an issue that's just
6 peculiar to the state of Florida?

7 MS. BANKS: I believe that there probably are
8 provisions in agreements or there is an arbitration provision,
9 but as staff has noted in its recommendation, we believe that
10 this is an issue of first impression before a state commission.

11 COMMISSIONER BRADLEY: Say that again.

12 MS. BANKS: I believe that the arbitration provision
13 may be common in some type of agreements that Verizon has, but
14 there is no commission that has actually addressed the issue
15 that we have before us today that staff is aware of.

16 COMMISSIONER BRADLEY: What I'm trying to -- the
17 reason why I asked that question, to find out if it's an issue
18 that's occurring maybe just in the state of Florida is to
19 really make a determination as to what the proper venue might
20 be if we, in fact, decide that we want to hear this -- address
21 this issue.

22 MS. BANKS: If your question is whether or not
23 there's been precedent established, staff does not believe
24 there's been precedent established whether or not the
25 Commission would agree to hear a case coming before us in this

1 posture.

2 COMMISSIONER BRADLEY: Thank you.

3 CHAIRMAN BAEZ: Thank you, Commissioner. Why don't
4 we hear from the parties that are here. I'm sorry, I'm drawing
5 a blank on your name, sir.

6 MR. PANNER: It's Aaron Panner for Verizon.

7 CHAIRMAN BAEZ: Mr. Panner, I apologize. Mr. Panner,
8 go ahead. And I just -- Commissioners, unless it's your
9 pleasure to do otherwise, what I had intended is since we've
10 already heard argument on the motion, we don't necessarily have
11 to stick to strict, you know, moving party and so on. We'll
12 just go down the line and see what they've got to say about the
13 recommendation. So go ahead, Mr. Panner.

14 MR. PANNER: Thank you very much, Chairman. Good
15 morning, Commissioners. Verizon agrees with the staff's
16 recommendation as to Issue 1 regarding the scope of the
17 Commission's jurisdiction to hear this case.

18 The staff recommendation doesn't indicate, and I
19 don't believe it's correct, that Issue 1 can be bypassed simply
20 by ruling on Issue 2. At the outset, before the Commission can
21 make a decision about the disposition of a case, it has to
22 decide whether it has jurisdiction, and a determination that
23 the Commission does have jurisdiction but chooses not to
24 exercise it would be a different type of determination and
25 would potentially lead to a different type of review or remedy

1 than a determination that the Commission does not have
2 jurisdiction at all. And the Commission cannot make a decision
3 under its discretion until it decides whether it has
4 jurisdiction in the first place. So I believe as a legal
5 matter it's important to resolve that first issue. It can't be
6 avoided.

7 Ordinarily in a court, before a court can reach a
8 nonjurisdictional issue, for instance, the exercise of
9 discretion, it must first decide whether it has jurisdiction
10 over the case in the first place. As I say, Verizon believes
11 that the staff got the recommendation on Issue 1 exactly right.
12 Section 364.162 grants authority over any dispute, it's very
13 broadly worded, any dispute regarding interpretation of
14 interconnection or resale prices and terms and conditions.

15 In using that very broad language, the Legislature
16 made clear that it wanted this Commission to be able to rule on
17 disputes between parties about interconnection matters. And it
18 has no limiting language that says, for example, if the parties
19 initially choose to submit the dispute to private mediation or
20 private arbitration or some other private alternative dispute
21 resolution procedure, that that somehow strips away the
22 Commission's jurisdiction.

23 Now, TCG relies prominently on cases involving final
24 and binding arbitration decisions that are -- have very narrow
25 review by statute. But as the staff rightly points out, that

1 is not the case here because the parties specifically agreed
2 that the arbitration decision would not be final if one of the
3 parties sought review from this Commission and the Commission
4 agreed to hear the case, had jurisdiction over the case.
5 That's what the parties agreed to. They wanted -- they made a
6 decision -- TCG deliberately agreed that there would be an
7 opportunity to seek review of that private arbitration
8 decision. And frankly, TCG is now trying to strip out this
9 provision that it agreed to and that is part of this agreement
10 and that's inappropriate.

11 Now, I know that there's also been some discussion
12 about the notion that the Commission may not have jurisdiction
13 over the case because it's somehow an appeal. First of all,
14 there's nothing in the language of 162 that in any way limits
15 the type of dispute that this Commission can hear as long as
16 it's a dispute over interconnection terms. No state commission
17 is an appellate tribunal. That's not the nature of a state
18 commission. They are administrative agencies and they hear
19 cases as a matter of first instance. When the parties agreed
20 to appeal an arbitration decision to the Commission, clearly
21 what they understood was that they would seek review of that
22 private alternative dispute resolution determination before the
23 Commission as a tribunal of first instance. That is the
24 ordinary way in which a party seeks review of some private
25 extrajudicial determination. It brings a civil action or an

1 action in a tribunal of first instance to seek a court's
2 determination concerning the underlying dispute and the outcome
3 of that private process.

4 Now, as I say, I think the staff got that issue
5 correct, and I urge the Commission to adopt the staff's
6 recommendation on Issue 1.

7 Verizon respectfully disagrees with the staff's
8 recommendation on Issue 2. There's really two separate
9 problems with the staff's analysis that I'd like respectfully
10 to bring to your attention.

11 First, there is a part of Verizon's argument that the
12 staff noted but simply did not address at all in its
13 recommendation, and I think it's the critical legal point that
14 this Commission should recognize. It's a very important
15 principle of administrative law that when the Legislature
16 delegates quasi-judicial authority, the authority on this body
17 to act as an adjudicator of a dispute, the Commission doesn't
18 have discretion over whether to exercise that authority. It's
19 as though somebody brought a case to a court. I have a
20 contract complaint with someone, and I bring it to a court.
21 The court can't say, you know what? This dispute isn't
22 sufficiently important or interesting. I don't want to hear
23 it. Precisely because the Legislature wanted this Commission
24 to have authority over any dispute between parties that related
25 to interconnection, it gave this Commission the authority to

1 adjudicate, to arbitrate those disputes. And this
2 Commission -- if this Commission doesn't exercise that
3 authority, the state will lose that authority altogether, and
4 that's not what the Legislature intended. The reason the
5 Legislature delegated that authority is because it wanted this
6 Commission to hear these disputes.

7 Now, TCG didn't address this point in its briefs, the
8 staff didn't address this point, I am aware of no principle
9 that would allow an administrative agency in a case properly
10 brought before it to decline to exercise adjudicatory authority
11 over such a matter where the Legislature has delegated that
12 authority to the Commission.

13 Now, the second reason that I depart from the --

14 COMMISSIONER DEASON: I need to ask a question at
15 this point.

16 CHAIRMAN BAEZ: Go ahead, Commissioner.

17 COMMISSIONER DEASON: Your first point basically that
18 the Legislature did not give discretion to the Commission to
19 either choose to hear or not to hear a given dispute, I guess
20 that's open to interpretation and debate, but I want to put
21 that in context of how do you reconcile that with the language
22 that I understand is in the agreement which there's a
23 three-prong task and one is that -- it's worded simply,
24 provided the agency agrees to hear the matter? You're saying
25 that language in the agreement has no meaning because we do not

1 have, according to your argument, we do not have the ability to
2 either agree or disagree to hear a matter; you're saying that
3 we have no option but have to hear it. So why is that language
4 in your agreement and what meaning does it have?

5 MR. PANNER: Well, when the parties adopted that
6 language, Section 162 in its present form, I don't believe that
7 existed. And the point is that if Commission had discretion
8 over whether to hear the case, that would be -- you know, that
9 language would become operative. But the parties can no more
10 strip jurisdiction away from this Commission than they can --
11 that the Legislature has granted to this Commission than they
12 can expand the Commission's jurisdiction as --

13 COMMISSIONER DEASON: Well, now, let's back up for a
14 moment. If the agreement had said arbitration was binding, no
15 appeal, aren't you then stripping away our jurisdiction?

16 MR. PANNER: I don't think so.

17 COMMISSIONER DEASON: I don't see that you can have
18 it both ways now in your argument.

19 MR. PANNER: I don't think that's the case. The
20 parties then would be agreeing that they would not bring -- the
21 parties would be waiving their own right to bring the action.

22 COMMISSIONER DAVIDSON: They would be agreeing to
23 strip away our jurisdiction.

24 MR. PANNER: They wouldn't be agreeing to strip away
25 your jurisdiction. The point is that the party bringing it

1 would not have a cause of action. A party that has agreed to
2 binding arbitration would not be able to bring an action --
3 it's a fundamentally different point.

4 I can agree that I will not bring an action that a
5 commission would have jurisdiction to hear. And if I did bring
6 that, I would be breaching the agreement, and the agreement is
7 enforceable by law. An agreement to arbitrate is an agreement
8 that you will not bring a case over which a tribunal would have
9 jurisdiction. That doesn't strip the tribunal of jurisdiction.
10 It takes away an action you would otherwise have. But here,
11 the circumstance is that the parties have agreed that they
12 would be able to bring this action.

13 If Verizon had said, I will not bring this action,
14 and then tried to bring the action, that would be
15 inappropriate, but it is not inappropriate for Verizon to do
16 precisely --

17 COMMISSIONER DEASON: What is the remedy in that
18 situation? If you agree not to bring it but you do it, and you
19 invoke our jurisdiction, you're saying we don't have the
20 ability to dismiss it because you've invoked the jurisdiction.
21 What is the remedy for the other party? Do they sue you in
22 civil court --

23 MR. PANNER: No, you would --

24 COMMISSIONER DEASON: -- for breaking an agreement?

25 MR. PANNER: You would have the ability to dismiss

1 the case because the case would have been brought in violation
2 of the interconnection agreement. The party would have no
3 right. That's what happened in the --

4 COMMISSIONER DEASON: All right. This agreement says
5 we have the discretion. So you're saying that you can give on
6 one hand and take away on the other by the wording of your
7 agreement?

8 MR. PANNER: No, no. The point is that the parties
9 agreed -- one goes to the scope of the remedy that I have under
10 the agreement, that Verizon has under the agreement, the other
11 goes to the scope of the Commission's jurisdiction. I can
12 waive any right that I want -- or I don't want to go too far.
13 I can waive rights that I may have to a judicial forum, to a
14 commission forum in an agreement and that could be enforceable.
15 An agreement to submit a dispute to binding arbitration with no
16 right to review would be an enforceable agreement. And if I
17 were to agree to that, if I came to the Commission and the
18 Commission could say, we're going to enforce your agreement as
19 written, dismissed, you don't have a cause of action. It's not
20 a question that you don't have jurisdiction. It's a question
21 that you don't have -- I don't have a right to bring the case
22 before you because I agreed to give up that right in my
23 interconnection agreement. But that's not the case here.

24 TCG tries to invoke those cases, but they're
25 completely inapposite here because the parties said, after

1 arbitration, you get to go to the Commission, you get to go to
2 the Commission. And so that's what Verizon has done. It's
3 precisely what the parties agreed would happen.

4 Now we get to the separate question. I'm properly --
5 you know, Verizon is properly here before you. And so the
6 question becomes, what is this Commission's scope of authority?
7 If the Commission doesn't have jurisdiction -- if the
8 Legislature said, Commission thou shalt not, then the case
9 would be over for that reason. But that's not what happened.
10 The Legislature said, Commission, thou shalt, you shall have
11 jurisdiction, you shall hear disputes over interconnection
12 agreement matters. And moreover, the Legislature's grant of
13 jurisdiction is not discretionary, it's adjudicatory authority.
14 The case is properly brought before you. Otherwise, Verizon
15 has no remedy, a remedy that the Legislature intended for
16 Verizon to have and that the parties specifically preserved
17 under the agreement.

18 If -- I don't think there's any question that had the
19 parties known -- the parties attempted to submit -- the parties
20 agreed to submit matters to private dispute resolution as an
21 initial matter perhaps in the hopes that it would lead to more
22 expeditious or more inexpensive dispute resolution, but they
23 specifically preserved, and it's not an every day provision,
24 they specifically preserved their right to come to this
25 Commission for review. Had they been told that, you know, the

1 Commission wouldn't be available to hear it or that the
2 Commission would decline to hear it, one doesn't know whether
3 that they would have agreed to the same initial private dispute
4 resolution at all. And so by refusing to hear such a case, the
5 Commission actually puts pressure on the parties to avoid
6 initial private dispute resolution and instead to come to the
7 Commission in the first instance because the Commission would
8 have heard the case. Had the dispute arisen in the
9 first instance, there's no question that the Commission would
10 have heard it. The parties have narrowed the issues. They've
11 taken care of a number of the factual litigation --

12 COMMISSIONER DEASON: Let me interrupt. Does the
13 Commission have the authority and when we receive an
14 arbitration if we think it's deficient because it does not
15 contain an alternative dispute resolution process that we can
16 require that to be in the agreement or to deny the agreement
17 because it is deficient for that reason?

18 MR. PANNER: I don't believe that the Commission
19 could force parties into alternative dispute resolution if they
20 didn't agree, but that's an established principle of -- I
21 haven't researched the point under Florida law. I do know that
22 as a matter of federal law and as a matter of other states' law
23 that a decision to forego a judicial remedy must be voluntary.
24 You can't require a party to forego a judicial remedy -- to
25 submit to private dispute resolution in the absence of

1 agreement. But the point here is that if the Commission thinks
2 that private dispute resolution is generally a good thing, the
3 Commission should preserve the ability of the parties to seek
4 review where there is a substantial challenge -- where there's
5 any challenge to the alternative dispute resolution. Now --

6 COMMISSIONER DAVIDSON: Well, hold on there for a
7 second. Let me interrupt. That defeats the whole purpose then
8 of arbitration. Let's just call it mediation. I mean, the
9 whole intent and policy behind arbitration is that it be final
10 and binding. If you don't want to adhere to the arbitrator's
11 decision in the first instance, then don't agree to
12 arbitration, agree to mediation, some other form of dispute
13 resolution. But it seems to be a poor policy to encourage the
14 parties to agree to arbitration, conduct an arbitration, go
15 through the expense of proceedings, and then come back
16 especially in these budget times to a commission to say, well,
17 you know what -- and it can be either party -- we're not happy
18 with what the arbitrator decided, so we're going to come back.
19 That's not really the purpose of arbitration. I mean, we can
20 disagree on that, but I wanted to put that comment on the
21 record.

22 MR. PANNER: Commissioner, I appreciate that, but
23 that just suggests that the parties here agreed to something
24 that might not have been a good idea because that's what the
25 parties agreed to do. The parties agreed that they would be

1 permitted under this agreement, and this is the agreement that
2 the Commission approved --

3 COMMISSIONER DAVIDSON: Well, on that, with all due
4 respect, I understand that's what you characterize as the
5 parties' agreement, but we've got differing interpretations of
6 what the parties agreed to. And that's for us, frankly, to
7 resolve.

8 MR. PANNER: Fair, Commissioner, but I would point
9 out that the staff's recommendation properly proceeds from the
10 determination that the parties did agree that this remedy would
11 be available, and I believe TCG has never argued to the
12 contrary. TCG concedes that there is an exception to finality
13 under this agreement if a party seeks review in the Commission,
14 it's within the Commission's jurisdiction, and the Commission
15 agrees to hear it.

16 COMMISSIONER BRADLEY: Question, Mr. Chairman.

17 CHAIRMAN BAEZ: Go ahead, Commissioner Bradley.

18 COMMISSIONER BRADLEY: A question of staff. For the
19 purposes of this discussion, can you define for me in succinct
20 terms what the difference is or what the differences are
21 between arbitration and mediation? We've had this discussion
22 before about binding and nonbinding arbitration and --

23 MS. BANKS: Commissioner, by definition of
24 arbitration, arbitration is really considered to be binding
25 unless there's some restriction otherwise. Mediation is

1 generally the same course of action where the parties are
2 trying to resolve disputes, but it's not considered to be
3 binding. So if we were going to distinguish between the two,
4 arbitration is considered to be binding by its nature unless
5 the parties agree otherwise to restrict whether or not it's
6 binding. And we believe that parties agreed to something other
7 than binding arbitration in this instance.

8 COMMISSIONER BRADLEY: So why in this instance did
9 the parties call this arbitration rather than mediation if by
10 definition arbitration is binding in most instances unless the
11 parties agree that it's nonbinding? Why use the word
12 "arbitration" when they could have mediated this rather than
13 arbitrate it and create this dispute or this discussion that
14 we're having?

15 MS. BANKS: I don't know the answer to that,
16 Commissioner.

17 COMMISSIONER JABER: May I follow up on your
18 question, Commissioner Bradley?

19 COMMISSIONER BRADLEY: Yes.

20 COMMISSIONER JABER: Do you think, staff, it's also
21 because in an arbitration the parties bring in a third person
22 that sits as an arbitrator, a final decision-maker, whereas in
23 mediation perhaps they are agreeing to have a facilitator allow
24 them to decide the resolution amongst themselves?

25 MS. BANKS: I believe that's possible, Commissioner.

1 COMMISSIONER JABER: Well, let's ask the parties. Is
2 that a fair characterization of the difference?

3 MR. PANNER: I think that -- Commissioner Jaber, I
4 think that's right, that by agreeing to arbitration as opposed
5 to mediation, the parties were able ensure that there would be
6 a decision-maker who would issue a decision about how the
7 dispute should be resolved. So it's not simply a question of
8 attempting to bring the parties to an agreement, which is the
9 mediator's role, but of actually taking both parties' sides and
10 making a determination. That is the arbitrator decision here
11 that the parties agreed would be subject to review by this
12 Commission.

13 MS. RULE: Just to add a little bit of gloss to that.
14 An arbitrator issues an order that is binding and enforceable
15 in court. You go to court; you have the order confirmed; you
16 get a judgment. That does not happen after a mediation, which
17 is merely a facilitated agreement.

18 CHAIRMAN BAEZ: And I've got a question on that, but,
19 Mr. Panner, first I want to gauge, are your comments at least
20 finished? I know that you have been peppered with questions.

21 MR. PANNER: No, I appreciate the questions,
22 Chairman, and I do have one other point I'd like to make.

23 CHAIRMAN BAEZ: Go ahead and make your point, sir.

24 MR. PANNER: I appreciate that. As I said, there
25 were two basic reasons that I -- that Verizon feels that the

1 staff's recommendation on Issue 2 shouldn't be accepted. And
2 the first goes to the lack of discretion. But even if there
3 were some discretion about whether to exercise jurisdiction, it
4 cannot be the case that the Commission can decline to hear this
5 case by prejudging the merits of Verizon's challenge. The
6 staff actually suggests that, you know, with respect at least
7 to the ISP-bound traffic issue, that the arbitrator's decision
8 seems to be right, and therefore, why should the Commission
9 hear it and that's just not fair.

10 For purposes of determining jurisdiction and whether
11 the Commission should exercise it, the Commission has to take
12 it since we haven't been given an opportunity to argue the
13 merits of our claims yet, has to take it that the claims that
14 we raised are meritorious. And the issue is whether if those
15 claims are meritorious, they are ones that the Commission must
16 hear. I note that --

17 COMMISSIONER DEASON: I'm sorry, I've got to ask a
18 question, and maybe you can help me here. It seems by your
19 argument that you're putting us -- and I know we're not an
20 appellant entity, we're an administrative agency, but it
21 appears that by your agreement to bring this to the Commission,
22 that we're almost being placed in that role. And it seems to
23 me that if we're being placed in that role that we should have
24 some discretion. Appeals courts always look at something and
25 look at the likelihood of success of the appeal before they --

1 or at least I understand that to be the case. How do you
2 reconcile that?

3 You're saying we have no choice. It is mandated by
4 the Legislature. We have to hear it, and we cannot give any
5 weight whatsoever. Do we think you have any possibility,
6 likelihood of success in weighing that? That's not part of the
7 evaluation that we have to make. Am I understanding your
8 argument?

9 MR. PANNER: Yes, Commissioner, but respectfully,
10 it's absolutely not the case that an appellate tribunal or any
11 tribunal can decide whether or not to exercise jurisdiction by
12 taking a quick look at whether the case is likely to be
13 meritorious. Certainly for extraordinary relief in determining
14 whether, for instance, to grant an injunction or, you know, a
15 preliminary injunction or in the case of an appellate court a
16 mandamus or other extraordinary writ, a court will look at
17 likelihood of success on the merits after having given the
18 parties an opportunity to address those issues in their papers.
19 But here, the issue is whether our claim is of a type that
20 merits the Commission's review if the Commission has
21 discretion.

22 Now, our point -- and Verizon tried to be faithful to
23 what the Commission asked the parties to address; that is, what
24 is the nature of the claims, and why are they the type of
25 claims that the Commission should hear. Now, we identified two

1 separate issues that were -- that is important for the
2 Commission to hear. One of those went to the arbitrator's
3 resolution of the treatment of virtual foreign exchange
4 traffic. Now, that's an issue that this Commission resolved in
5 a rulemaking proceeding. The Commission's never adjudicated a
6 case involving that type of traffic. It's an important issue,
7 a lot of dollars at stake, and the Commission had important
8 policy reasons for believing that the type of treatment that
9 the arbitrator here required for VFX traffic is inappropriate.

10 Now, this Commission should resolve that issue and
11 should -- because it's an important issue and because, you
12 know, frankly, we think the arbitrator got it wrong, and the
13 Commission has to assume for purposes of determining whether
14 review is required that the arbitrator did. The arbitrator was
15 looking at language precisely equivalent to the type of
16 language that this -- the type of regulatory language that this
17 Commission was interpreting in formulating its VFX rule when it
18 held that this requirement requires payment of compensation for
19 VFX traffic. I know there are arguments on the merits.
20 Frankly, we don't think that they're -- we haven't briefed them
21 yet, and we haven't had an opportunity to brief them yet
22 because the Commission hasn't determined whether it's going to
23 hear our claim.

24 But the point is that in determining whether this
25 Commission should proceed, you need to assume that our claims

1 have merit, and therefore, the question is, if our claims do,
2 this Commission appropriately exercises its jurisdiction to
3 provide relief. Likewise, with ISP-bound traffic. Again,
4 there are disputes about whether -- you know, I've been in this
5 business long enough to know that one doesn't always win when
6 one thinks one's right. You know, if we always won when we
7 thought we were right, every case would be a draw. But, you
8 know, we have substantial arguments, and again, there's a lot
9 of money at stake, and this is money that comes straight out of
10 the -- that directly affects the cost of service that's going
11 to be provided to consumers in Florida. And the Commission
12 should not discount the financial impact of this type of a
13 decision and the manner in which that's going to affect the
14 provision of service in this state. That's why the Legislature
15 gave this Commission this type of jurisdiction to resolve these
16 types of disputes. And it's critically important that these
17 disputes be resolved correctly, and that where the Commission
18 has the experience and the expertise and the authority to rule
19 on a challenge like this, that the Commission exercise that
20 discretion.

21 As I say, you know, again, I've argued the point that
22 the Commission doesn't actually have the discretion, but even
23 if it did, I think that exercising that authority here is
24 critical to the welfare and the well-being of both competition
25 in Florida and the well-being of Florida consumers.

1 CHAIRMAN BAEZ: Thank you, Mr. Panner. Did you have
2 a question?

3 COMMISSIONER DAVIDSON: I do. I'll go after
4 Commissioner Jaber.

5 CHAIRMAN BAEZ: Go ahead, Commissioner Jaber.

6 COMMISSIONER JABER: Thank you, Commissioner.
7 Mr. Panner, I listened carefully to your arguments, and one of
8 the things I did not hear -- so let me just get that out of the
9 way. It is not your allegation that the decision made by the
10 arbitrator in this case resulted in something that was
11 inconsistent with state or federal law or contrary to the
12 public interest. What I heard you say is you disagree with the
13 decision, but it is not your position here today that somehow
14 that decision is inconsistent with state or federal law;
15 correct?

16 MR. PANNER: It's absolutely our position that the
17 decision is inconsistent with state and federal law. The
18 interconnection agreement at issue is binding. And the -- by
19 imposing obligations that are inconsistent with that
20 interconnection agreement, the arbitrator violated both state
21 and federal law. And furthermore, the arbitrator --

22 COMMISSIONER JABER: Let me stop you there. The way
23 he interpreted your interconnection agreement it's your belief
24 has resulted in something contrary to state or federal law?

25 MR. PANNER: Yes, Commissioner. And furthermore, the

1 underlying understanding of state and federal law that the
2 arbitrator applied was likewise inconsistent with this
3 Commission's interpretation of those requirements.

4 COMMISSIONER JABER: Okay. Well, I heard you say a
5 couple of things that were inconsistent with each other. Is it
6 his interpretation of what was in your interconnection
7 agreement that was violative of state and federal law, or is it
8 the fact that he made the interconnection agreement binding
9 that you think is inconsistent with state or federal law?

10 MR. PANNER: No, no. It's the interpretation. But
11 as the -- you know, this is actually an issue that the courts
12 have wrestled with quite a lot, which is can one say that if a
13 decision-maker, often it's a state commission, misinterprets an
14 interconnection agreement, that that constitutes a violation of
15 federal law? And the uniform decision of the federal courts
16 going up to the Supreme Court is that the answer is, yes, that
17 that articulates a violation of the federal law that is subject
18 to, in the case of a state commission decision, review in the
19 federal courts. And in the case of this private arbitration
20 decision, it's one that implicates the core of this
21 Commission's jurisdiction under Section 162.

22 COMMISSIONER JABER: Okay. And my final question.
23 If that language did not exist in the interconnection agreement
24 and if memory serves me right, it's that this company adopted a
25 preexisting agreement; is that correct?

1 MR. PANNER: That's correct, Commissioner.

2 COMMISSIONER JABER: Okay. If that language that
3 reserves some sort of opportunity to come here was not in this
4 agreement, what appellate recourse is available for parties who
5 dispute the final order of an arbitrator?

6 MR. PANNER: It would be very limited. The parties
7 would in that case have agreed to forego any remedy that would
8 otherwise be available. I mean, it would be in the same way
9 that if, for instance, a party signed a binding arbitration
10 clause in a securities agreement. A party could lose the
11 opportunity to bring a securities fraud action in a federal
12 court. It would have to go to private arbitration. The
13 Supreme Court has held that parties can give up antitrust
14 claims in a binding arbitration provision.

15 Again, the fact that parties could give up a judicial
16 remedy or a quasi-judicial remedy, a remedy before this
17 Commission is not disputed, but the parties here did not agree
18 to do so. They agreed that they would have this remedy, and
19 that's the remedy that Verizon is attempting to exercise in
20 this case.

21 CHAIRMAN BAEZ: Commissioner Davidson. And then
22 after your questions, Commissioners, I think we need to move
23 along to the other parties so we can start getting some balance
24 to this argument. Go ahead, Commissioner Davidson.

25 COMMISSIONER DAVIDSON: Thank you, Chairman. And

1 following up in part to Commissioner Deason's question going to
2 the likelihood of success and to Commissioner Jaber's most
3 immediate question. Florida Statute 682.13 provides five
4 separate grounds for vacating an award, and I want to
5 understand here from your mouth exactly what it is Verizon
6 would be alleging.

7 The first ground is that the award was procured by
8 corruption, fraud or other undue means. Is Verizon going to be
9 alleging that the award falls within that exception?

10 MR. PANNER: Commissioner --

11 COMMISSIONER DAVIDSON: Yes or no? Is Verizon going
12 to allege that the arbitral award was procured by corruption,
13 fraud or other undue means?

14 MR. PANNER: I don't believe that we've alleged that,
15 Your Honor -- Commissioner.

16 COMMISSIONER DAVIDSON: Does Verizon intend to allege
17 that there was evident partiality by an arbitrator appointed as
18 a neutral or corruption in any of the arbitrators or umpire or
19 misconduct prejudicing the rights of Verizon?

20 MR. PANNER: I don't believe we raised that in our
21 petition.

22 COMMISSIONER DAVIDSON: Does Verizon intend to allege
23 that the arbitrators or the umpire in the course of his or her
24 jurisdiction exceeded their powers?

25 MR. PANNER: I don't believe that we argued that in

our petition.

2 COMMISSIONER DAVIDSON: Does Verizon intend to argue
3 that the arbitrators or the umpire in the course of his or her
4 jurisdiction refused to postpone the hearing upon sufficient
5 cause being shown therefor or refused to hear evidence material
6 to the controversy?

7 MR. PANNER: Again, it's not something that we allege
8 in our petition that I'm aware of.

9 COMMISSIONER DAVIDSON: And does Verizon intend to
10 allege that there was no agreement or provision for arbitration
11 subject to this law, which would be Chapter 682 of the Florida
12 Statutes?

13 MR. PANNER: Well, that's interesting. I suppose
14 that we would.

15 COMMISSIONER DAVIDSON: So Verizon's argument will be
16 that there was no agreement or provision for arbitration.

17 MR. PANNER: Not within the sense that would limit
18 our remedies as you've suggested.

19 COMMISSIONER DAVIDSON: Fair enough. Thank you,
20 Chairman.

21 CHAIRMAN BAEZ: Thank you, Commissioner. Ms. Rule.

22 MS. RULE: Thank you. I must confess, I do not agree
23 with Verizon's position that the agreement, specifically
24 Section 11.2 of Attachment 1 of the agreement, has to be both
25 construed strictly and ignored, that words in the same sentence

1 must be ignored by you while others must be construed strictly.
2 Let me back up and tell you where we are in the agreement when
3 I'm talking about this.

4 Attachment 1 to the agreement is the parties'
5 agreement to arbitrate disputes. It's the alternative dispute
6 resolution provision. Section 2.1 of that attachment says that
7 negotiation and arbitration shall be the exclusive remedy for
8 all disputes. Following that in that same attachment the
9 agreement specifies that the arbitrator's decision and award
10 shall be final and binding subject only to a very limited
11 possibility of appeal. And the parties use that term
12 repeatedly. They use it five times in the course of that
13 paragraph. It clearly anticipates an appeal.

14 And it says that the arbitrator's decision shall not
15 be final if two things happen. First, the party appeals and
16 it's within the Commission's jurisdiction. That's number one.
17 And second, that the agency agrees to hear the matter. And
18 Verizon is telling you that you have to pay close attention to
19 that part about appeal because it tells you you've got
20 jurisdiction, but you have to ignore the part about your
21 ability to agree or not to agree to hear the matter. And I
22 submit to you that that's just simply an unreasonable
23 construction of this particular section of the contract.

24 As we've argued before, and I don't intend to take a
25 long time, but I will remind you, this particular contract

1 provision was entered into in 1996, 1997 era. As you know, it
2 was at the very dawn of the competitive era that we're in now.
3 It was not at all clear how these arbitrated agreements were
4 going to be enforced, let alone what would happen down the road
5 if somebody got a decision in an arbitration agreement that
6 they didn't agree with. This was boilerplate language. We've
7 shown that it was put into 19 different contracts verbatim.
8 It's in every Verizon-AT&T contract of this era. It is not
9 specifically designated to this Commission. It does not
10 indicate that the parties believe that this Commission had any
11 particular statute that offered it jurisdiction. And indeed,
12 we believe that there is no such statute that grants the
13 Commission such jurisdiction, and we disagree with the staff
14 recommendation.

15 We believe that if the Legislature had intended, as
16 Verizon claims, if the Legislature had intended this Commission
17 to exercise any sort of review authority over any arbitration
18 order no matter what the subject matter, it would have come
19 right out and said so. Instead, the Legislature has enacted an
20 entire chapter in the Florida Arbitration Code that specifies
21 how all arbitration awards will be handled, the circumstances
22 under which they can be confirmed in court, the circumstances
23 under which they can be modified, and the very limited
24 circumstances under which they can be vacated. So staff's
25 recommendation requires you to believe that without saying so,

1 the Florida Legislature has carved out a particular area of
2 arbitration awards for your special consideration. And
3 Mr. Panner's argument requires you to believe moreover that
4 having silently carved that section out for your review, it
5 then made it mandatory for you to accept jurisdiction, and I
6 believe that there is nothing in the statutes that supports
7 that conclusion.

8 This is the nothing more than a contract dispute
9 between parties. The contract specifies that the parties shall
10 bill reciprocal compensation to each other for every single
11 call in which the NPA/NXX of the originating -- or the
12 originating NPA/NXX and the terminating NPA/NXX are associated
13 with the same LATA. The arbitrator said that that says what it
14 means. That whenever a call both originates and terminates
15 with NPA/NXXs in the same LATA, reciprocal compensation is due.
16 He further said that there is no change of law provision in
17 this particular contract that would operate to make the FCC's
18 ISP Remand Order or your Reciprocal Compensation Order
19 effective as to this contract. In essence, he said the
20 contract says what it means. And because your order and the
21 FCC order specifically said they did not affect existing
22 contracts and there's nothing in the contract to the contrary,
23 then that's what the decision is. It's not a matter of public
24 policy. It's not a question of whether anybody has violated
25 your orders or federal orders. It's contract interpretation.

1 The very same sort of thing that you send to arbitration to
2 have taken care of so you don't have to use your resources on
3 it. And I can tell you, TCG in particular has used quite a lot
4 of its resources litigating this issue before an arbitrator for
5 over a year and a half. We have come to a decision. That
6 decision from the arbitrator is well reasoned. Verizon
7 disagrees with that and I understand that. But that does not
8 mean that it's the type of case that cries out for your review.

9 You do have jurisdiction that cannot be stripped from
10 you over every arbitration award, but it's not the sort that
11 can be conferred by the parties. You have jurisdiction over
12 your statutes. You have jurisdiction over policy. But neither
13 of those issues are triggered by this decision.

14 CHAIRMAN BAEZ: Commissioner Bradley.

15 COMMISSIONER BRADLEY: This is a question for both
16 parties. Would this matter be better served if the
17 Commission -- no, that's not the way I want to ask it. Would
18 this matter be better served if you all were allowed to now
19 take this disputed arbitration agreement to mediation? Both
20 parties.

21 MS. RULE: No, sir.

22 MR. PANNER: I think in all likelihood that the
23 parties -- I think that -- a mediation would probably be most
24 productive in a circumstance where the parties haven't yet
25 explored the source of their differences and have a -- and

1 where there's a realistic possibility that sort of a neutral
2 facilitator could help to bring about a meeting of the minds on
3 something. And I suspect that we're -- as to this particular
4 dispute, we're sadly probably past that point.

5 COMMISSIONER BRADLEY: Thank you.

6 CHAIRMAN BAEZ: Commissioner Bradley, I always
7 thought I was the eternal optimist on this Commission and now I
8 realize it's you.

9 Commissioner Deason, you were leaning in to ask a
10 question?

11 COMMISSIONER DEASON: Well, I do have a -- does
12 Mr. Hoffman have a presentation or not? No. Okay.

13 I have two questions. Mr. Panner, you indicated that
14 there's substantial sums of money at stake. Who's holding that
15 money at this point?

16 MR. PANNER: I believe that since the award hadn't
17 been enforced I believe Verizon has the money, although I don't
18 know exactly what the terms are of -- I don't frankly know
19 exactly what the terms are. It's not that there's been no
20 payments made, but there has been money withheld that has not
21 been paid.

22 COMMISSIONER DEASON: Substantial amounts according
23 to you; correct?

24 MR. PANNER: I believe it's a substantial amount,
25 yes.

1 COMMISSIONER DEASON: Does your agreement have --

2 COMMISSIONER BRADLEY: I missed that. Repeat that
3 answer again.

4 MR. PANNER: I believe that there are substantial
5 amounts of money that Verizon has not paid that the arbitrator
6 has determined are due.

7 COMMISSIONER DEASON: And does your agreement have
8 any terms concerning payment of interest for the money -- if it
9 is ultimately determined that these moneys need to be paid, is
10 the payment made in principal and interest?

11 MR. PANNER: I believe that the arbitrator ordered
12 late fees, yes. So there would be -- there would be -- and,
13 you know, I suppose ordinary prejudgment -- the reason for my
14 hesitation is I haven't studied the particular terms related to
15 this, and agreements vary tremendously with respect to this.
16 Parties always address or in my experience always address
17 exactly what will happen. Billing disputes happen all the
18 time, and moneys are withheld all the time in billing. AT&T
19 does it all the time; Verizon does it all the time. And the
20 agreements generally address how the parties will compensate
21 one another when ultimately a party is required to pay.

22 COMMISSIONER DEASON: Ms. Rule, do you have any
23 information on that?

24 MS. RULE: Yes. In Attachment 1, Section 11.3 of the
25 agreement states that in the event of an appeal, a party must

1 comply with the results of the arbitration process during the
2 appeal process. Verizon has not done so. Verizon continues to
3 withhold payment despite the orders of the arbitrator.

4 COMMISSIONER DEASON: If you ultimately prevail and
5 there are moneys to be forwarded from Verizon to your client,
6 will that be with interest or without any interest on the
7 principal?

8 MS. RULE: There are two periods of time at issue,
9 and one is preorder and the other is postorder. For periods of
10 time before the arbitrator's order, he has ordered interest to
11 be paid. For a period of time after that, that is where
12 Verizon continues to withhold, TCG will charge late fees. The
13 collection of those late fees will depend on eventually the
14 confirmation of the arbitrator's order. He did order Verizon
15 to begin making payment and to continue making payment
16 throughout the life of the agreement. So we will argue, of
17 course, that we are entitled to collect late fees on that.

18 COMMISSIONER DEASON: But no moneys have been
19 forwarded as a result of the decision by the arbitrator.

20 MS. RULE: No, sir, they continue to withhold most
21 amounts that were due. But to be quite honest, I can tell you
22 that there have been several months where Verizon did make some
23 payments, but then they again decided to dispute. And I
24 believe for the past -- I believe it's in excess of a year they
25 have been disputing it now and withholding payments.

1 COMMISSIONER DEASON: One other question. Do the
2 parties have the option to take this to the FCC?

3 MR. PANNER: If this Commission failed to exercise
4 its jurisdiction, then Verizon believes that it would, yes.

5 MS. RULE: If I may address that. I disagree again.
6 Section 11.3 of Attachment 1 specifies that any permitted
7 appeal must be commenced within 30 days after the arbitrator's
8 decision. The only appeal that was commenced was this one. I
9 believe it's way too late to bring it to the FCC.

10 CHAIRMAN BAEZ: That wouldn't be something you were
11 arguing here, would it?

12 MS. RULE: It's the first time I've heard they intend
13 to take it to the FCC.

14 CHAIRMAN BAEZ: Commissioner Bradley.

15 COMMISSIONER BRADLEY: In the spirit of today being
16 an eternal optimist, both parties agreed initially to
17 nonbinding arbitration or to have an appealable decision if you
18 all did not -- what was the contract? You're saying no.

19 MS. RULE: The contract says if the Commission has
20 jurisdiction and the Commission agrees to hear it, in that
21 single case the arbitration is not final and binding. But it
22 does specify that arbitration is the exclusive remedy and that
23 the remedy shall be final and binding.

24 COMMISSIONER BRADLEY: Okay. Well, I'm not a
25 wordsmith this morning. What would TCG's position be if the

1 ruling had been just the opposite? If the arbitrator had ruled
2 in TCG's opinion that -- and Verizon's -- if the scales had
3 been tilted in TCG's opinion in the direction of Verizon, would
4 TCG have the same argument this morning as it has?

5 MS. RULE: Sir, if you're here asking me, would we be
6 giving it every last chance to try and get the money we believe
7 Verizon owes rightfully under the contract, we probably would.
8 But as --

9 COMMISSIONER BRADLEY: That's not my question. If
10 the arbitrator had ruled that Verizon -- you are not entitled
11 to the money, would you have the same position this morning as
12 you have as it relates to the arbitrator's ruling --

13 MS. RULE: I can only tell you --

14 COMMISSIONER BRADLEY: -- and it be a nonbinding --

15 MS. RULE: I can only --

16 COMMISSIONER BRADLEY: And I'm trying to get back to
17 mediation.

18 MS. RULE: I don't think you're going to lead me
19 there very quickly. I can only tell you that throughout the
20 course of this very long arbitration that I would remind you
21 started in 2001, we have had ample opportunity to explore the
22 differences of opinion and perhaps agree on some things that we
23 were able to agree on, and I don't think mediation is going to
24 help right now. Arbitration by its very nature is a gamble.
25 You do give up a lot. You give up a right to an appellate

1 review. You give up the right to have anybody look at the
2 arbitrator's decision to determine if he got it right. That's
3 the nature of arbitration.

4 CHAIRMAN BAEZ: Thank you, Commissioner. I have a
5 couple of questions of staff quickly because I'm trying to
6 really interpret or clarify in my mind what you mean in your
7 recommendation.

8 First of all, as to the -- you speak a lot of review
9 of the arbitrator's decision, and that raises for me the
10 question, something which I think is probably contrary to what
11 Mr. Panner had suggested in his argument, is what exactly are
12 we looking at? Would we -- assuming that the arbitrator's
13 decision was before us, are we looking at the arbitrator's
14 decision, or are we looking at the issues brand new?

15 MS. BANKS: If the Commission were to decide to hear
16 this case, although there's nothing definitive on point to give
17 guidance in this regard, I believe that the type of review
18 would be administrative type review, which I think is what
19 Verizon has asserted. I think the best guidance I can give in
20 that instance is looking at Section 120.57(1). I think the
21 type of review would be similar to what we give when we have
22 something similar to a recommended order review, something -- a
23 decision coming from DOAH. If you look at the subsection
24 120.57(1), it says that the agency may adopt the recommended
25 order as a final order of the agency. It goes on to say that

1 the agency in its final order may reject or modify the
2 conclusions of law over which it has substantive jurisdiction
3 and interpretation of administrative rules or which it has
4 substantive jurisdiction.

5 COMMISSIONER JABER: Are we sure about that? I don't
6 know why I was thinking it would be a de novo review.

7 CHAIRMAN BAEZ: Well, and really that's really the
8 point of my question. We obviously have language that suggests
9 some appellate process by the words of the contract. I heard
10 Mr. Panner suggest that that's -- you know, that that word
11 doesn't really mean what it means, that in fact it's a de novo
12 review and the fact that it's nonbinding -- I mean, if we
13 accept staff's analysis that the arbitration wasn't binding,
14 that anything that comes before the Commission doesn't have to
15 look to the terms of the arbitration award. And I'm hearing
16 you say that that's not quite it.

17 MS. BANKS: I think that argument could be made, and
18 as I just mentioned, there's nothing definitive in our rules
19 that would give guidance in this regard. But I think
20 Section 120.57, the section that I just cited, would probably
21 be something on the line of what we would consider to be
22 administrative review.

23 CHAIRMAN BAEZ: And isn't that part and parcel of
24 determining that you have jurisdiction?

25 MS. BANKS: Yes, Commissioner.

1 CHAIRMAN BAEZ: And is that something that's being
2 determined by Issue 1?

3 MS. BANKS: Issue 1 is basically stating whether or
4 not the Commission has jurisdiction. Of course, it's staff's
5 position that the Commission does have jurisdiction on --

6 CHAIRMAN BAEZ: What kind of jurisdiction in this
7 case? Because I see them as different. Now, if we're supposed
8 to interpret the ADR language in this particular agreement a
9 certain way, this is clearly not the same thing as having an
10 arbitration. I mean, we're a step or two down the road, and
11 just by saying that, yes, the statutes say we have jurisdiction
12 over the interconnection agreements, that doesn't help me very
13 much to know what kind of -- you know, I either have to accept
14 that it's de novo, or I have to understand that it's something
15 else. And maybe we have both by the terms of the agreement.
16 That's entirely possible. And it's not that I'm uncomfortable
17 with that. I'd just like to understand what it is that we're
18 saying yes. What kind of jurisdiction do we have in this case?

19 MS. BANKS: As staff's Issue 1, the jurisdiction that
20 staff is asserting here that the Commission has is more or less
21 the jurisdiction to review interconnection agreements as
22 provided in Section 364.162 of the Florida Statutes. Now, I
23 think we get a step further if we're talking about the type of
24 jurisdiction or review in this instance if the Commission were
25 to hear the case.

1 CHAIRMAN BAEZ: Well, I mean, I seem to recall
2 interconnection -- or disputes on the interpretation of
3 interconnection agreement terms come up before this Commission
4 on several occasions, probably more than several occasions, and
5 we've always engaged in some kind of determination of whether
6 these were, as Ms. Rule puts it, straight contract
7 interpretation terms, in which case we may want or not, or if
8 they're policy questions. But that to me is something
9 different because we still get a fresh look. Perhaps it's even
10 something that we arbitrated originally. This is coming to us
11 from a different direction. And just merely saying that we
12 have jurisdiction over interconnection agreements doesn't quite
13 spell it all out. I think this decision probably goes a lot
14 farther than that.

15 And again, I don't -- you know, assuming the rest of
16 the Commissioners are in agreement as to our jurisdiction, I'm
17 not uncomfortable with what it might imply as it relates to
18 this particular language, but I need to know if what we're
19 doing is we're saying, yeah, the arbitrator was right, or the
20 arbitrator was wrong. And we'll to continue to look at it,
21 because by our decision in Issue 2, we're either going to wind
22 up by our actions if we agree that we have a certain discretion
23 and we say, we're not going to hear this case, we're in fact
24 having some -- there is some affirmation of an arbitration
25 award. And I want to understand what the effect is -- what

1 kind of jurisdiction we have so that I can understand what
2 effect we have by our decision in Issue 2. I don't if I've --

3 COMMISSIONER JABER: Chairman Baez, Ms. Keating wants
4 to answer you, but maybe she can respond to both of our
5 concerns --

6 CHAIRMAN BAEZ: Go ahead.

7 COMMISSIONER JABER: -- because I am uncomfortable.
8 You said you could get comfortable with this clarification. I
9 am uncomfortable with what was just said because if this were
10 to be treated in the form of a recommended order from an ALJ,
11 that goes to the heart of jurisdiction because, frankly, the
12 allegation has been made, and I tend to agree. If that's the
13 kind of review, we don't have specific statutory authority to
14 look at the arbitrated agreement or the final order from an
15 arbitrator in the forum of a commission looking at a
16 recommended order. We don't have, in my opinion, specific
17 statutory authority to do that.

18 If it's a de novo review where we are looking at the
19 foundation, the interconnection agreement and the term in
20 dispute, then maybe we've got jurisdiction over the
21 interconnection agreement by virtue of the Telecommunications
22 Act. But I cannot get comfortable with just a bare statement
23 that's it's jurisdiction over the interconnection agreement and
24 then the case gets postured as just a review of a recommended
25 order. I think that we would be remiss.

1 MS. KEATING: Commissioner, I think I come at it from
2 a little bit of a different angle. I think you first look to
3 determine whether or not you have jurisdiction. And I think in
4 either case staff is recommending that you've got primary
5 jurisdiction over the interconnection agreement itself. So
6 then the next question becomes, what type of review do you
7 engage in when you're -- if you take this complaint? And then
8 that goes to the question that Ms. Banks answered. We don't
9 really have any clear-cut rules or guidance as to how you
10 should properly conduct this review. There's probably really
11 good arguments either way.

12 When staff was looking at the statutes trying to find
13 something remotely similar, what we came upon was the process
14 when we take a recommended order from DOAH and the review that
15 is done with regard to an order that comes out of DOAH. Even
16 in those cases when the Commission sends a case to DOAH for
17 them to conduct a proceeding, the Commission has primary
18 jurisdiction over those issues but the review is different.

19 COMMISSIONER JABER: But, Ms. Keating, DOAH and
20 recommended decisions coming out of DOAH are specifically
21 referenced in 120, aren't they?

22 MS. KEATING: That's correct. That's correct.

23 COMMISSIONER JABER: Maybe we're looking too hard. I
24 mean, if we're having to look so hard, you can't make it up as
25 you go along.

1 MS. KEATING: Good point, Commissioner. Like I said,
2 we were looking for something remotely similar. We're
3 definitely not saying that this is, in fact, the same thing.

4 CHAIRMAN BAEZ: But here's where I'm in conflict,
5 Ms. Keating. On the one hand, staff suggests obviously or
6 confirms primary jurisdiction and that's fine. It also
7 suggests that the intent was some nonbinding arbitration.
8 Well, for me that leaves a whole lot more comfort for it to be
9 a de novo review. And have it -- had the arbitration language
10 have been, well, it was a nice try, it was a good idea, but,
11 you know, we left -- there's some back door to it. And I think
12 that probably comports with what Commissioner Jaber's level --
13 and yet, on the other hand, we have language in the
14 recommendation that says, review of the arbitrator's decision,
15 and that to me suggests a whole different thing.

16 So if we can at least whatever our decision would be,
17 Commissioners, I'd like it to clear that up and not leave that
18 kind of conflicting language in the recommendation or
19 ultimately in the order. That's really the source of my
20 misunderstanding.

21 MS. KEATING: And, Mr. Chairman, I think that is an
22 equally supportable argument, that should you choose to take
23 this case, I think there's certainly a basis for you to do a de
24 novo review.

25 CHAIRMAN BAEZ: All right. Commissioner Davidson, I

1 know that --

2 COMMISSIONER DAVIDSON: Just sort of a couple of
3 comments for the bench. I mean, I think you hit the nail on
4 the head, and it's what did the parties intend to do. And
5 here, we don't have anything other than the language itself at
6 issue. There's no extrinsic evidence, no memos, no letters
7 exchanged between the parties as to what the parties meant.
8 And we really have two interpretations.

9 Does the PSC have jurisdiction over the appeal of
10 this arbitral award? That's one interpretation. Clearly not
11 over an appeal of an arbitral award. Some commissions do.
12 Some commissions actually review arbitral awards. That's
13 provided and that may be one reason that this boilerplate was
14 added in, so that for those commissions that do have
15 jurisdiction over arbitral awards, an appeal could be had to
16 them. We don't have that jurisdiction in our statutes.

17 The other interpretation is, do we have the primary
18 jurisdiction over the subject matter? And I think, I mean,
19 everyone in the room would agree, sure, we've got jurisdiction
20 over interconnection agreements. And sort of figuring out if
21 we were to hear this -- and I'll tell you just right up front,
22 I disagree with staff on Issue 1 fairly strongly. I do agree
23 that even if we assumed arguendo we have jurisdiction, that we
24 shouldn't take it. And I'll tell you here's why. I went
25 through the five elements in the Florida Arbitration Act that

1 provides the basis for an appeal. And Verizon basically said
2 none of those have been met, sort of speculated on the last one
3 that there was no agreement for the provision of arbitration
4 subject to this law. I would take issue with that. I think a
5 little bit of research would show that they had an agreement.
6 But I went on-line and did some research as this was going on
7 because what is it that we would actually do if this came up?
8 How would we proceed? And that's what you just asked. And I
9 want to just read some language from three cases.

10 The first one is State Department of Insurance vs.
11 First Floridian, 803 So.2d 771. Then as now, an arbitration
12 award can be vacated only upon the grounds stated in Section
13 582.13 and cannot be set aside for mere errors of judgment
14 either as to the law or the facts.

15 Cochran vs. Broward County, 693 So.2d 134. A trial
16 court has no authority to overturn an arbitration award except
17 for the statutory ground, and awards will not be set aside for
18 mere errors of judgment as to the law.

19 Next case and final one, Boyhan vs. Maguire,
20 593 So.2d 659. Review of arbitration proceedings is extremely
21 limited. An award may not be set aside by the court except
22 upon the grounds set forth in the statute; namely, specified
23 extrinsic acts of misconduct or procedural errors. A review in
24 court may not comb the record of the arbitration hearing for
25 errors of fact or law inherent in the decision-making process.

1 I mean, we've got competing policies at play. On the
2 one hand, there's the allegation that the parties intended
3 something else, some type of appeal, which I think is a
4 reasonable sort of argument to make where a commission actually
5 hears these arbitral awards, and there are commissions out
6 there. But we also have the competing policies. We've got a
7 strong federal policy that says, you should encourage
8 arbitration and uphold awards.

9 Courts are limited in what they can do. They can't
10 just simply sort of revisit the issues. We have a strong
11 Florida policy that says we should encourage arbitration and we
12 should uphold awards. And the policy is absent some type of
13 compelling circumstance such as fraud, duress, some type of
14 procedural irregularity, a lack of due process, awards are not
15 revisited. Under Florida law, mistake of fact, mistake of law
16 is not enough, and it's sort of the same standard if we go up
17 and somebody claims we made a mistake of fact. It's typically
18 not enough to have the order reversed. It's the same analogy.
19 And we have strong sort of Commission precedent here and FCC
20 precedent and policy that we encourage arbitration.

21 Now what we're doing is we've had an arbitration.
22 The parties agreed to it. They didn't use the best language.
23 They've gone through the arbitration and one party is unhappy.
24 And I think if TCG had lost, they might be in the other case.
25 That was a question. I think they would probably have

1 appealed, but it's our job not to sort of look at that. So I
2 think it's -- you know, Verizon's arguments are not without
3 merit, but this is an issue of first impression apparently
4 across the country. I would rather that we not be the
5 first commission on such a scant record and with such
6 compelling policies to just sort of hold out there, yep, we've
7 got jurisdiction to revisit this. Sort of back to the question
8 of, well, what will we do? I think the Florida Arbitration Act
9 and Florida case law sort of gives guidance as to what our role
10 should be if we're revisiting an arbitration act. And I think
11 that addresses Commissioner Deason's, shouldn't we look at the
12 likelihood of success of this before going forward, and I agree
13 wholeheartedly with that.

14 So I'll tell you, I'm not making the motion now, but
15 I am prepared to make a motion that we don't decide Issue 1,
16 and assuming arguendo -- even assuming arguendo that we would
17 have jurisdiction, we move that the Commission not hear the
18 matter, which I think is clearly an outcome contemplated by the
19 parties. So I throw that out for discussion, and again, I'm
20 not making the motion at this point.

21 CHAIRMAN BAEZ: You raise some interesting points
22 because I think the question popped into my head is whether
23 this Commission has a responsibility to massage the language of
24 the interconnection agreements to coincide with what our
25 primary jurisdiction is, or are there those instances that say,

1 yeah, we have primary jurisdiction if you had brought it to us
2 first, but by operation of this language, and as I read it, you
3 know, there are certain starting and stopping points in the
4 paragraph clearly, and so then those thoughts can be separated
5 out. And it just so happens that there are portions of
6 11.2 that, well, may create an avenue somewhere but where we --
7 and not just this Commission but any state commission that
8 didn't have the authority to review -- the statutory authority
9 to review arbitrator's award would say, well, you know what?
10 That particular piece just doesn't apply here because that
11 avenue is not open by statute. So I see your point.

12 COMMISSIONER JABER: Let me throw this out there.
13 Again --

14 CHAIRMAN BAEZ: Commissioner Jaber and Commissioner
15 Bradley.

16 COMMISSIONER JABER: -- not in a fashion of a motion
17 out just further discussion. What troubled me about Issue
18 1 was not staff's statement that we have jurisdiction to
19 resolve disputes arising under the interconnection agreement,
20 right in line with what Commissioner Davidson was saying.
21 That's not what troubles me. Maybe as we entertain a motion in
22 this case that we say, we acknowledge we have jurisdiction to
23 resolve disputes arising out of an interconnection agreement,
24 out we do not believe we have jurisdiction or it has not been
25 shown to us that we have jurisdiction to review a decision made

1 by an arbitrator.

2 And then with Issue 2, with respect to Issue 2,
3 recognizing we have jurisdiction over the interconnection
4 agreement, decide not to exercise the discretion to hear
5 disputes in that regard because it was decided by the
6 arbitrator. I would only add to that because we haven't
7 discussed it yet, the allegation that staff goes a little bit
8 beyond where it needed to go on Issue 2 with regard to
9 prejudging how -- any sort of outcome as a result **of our**
10 hearing that case, I agree with.

11 I think that if you look at Issue 2, staff raises
12 four points to explain that we should decline to hear the case
13 And the fourth point is by the way the arbitrator ruled in a
14 fashion that's consistent with our previous decisions. **Well**, I
15 think each case stands on its own. And I'm not ready in
16 deciding Issue 2 to make the fourth point part of the decision
17 to not exercise jurisdiction to hear this. I think it does
18 have the effect of prejudging what our decision might be.

19 CHAIRMAN BAEZ: Commissioner Bradley, you have a
20 comment?

21 COMMISSIONER BRADLEY: Yes. I think that
22 Commissioner Davidson as well as Commission Jaber have
23 compelling rationales. And I think that I would agree to -- or
24 at this point I'm of the mind-set to move staff as it relates
25 to Issue 1 and Issue 2. Issue 1 because I think that by moving

1 Issue 1 and I think that what we do is preserve our right to --
2 or I wouldn't say our right to, but we reserve the ability to
3 be consistent as it relates to us being able to get involved in
4 interconnection agreements, and I think that by moving staff
5 that that would help us preserve that ability. And as I said,
6 I would be in favor of moving staff as it relates to Issue 1
7 as well as Issue 2, but --

8 CHAIRMAN BAEZ: Commissioner, is that a motion that
9 you're making or --

10 COMMISSIONER BRADLEY: Well, I will only be willing
11 to make the motion if there's a consensus among the other
12 Commissioners.

13 CHAIRMAN BAEZ: I think you might get it subject to
14 some friendly amendments. So if you want to hold off and --

15 COMMISSIONER BRADLEY: I'll put it out subject to
16 some friendly amendments.

17 CHAIRMAN BAEZ: Or maybe we can get a motion that's a
18 little more encompassing. Commissioner Deason, you had a
19 comment?

20 COMMISSIONER DEASON: Yeah. Just let me kind of
21 explain what the dilemma that I'm in. I'm comfortable with
22 staff's recommendation in Issue 1 that basically would allow us
23 the ability to exercise our jurisdiction, but I'm having
24 difficulty with the argument that I've heard here today from
25 Verizon that says, not only do you have jurisdiction, but you

1 have to exercise it, you have no discretion. And if it comes
2 down to one or the other, I'm willing to say we don't have
3 jurisdiction because I am not going to be put -- by my vote be
4 put in the situation where you have jurisdiction and every time
5 there's a disagreement with an arbitrator's decision we have to
6 hear it. I think that's bad policy, and I'm not going to
7 support that. I'm going to put that out right now.

8 COMMISSIONER BRADLEY: That's why as a part of my --
9 let me further maybe --

10 COMMISSIONER DEASON: One --

11 COMMISSIONER BRADLEY: I said to preserve our right,
12 not that we have to.

13 COMMISSIONER DEASON: And I also have a concern about
14 the effect of a decision here has on future arbitrations and
15 what should be and is our policy of encouraging arbitration.
16 If we can encourage arbitration with the idea that there is
17 some avenue available, some type of backstop here at the
18 Commission, if there's some decision that just cries out for
19 this Commission to exercise our jurisdiction, but it should be
20 in a fairly extreme case, if that's what we're trying to
21 achieve, I can support that. And I think that would have
22 the -- would give parties more comfort in entering into
23 arbitration and it be more binding, if you will.

24 I do not think this Commission should be in a
25 position of saying that we have jurisdiction, and every time

1 there's a disagreement, no matter how small we have to throw
2 that aside, open up a de novo proceeding. And instead of
3 hearing cases that have been in dispute now for three or four,
4 they last six or seven years before a decision is made. I
5 think that is bad.

6 CHAIRMAN BAEZ: And, Commissioner, starting first,
7 something you said about being placed in a box or having to
8 take these actions on a mandatory basis, I also would agree
9 with you. I think that, you know, anything that is subject to
10 a dismissal on the part of -- by motion of a party has to
11 have -- has to be subject to dismissal by the Commission's
12 discretion. It wouldn't make sense to me otherwise because
13 then you start getting some really funky cases coming in here
14 that we don't have an ability to administer even our own time
15 and on a policy basis decide what is worthy of deciding in the
16 best interest of the state.

17 And I'm willing to say something. I think I've heard
18 certainly a lot of -- on the jurisdictional question -- well,
19 let me say this. I think it's poor draftsmanship in this case,
20 maybe not consciously, but there should have been some more
21 care put into the language. I think the way that arbitration
22 language gets drafted from now on based on this discussion at
23 least in this state is going to have -- it is going to have
24 some -- well, I won't even go that far, Commissioner, but, you
25 know, it will be of a more binding nature. It may also include

1 limited instances in which the arbitrator's award may get to
2 the Commission if it, in fact, is something that screams out
3 that it should be -- and not reviewed by the Commission, that
4 it's more than likely be in de novo review, but it has to be
5 with that kind of specificity.

6 As for me, I'm comfortable acknowledging our primary
7 jurisdiction. I think Commissioner Davidson's comments, and
8 Commissioner Jaber's as well, are pretty compelling to say that
9 we don't have statutory authority in this case based on the
10 language in this agreement. We don't have to reach out and
11 kind of create and reconcile our primary authority to the
12 language in the contract. I don't think we have to go that
13 far.

14 So on the authority issue, I think we have it to
15 dismiss on our own authority. On the jurisdiction issue, I
16 think while we do have jurisdiction it's clear to everyone I
17 think by virtue of the language in the contract that we were
18 probably written out of the process is my opinion. I don't
19 know what kind of motion comes out of that, but now that
20 everyone has spoken perhaps we can craft something that's
21 consistent with what everyone has said.

22 Go ahead, Commissioner.

23 COMMISSIONER DAVIDSON: And I thank Commissioner
24 Jaber because she was preparing to make a motion. I just asked
25 her if I could make this to incorporate a couple of the last

1 comments in. And before I make it, I'll read out what it would
2 contain and then sort of ask for any friendly amendments before
3 it's made -- or I'll go ahead and make it and then we'll -- you
4 know, friendly amendments.

5 CHAIRMAN BAEZ: If you hear a lot of coughing,
6 maybe --

7 COMMISSIONER DAVIDSON: On Issue 1, our decision on
8 Issue 1 would be to hold that the Commission has jurisdiction
9 to resolve disputes arising out of interconnection agreements;
10 (b), recognize that parties may choose, however, to have
11 disputes addressed via arbitration; (c), hold that the
12 Commission does not have jurisdiction to consider appeals of
13 arbitral awards; and (d), hold that the Commission does not
14 have jurisdiction in this case based upon the specific language
15 at issue to consider the issues raised -- strike that, to
16 consider the interconnection issues raised by Verizon's appeal.

17 And obviously tweak the word --

18 COMMISSIONER JABER: I think --

19 COMMISSIONER DAVIDSON: I was trying to capture the
20 spirit of the Chairman's last comment that base sort of this
21 language and these facts that we are not exercising that
22 jurisdiction and maybe that goes to Issue 2.

23 COMMISSIONER JABER: A, B, and C I could second. I
24 think D probably gets us beyond Issue 1 was my statement which
25 you just said. So I think a motion which basically to deny

1 staff on Issue 1 as articulated by Commissioner Davidson with
2 the A, B, and C, I could second.

3 COMMISSIONER BRADLEY: (Inaudible. Microphone off.)

4 COMMISSIONER JABER: You have to modify staff's
5 recommendation. So it would be to deny staff's recommendation
6 and find --

7 COMMISSIONER DAVIDSON: So moved -- it would be a
8 motion to deny staff's recommendation and find points A, B, and
9 C as stated.

10 CHAIRMAN BAEZ: And for your benefit, Commissioner
11 Bradley, just so that you have a clear understanding --

12 COMMISSIONER BRADLEY: Yes, I do.

13 CHAIRMAN BAEZ: -- I think we meet your --

14 COMMISSIONER BRADLEY: We're modifying staff's --
15 we're modifying staff's recommendation.

16 CHAIRMAN BAEZ: It is, in fact, a modification.
17 We're meeting your preservation issues, which I share.

18 There is a motion and a second. And it is
19 acknowledge primary jurisdiction, a right of the parties to
20 arbitration, an acknowledgement that there is no jurisdiction
21 to review arbitral awards on the part of this Commission, and
22 there's a second. All those in favor -- hold on, hold on,
23 Commissioners.

24 COMMISSIONER DEASON: I just wanted to say that I
25 can't support the motion.

CHAIRMAN BAEZ: Okay. Fair enough. Well, then
2 you're going to be --

3 COMMISSIONER DEASON: I can't support the --

4 COMMISSIONER BRADLEY: Well, let's have a little bit
5 more discussion.

6 COMMISSIONER DEASON: Well, I just have disagreement
7 with the -- well, I guess a question I would have then, what is
8 meant by Item C in the motion?

9 CHAIRMAN BAEZ: That no jurisdiction to review
10 arbitral awards. I would interpret it, Commissioners, based on
11 what my belief is, is that while we don't have a statutory --
12 well, a practical effect, in my opinion, would be that any
13 language that would be written into an interconnection
14 agreement would have to necessarily imply that although it
15 does -- it may afford a forum at the Commission beyond an
16 arbitration, that it would be understood that it's a de novo
17 review. In fact, fixing the standard of review is -- you know,
18 we're taking it all once again because otherwise we would be
19 taking the arbiter's award and opinion and ruling up or down on
20 that. And it's my understanding that the statutes wouldn't
21 give us that authority.

22 COMMISSIONER DEASON: My concern is, does the motion
23 restrict the Commission from exercising our primary
24 jurisdiction where we feel that there's been a decision made
25 through arbitration that is inconsistent with either law or

1 policy that we feel like cries out for some type of review by
2 this Commission? And I don't have a problem with it being a de
3 novo review.

4 COMMISSIONER DAVIDSON: And my intent would be that
5 it would, but specifically for these two reasons. One, that
6 the Commission doesn't have jurisdiction to review those
7 awards, but an avenue for review does exist. Parties to
8 arbitration agreements would do what they have always done.
9 They would seek to have that award confirmed or challenged in
10 court. They've never brought the arbitration awards back here.
11 So this would not deny any remedy that already exists. It just
12 wouldn't create a new one which, as I understand it, heretofore
13 has not existed. The parties can't bring arbitration awards
14 back here no matter how unhappy. **However, they have a remedy.**
15 They go straight into court and would argue that there has been
16 an egregious violation of some policy or practice.

17 COMMISSIONER DEASON: So under that scenario, this
18 Commission would not even be aware that there had been an
19 arbitration and there had been a decision?

20 COMMISSIONER JABER: Commissioner Deason, let me see
21 if this is your concern because I share this part, and this is
22 how I've resolved it in my own mind. It may not work. I think
23 the fear you may have, the concern is that in those most
24 egregious examples where, God forbid, an arbitrator just makes
25 a decision not only inconsistent with state or federal law but

1 just has long-lasting policy and economic development
2 implications that are not good for the industry or for the
3 state; hopefully those examples will be rare to none. In those
4 situations, because I was worried about that myself, I would
5 hope that our clear Florida statutory authority on protecting
6 the public interest and safety and welfare of the citizens of
7 the state of Florida and those rare situations that that part
8 of state law holds, but the other thing I decided is it just
9 puts us in a different position. Rather than being -- sitting
10 as a commission that will entertain an appeal of an
11 arbitration, perhaps it puts us in a position of intervening in
12 whatever appellate action is taken for the benefit of informing
13 the court of appropriate jurisdiction what the state of the law
14 is and what the state of the telecommunications industry is.
15 So perhaps it puts us in that posture of becoming parties or
16 amicus intervenors or something like that. But for me, it was
17 going to be a case of each case stands alone.

18 CHAIRMAN BAEZ: And even so, Commissioner, just to
19 add to that, I believe that if-- I mean, this example -- at
20 least by our discussion, this example actually proves the
21 point. It is possible for arbitration language or mediation
22 language or whatever ADR term you want to ascribe to it can, in
23 fact, contain or contemplate the Commission as a forum. And I
24 guess -- I mean, it can be written in. By our analysis, we
25 were written out; we can certainly be written in. And I think

1 that that's something that the parties have to agree to and
2 contemplate as well. And what we're doing today by our
3 discussion and hopefully by our vote is to put them on notice
4 that they've got to be a little bit clearer in understanding
5 what our capabilities are according to our own statutes and
6 draft accordingly.

7 COMMISSIONER DAVIDSON: And I've got one more comment
8 to Commissioner Deason. I'll tell you where I'm coming from on
9 this. It may be that if the statutes could be amended, we
10 would be a better place for appeals of arbitral awards dealing
11 with certain issues to come, but it's just not the state of the
12 law, but maybe some type of statutory amendment is needed. But
13 on this, as I was thinking about this, Commissioner Jaber's
14 idea of intention is a good one. In general, and this is just
15 sort of general of all arbitration, courts will not enforce
16 awards that are contrary to the public policy of the state or
17 national public policy, and what that means is developed on a
18 case-by-case basis. But if an argument can be made that an
19 arbitral award is contrary to actual public policy, not just
20 that it somehow disregards law, or got it wrong, or there was a
21 mistake of fact, mistake of law, but really something
22 fundamental, and I guess we just have to trust courts to, you
23 know, be able to determine what that is when they see it, that
24 could provide an additional avenue as well. And that is
25 evolved on case-by-case basis.

1 But my motion here is just simply trying to recognize
2 that we have jurisdiction over the issue. The parties can opt
3 out, and we don't have jurisdiction over the awards. And I
4 think no matter how much we would want to exercise jurisdiction
5 over a compelling case presented by an arbitral award, we don't
6 have that jurisdiction. And I may be off on that, but some
7 commissions do. We don't. The Legislature just hasn't vested
8 us with that. So, I mean, I would guess there are lots of
9 arbitral agreements where one side is not happy, and those have
10 gotten appealed to the courts and we don't know about those.

11 COMMISSIONER BRADLEY: And I want to make sure I
12 understand what Commission Deason's issue is here. I think I
13 hear him saying that we as a body need to preserve the right to
14 either accept an arbiter's award, as Commissioner Jaber said,
15 if it makes good policy sense. Now, if it does not, then we
16 don't want to make a ruling that does not allow us to reject an
17 arbitrator's decision that does not make good public policy
18 sense.

19 And I think that I hear Commissioner Davidson saying
20 that we are not by statute authorized to serve as an appellate
21 body. So how do we incorporate our ability --

22 COMMISSIONER DAVIDSON: Commissioner, I don't think
23 we accept or reject arbitral awards. I mean, that's sort of
24 the point. We don't have that jurisdiction. We may accept
25 sort of in our deliberations determinations that have been made

1 by the arbitrators because those are facts that somehow relate
2 to the proceeding. But unless I'm unaware of something, we
3 don't reject the arbitral award, and we don't accept it.
4 Courts do that. And the courts have the exclusive jurisdiction
5 to accept or refuse to accept the arbitral award.

6 COMMISSIONER BRADLEY: So it's your opinion then that
7 when we agree to arbitration, then the matter leaves this body
8 altogether.

9 CHAIRMAN BAEZ: Not necessarily. I mean, not
10 necessarily. In this instance, the language that created an
11 alternate forum for appeal cannot apply to us. And this is
12 what I believe the motion is saying, cannot apply to us because
13 we don't have that authority in the statutes.

14 COMMISSIONER BRADLEY: Exactly.

15 CHAIRMAN BAEZ: Now, it is entirely possible that it
16 can be -- you know, that the next set of arbitration language
17 that you see in these interconnection agreements creates less
18 of a stringent -- a less restrictive avenue to get to a state
19 commission, and this Commission in particular, with full
20 understanding that we don't have review authority over an
21 arbitral order. The only thing that we could ever have is have
22 a replay, in essence, that the arbitration award is of such a
23 nonbinding nature that it evaporates once the, quote, unquote,
24 appeal is taken to the Commission. I use that term loosely
25 because it's not accurate. But once that alternate avenue is

1 taken to the state commission, the arbitral award is no longer
2 effective even for consideration by this Commission, **that** we
3 are, in fact, reviewing it as if it had come to us first.

4 And at this point the statutes, at least what I
5 believe the motion to be recognizing is that at this point the
6 statutes make it so that that is the only way that we can get
7 this before us, is in a manner that is an exercise of our
8 primary jurisdiction, not some creation which doesn't include
9 authority to review a decision.

10 COMMISSIONER BRADLEY: And what I'm trying to do is
11 to put clearly on the plate the differences that exist between
12 a legal interpretation and a public policy interpretation. And
13 I most certainly would be interested in preserving our right to
14 deal with the public policy aspect of any arbitrator's
15 decision, but not to go past our statutory authority as it
16 relates to our ability to deal with this as a legal issue. And
17 I think that's what I hear Commission Deason saying. I'm not
18 trying to put words in your mouth.

19 CHAIRMAN BAEZ: And I don't think that's inconsistent
20 and I would agree with you. But I would submit to you that the
21 Commission's decisions become not only the basis for arguing in
22 front of an arbitrator, but it also becomes a basis for someone
23 who doesn't agree with an arbitrator's decision on some policy
24 basis to go the extra step of going to a proper forum, **that**
25 being, what did we say? Because I'm not the expert on

1 arbitration, but whatever it is, it's a circuit court or a
2 federal court, whatever the proper judicial forum might be, it
3 is, in fact, this Commission's decisions that create the basis
4 for that next step, because you can sure bet that anybody that
5 doesn't agree with the arbiter's award is going to be running
6 to court saying, you know what? This decision is directly in
7 contravention to the policy established by the Florida Public
8 Service Commission. That either is going to create an avenue
9 for our policy to get aired out -- in short. I don't believe
10 that by acknowledging --

11 COMMISSIONER BRADLEY: Well, public policy within the
12 confines of the statute -- of our statutory --

13 COMMISSIONER DAVIDSON: Yeah, I mean, the motion --
14 as I wanted to ask Commissioner Deason what type of motion he
15 would have agreed to. Maybe there's some way we could modify
16 this. But, I mean, the way I'm looking at this is, this is
17 merely simply easily just a choice of forum issue. It's a
18 venue issue. It's not an issue of are we going to disregard
19 policies because those will be addressed in the court that has
20 jurisdiction over this. So that's my focus.

21 I mean, it may be at some point that -- you know, you
22 could always argue, well, this tribunal or that tribunal or
23 this commission or that commission is the better agency to
24 decide this for whatever reasons, but the law is pretty clear
25 on the structure of how arbitral awards get appealed. So my

1 ruling here is -- or motion here is not to suggest that we
2 don't have jurisdiction over interconnection agreements in
3 general or sort of these public policy issues, but it's merely
4 to reflect that where the parties have agreed to arbitrate,
5 then let the chips fall where they may. They've agreed to
6 arbitrate. They'll get an arbitral award. And at that point
7 the appeal of that arbitral award and sort of all the arguments
8 that go with it go to court as opposed to here.

9 Again, I think a statutory change if it was warranted
10 to say, well, some of those appeals maybe should go to the
11 Commission, maybe that makes sense, but where we are now is the
12 law says, you must appeal an arbitral award, if at all, to
13 court. And, as the Chairman pointed out, there's a tremendous
14 opportunity to argue what the public policy of the state is.
15 As Commissioner Jaber pointed out, perhaps the PSC can somehow
16 intervene to help articulate that public policy.

17 But under the question to Commissioner Deason, I
18 mean, is there a friendly amendment to the motion that would
19 satisfy you?

20 COMMISSIONER DEASON: I don't think so. I mean, let
21 me ask our General Counsel a question. Give you the -- between
22 the position of -- an enviable position of maybe disagreeing
23 with a majority of the Commissioners' stated position. You've
24 heard the discussion, and apparently you signed off on a
25 recommendation that says we have jurisdiction. What is your

1 opinion?

2 MR. MELSON: Commissioner, if you look at
3 Section 11.2, which is on Page 4, it talks about a decision of
4 the arbitrator not being final if a party appeals a decision to
5 the Commission or FCC and the matter is within the jurisdiction
6 of the Commission. I think Commissioner Davidson's pointed out
7 there are two ways to read what the matter being in the
8 jurisdiction of the Commission means. It can mean is the
9 underlying matter the interconnection agreement dispute within
10 the jurisdiction of the Commission, or it can mean is an appeal
11 of an arbitrator's award within the jurisdiction of the
12 Commission.

13 I signed off on this believing that a fair reading of
14 it was that the interconnection agreement dispute was within
15 the jurisdiction of the Commission. But, you know, that
16 language clearly can be read two ways, and ultimately whatever
17 way the majority of the Commission reads it is going to be the
18 one that controls here.

19 COMMISSIONER DEASON: Well, then, okay. Thank you
20 for that. I guess then the question that I have is, what
21 language would be required in an interconnection agreement that
22 would enable this Commission to be the place a disagreement
23 goes to in lieu of a court?

24 COMMISSIONER DAVIDSON: Well, I think in that case,
25 if I may answer, the parties cannot create jurisdiction where

1 it does not otherwise exist. So they cannot create in this
2 tribunal a right of an appeal of a final arbitration award.
3 They cannot do it. So what I believe they would have to do is
4 either agree to mediation, even if they call it binding
5 mediation, that's not arbitration, or agree to nonbinding,
6 nonfinal arbitration. But there are lots of other indicators
7 in this agreement that indicate the parties agreed to binding
8 and final arbitration. And again, General Counsel pointed out
9 the two different readings. So I think the language would have
10 to make clear that the process we're going through is not final
11 and binding as between the parties. This is sort of our
12 first step in dispute resolution, but ultimately if we don't
13 resolve this will go to the Commission. Just leave that clear
14 and omit so that they don't go through this exercise again,
15 omit words like final arbitration, binding arbitration, and
16 just make clear that they're choosing another type of dispute
17 resolution in total.

18 Because again, if they go through arbitration and the
19 arbitrator issues the award and signs it and dates it, it
20 becomes a binding award, and then you have to take that to
21 court. So I think they make it clear we're not taking that
22 path of binding arbitration. We're going to take one of these
23 other five dispute resolution vehicles that exist, you know,
24 under the law or in commercial practices. That's what I would
25 suggest.

COMMISSIONER DEASON: The language in question here, the instant agreement that we have, the language says, a decision of the arbitrator shall not be final if, and there are things set out there. And they have all been met in this case except we haven't agreed to hear it yet.

COMMISSIONER DAVIDSON: Well, I don't believe they have. I don't believe -- a party appeals a decision and the matter is within the jurisdiction, my reading is --

COMMISSIONER DEASON: There has to be --

COMMISSIONER DAVIDSON: -- that appeal has to be within our jurisdiction. Some commissions have jurisdiction over appeals of arbitral awards in the telecom arena; we don't. So again, it's coming down on, does that mean does the matter within the jurisdiction of the Commission mean the appeal of the arbitral award, or does it mean the sort of underlying subject matter of the dispute? And we could disagree on that, and I'm sort of weighing in favor of it, it means an appeal based on sort of all the facts and circumstances of the case, the other language used in the agreement, the facts that the parties have all gone through an appeal, the award's been issued. I mean, every -- sort of all the other indicia of real arbitration has been followed. And this language probably helps an aggrieved party or the complaining party in those jurisdictions where a commission can hear it. I just don't think we are one of those. So that's the basis for my motion.

1 CHAIRMAN BAEZ: And honestly, Commissioner Deason,
2 I've got to say that those -- that A, B, and C that
3 Commissioner Davidson has put out actually accommodates what
4 the General Counsel said in terms of two interpretations. It
5 actually allows us to get to -- I think what one of your
6 issues -- one of our concerns was, which I share is to whether
7 we have the discretion to say we're not going to hear a certain
8 case or not.

9 What it does and what gives me comfort by the motion
10 is the fact that it really does clear up what we would believe
11 our jurisdiction is. If there is -- and again, I use the term
12 loosely. If there's an appeal or if there is some relief,
13 let's call it, sought by this Commission that is precipitated
14 by an arbitration, it has to be of a certain -- it has to be of
15 a type that would allow us to assert the only jurisdiction we
16 actually have, and that is a primary jurisdiction, which to me
17 suggests that it would have to be a brand new review of the
18 case, and not having to do anything with the actual arbitration
19 award, but that we would be getting all disputes, all issues --
20 you know, the entirety of the case. And I don't think that the
21 motion forecloses that from us. It basically puts the onus on
22 the parties to the agreement to draft accordingly. And
23 frankly, I don't think this language necessarily doesn't do
24 that. I mean, I think it does. It's sort of our motion
25 validating the language, in essence. It maintains whatever

1 jurisdiction we have.

2 COMMISSIONER BRADLEY: Would it be helpful maybe to
3 clarify the intent of our ruling?

4 CHAIRMAN BAEZ: Well, we've got to have a ruling
5 first, but --

6 COMMISSIONER BRADLEY: I mean, we don't have
7 appellate -- we don't the ability to accept appeals or to serve
8 as an appellate body, but we do have the authority within our
9 statutory authority to serve as a body that deals with disputes
10 and public policy.

11 CHAIRMAN BAEZ: Clearly.

12 COMMISSIONER BRADLEY: And I agree with Commissioner
13 Davidson that we don't have appellate -- the ability to render
14 a decision as it relates to appeals. But I do want to make it
15 clear that we reserve or preserve our right to deal with
16 interconnection agreements from a dispute perspective and from
17 a public policy perspective. And maybe just by putting some
18 language in that that clears up our -- that defines what we're
19 trying to get at.

20 COMMISSIONER DAVIDSON: Well, I think that's right,
21 but to be fair and sort of out there and open about
22 Commissioner's Deason concern, if I can express it, it's that I
23 think Commissioner Deason expressed a concern that even in the
24 case where you have an arbitral award, if there's some
25 egregious aspect to that arbitral award, we ought to be able to

1 reconsider that. My motion would -- where you've had a binding
2 arbitration would prevent that. The parties' remedy, their
3 forum, their forum, their choice of forum would be a court, not
4 the Commission, but nothing in there, to me, indicates that the
5 parties will not be able to have public policy issues
6 addressed. That will be based upon the scale of the advocacy
7 and taking into the court all of our rulings and decisions. So
8 it would be -- to your point, there would be an exception
9 carved out of that jurisdiction where the parties have agreed
10 to arbitrate and have taken that aspect of the dispute away,
11 which they do all of the time. There are lots of disputes that
12 are arbitrated that we never hear about, learn about, know
13 about, and any appeal is handled in court, not at this
14 Commission.

15 COMMISSIONER DEASON: Let me -- you asked of
16 possibility of a friendly amendment, and I said no, but maybe
17 there is. I'm willing to accept for purposes of the instant
18 case in front of us and the language which we're being asked to
19 review, I'm willing to accept that in this case that there was
20 a party who sought the Commission -- to appeal the decision to
21 the Commission. And I guess that's the real -- the term appeal
22 an arbitrator's decision. And the motion says that's not
23 within our jurisdiction because there's nowhere in the statute
24 where it says that the Commission shall have the jurisdiction
25 to review the decision of an arbitrator. If that's what we're

1 limiting it to, I can accept that.

2 I just have difficulty carrying it a step further
3 than that and making more general or generic statements because
4 it seems to me that perhaps there could be language crafted in
5 an agreement which would preserve the ability of the Commission
6 to act. And I don't know. For example, instead of using the
7 term appeal the decision to the Commission, if it were
8 something to the effect that if there were a continuing dispute
9 and the Commission is notified, then the arbitrator's decision
10 is a nullity and we have a de novo proceeding at the
11 Commission. Maybe that preserves our jurisdiction. I don't
12 know.

13 COMMISSIONER DAVIDSON: Yeah, and I don't know
14 either. I mean, there may be options that we've -- there may
15 be new cases and scenarios. So I am fine with limiting a
16 ruling to this specific case. My intent of the motion was not
17 to sort of offer some broad proclamations. I mean, the law is
18 pretty clear what the law so that's -- if we could just add
19 that as point D as a friendly amendment.

20 COMMISSIONER JABER: Second the modified motion.

21 CHAIRMAN BAEZ: Very well. There's a motion and a
22 second. All those in favor say, "aye."

23 (Simultaneous affirmative vote.)

24 CHAIRMAN BAEZ: All those opposed, just for -- okay,
25 great.

1 Issue 2.

2 COMMISSIONER DEASON: I think Issue 2 is moot at this
3 point, is it not?

4 CHAIRMAN BAEZ: Is Issue 2 mooted?

5 MS. BANKS: Yes, Commissioner. It's staff's belief
6 that if we decline -- well, that you don't assert
7 jurisdiction --

8 CHAIRMAN BAEZ: Okay. Very well.

9 COMMISSIONER DAVIDSON: Move staff on Issue 2.

10 CHAIRMAN BAEZ: I don't think we need to.

11 COMMISSIONER DAVIDSON: Oh, all right. Sorry. I
12 wasn't paying attention.

13 CHAIRMAN BAEZ: So show Issue 2 as a no vote.

14 And Issue 3, I think we need to close the docket, is
15 that correct, staff, at this point?

16 MS. BANKS: Yes, Commissioner.

17 COMMISSIONER JABER: Move to close the docket.

18 CHAIRMAN BAEZ: There's been a motion to close the
19 docket. Is there a second?

20 COMMISSIONER DEASON: Second.

21 CHAIRMAN BAEZ: All those in favor say, "aye."

22 (Simultaneous affirmative vote.)

23 CHAIRMAN BAEZ: Thank you, Commissioners. Thank you,
24 staff. And thank you, parties. Why don't we take a ten-minute
25 break and we'll be back at 11:45.

(Agenda Item Number 3 concluded.)

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1 STATE OF FLORIDA)
 :
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3
4 I, TRICIA DeMARTE, RPR, Official Commission Reporter,
5 do hereby certify that the foregoing proceeding was heard at
6 the time and place herein stated.

7 IT IS FURTHER CERTIFIED that I stenographically
8 reported the said proceedings; that the same has been
9 transcribed under my direct supervision; and that this
10 transcript constitutes a true transcription of my notes of said
11 proceedings.

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

17 DATED THIS 14th DAY OF JULY, 2004.

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