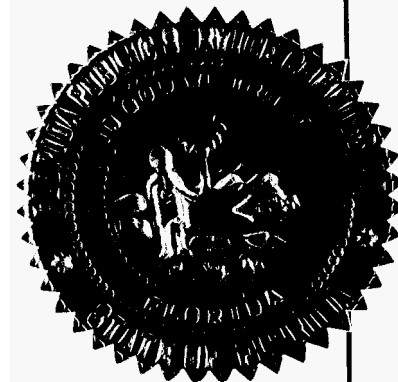


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040779-TP

In the Matter of:

NOTICE OF ADOPTION OF EXISTING
INTERCONNECTION, UNBUNDLING, RESALE,
AND COLLOCATION AGREEMENT BETWEEN
SOUTHEASTERN BELL TELECOMMUNICATIONS, INC.
AND NETWORK TELEPHONE CORPORATION BY
SOUTHEASTERN BELL TELECOMMUNICATIONS, INC.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 8

BEFORE: CHAIRMAN BRAULIO L. BAEZ
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER RUDOLPH "RUDY" BRADLEY
 COMMISSIONER CHARLES M. DAVIDSON
 COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, January 18, 2005

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

REPORTED BY: JANE FAUROT, RPR
 Chief, Office of Hearing Reporter Services
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FLORIDA PUBLIC SERVICE COMMISSION

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FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 NANCY WHITE, ESQUIRE, representing BellSouth
3 Telecommunications, Inc.

4 MICHAEL B. HAZZARD, ESQUIRE, representing Z-Tel
5 Communications, Inc.

6 JASON ROJAS, ESQUIRE, representing Commission
7 Staff.

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P R O C E E D I N G S

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CHAIRMAN BAEZ: Commissioners, Item 8.

MR. ROJAS: Commissioners, Item 8 is staff's recommendation regarding the notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Incorporated and Network Telephone Corporation by Z-Tel Communications, Incorporated.

Staff is available to answer questions, and I believe the parties are here to comment.

CHAIRMAN BAEZ: Good morning, sir.

MR. HAZZARD: My name is Michael Hazzard. I'm with the law firm of Womble Carlyle, and I'm appearing on behalf of Z-Tel Communications.

CHAIRMAN BAEZ: Great. Thank you, Mr. Hazzard. We'll just wait for Ms. White to --

MS. WHITE: I'm sorry.

CHAIRMAN BAEZ: That's all right. And I'm at a loss as to who should, perhaps, go first, but we will let Ms. White, if you have comments.

MS. WHITE: Yes, Nancy White for BellSouth.

BellSouth opposes the staff recommendation. On July 23rd, 2004, Z-Tel unilaterally noticed the Commission that it had adopted the interconnection agreement of Network Telephone. There was no BellSouth agreement to the adoption. There was no signed adoption language. BellSouth was not even informed by

1 Z-Tel of this action. Now, as you all know, it takes two to
2 sign a contract. So I don't see how there can be a contract
3 when there is only one signatory.

4 First, they failed to follow the requirements of the
5 interconnection agreement which requires that the parties have
6 to sign the agreement or the amendment of an adoption. The
7 parties did not sign, only Z-Tel signed. There was not even a
8 signature page. Adoption of another contract was not new to
9 Z-Tel, since they had originally adopted the MCI agreement in
10 2003. The bottom line here is that staff has applied a
11 different level of scrutiny, a different standard to the CLECs
12 than to the ILECs.

13 Any time, and there have been a couple, where
14 BellSouth has filed an adoption without the signature of both
15 parties, the staff has refused to accept it, and has turned it
16 back and said you have to produce the signature of both
17 parties. They didn't do that here. They ignored that. So
18 they are setting a different standard for when ILECs file an
19 interconnection agreement than when CLECs file an
20 interconnection agreement. And there is no basis for that
21 different level of treatment.

22 CHAIRMAN BAEZ: Ms. White, a quick question. If you
23 are not finished, I'm sorry to interrupt. That example that
24 you just gave, the ILEC adopting an agreement --

25 MS. WHITE: No. We were filing an agreement that had

1 been adopted by a CLEC. But when we filed the adoption
2 papers --

3 CHAIRMAN BAEZ: But it is your agreement that you are
4 filing. I just want to understand.

5 MS. WHITE: Well, I mean, it's our agreement. It was
6 the agreement between BellSouth and a CLEC.

7 CHAIRMAN BAEZ: But it is an agreement to which you
8 were a party to prior, yes?

9 MS. WHITE: Well, what we were filing was a piece of
10 paper that said BellSouth and ABC CLEC agree that ABC CLEC will
11 adopt this particular -- MCI's agreement.

12 CHAIRMAN BAEZ: MCI's agreement with you?

13 MS. WHITE: Yes.

14 CHAIRMAN BAEZ: Okay. Go ahead.

15 MS. WHITE: So the bottom line is we feel there is a
16 different standard in place, and there is no basis for that
17 different standard.

18 Second, on July 21st, 2004, the FCC adopted Order
19 Number 04-179, the interim rules order. And the interim rules
20 order specifically stated that CLECs may not opt into contract
21 provisions that were frozen in place. In other words, they
22 wanted to maintain the status quo without expanding unbundling
23 beyond that in place on June 15, 2004.

24 BellSouth provided a copy of the order to the
25 Commission. Footnote one on the recommendation claims that

1 BellSouth made no specific argument as to its applicability.
2 But while this Commission has traditionally allowed official
3 recognition of FCC orders and orders from other states, it has
4 consistently disallowed written argument on the interpretation
5 of or the effect of such orders within the request for official
6 recognition.

7 So the bottom line is what is happening is that Z-Tel
8 is using the adoption of this agreement in an attempt to expand
9 their rights in complete disregard of the interim rules order.
10 They are trying to avoid the change of law by continually
11 adopting agreements. They are going to keep perpetuating the
12 old rules. In other words, until the very last agreement is
13 negotiated under change of law, they will just keep adopting,
14 and they will be talking about another two or three years of
15 UNE-P longer than what they are entitled to.

16 Fourth, BellSouth opposes the staff recommendation
17 and Z-Tel's adoption because we do not believe the adoption is
18 within a reasonable period of time. We are not talking about
19 the length of time that the Network Telephone agreement still
20 has to run, we are talking about the fact that the law has
21 changed so substantially, that it is unreasonable for Z-Tel to
22 adopt an old agreement, an agreement that is not consistent
23 with the state of the law today.

24 Staff is correct that the FCC has not issued rules on
25 what a reasonable period of time means, and that it has to be

1 dealt with on a case-by-case basis. But in this case the
2 substantial change of law, in addition to a clear prohibition
3 against adoption in the interim rules order, indicates that the
4 adoption was not requested in a reasonable period of time.

5 Finally, the all-or-nothing rule. The FCC has stated
6 that CLECs have to either adopt an entire agreement or they
7 can't adopt the agreement at all. They can't adopt piece-parts
8 of it anymore. We would argue that they cannot adopt the
9 entire Network Telephone agreement because the entire Network
10 Telephone agreement is not consistent with existing law, with
11 the state of the law as it is now. The switching, the high
12 capacity facilities, the unknowns about UNE-P and other
13 unbundled elements means that it is no longer appropriate or
14 proper for them to adopt that agreement.

15 The FCC voted on the final rules on December 15th,
16 2004. We don't have an order yet. The latest rumor I heard
17 said February or March. Who knows. But we know that UNE-P is
18 going to be phased out. We know that much from what they have
19 done. The effect of Z-Tel's action is to extend their rights
20 beyond what they had in June 2004, plus ignore the FCC's order,
21 and we do not believe that is appropriate.

22 Thank you.

23 CHAIRMAN BAEZ: Questions, Commissioners?

24 COMMISSIONER DAVIDSON: Just one question, Chairman.

25 Ms. White, specifically how is Z-Tel, according to

1 BellSouth, expanding its reliance on UNE-P?

2 MS. WHITE: Well, for example, they have adopted the
3 Network Telephone agreement, which I believe expires in 2006.
4 I believe it is the middle of the year 2006. I'm not sure
5 about the month. If an order came out from the FCC, if the
6 order comes out from the FCC on February 1, 2005, and says,
7 okay, UNE-P is being phased out. You have a 12-month
8 transition period from 30 days after the date of this order, or
9 from the date of this order, because I'm not sure exactly what
10 that order is going to say, then they would have the right to
11 order UNE-P longer than that transition period through their
12 contract unless the change of law had been done first.

13 COMMISSIONER DAVIDSON: Would an agreement by Z-Tel
14 that that is not what it is seeking, that is not what it is
15 trying to do, extend its reliance on UNE-P, satisfy BellSouth
16 if Z-Tel were so inclined to make that?

17 MS. WHITE: It might. I mean, the bottom line is
18 that even though their agreement has expired, essentially
19 BellSouth is treating Z-Tel as if that agreement is still in
20 place and we will continue to do so until the change of law
21 proceeding is conducted before this Commission, unless, of
22 course, the FCC says cut everybody off in a flashcut, which I
23 would sincerely doubt they would do, so I think it would help.

24 COMMISSIONER DAVIDSON: Thank you.

25 COMMISSIONER DEASON: How does the change in law -

1 how does that effect the agreement which Z-Tel is currently
2 attempting to adopt?

3 MS. WHITE: Well, right now Z-Tel is -- we were
4 trying to negotiate with them to come up with a new agreement.
5 We have a standard agreement now that --

6 COMMISSIONER DEASON: You're missing my question.

7 MS. WHITE: I'm sorry.

8 COMMISSIONER DEASON: They're attempting to adopt an
9 existing agreement.

10 MS. WHITE: Right.

11 COMMISSIONER DEASON: Does that agreement that they
12 are attempting -- I assume the agreement they are attempting to
13 adopt has a change in law provision?

14 MS. WHITE: Well, it has the provision that says if
15 the law changes you give 30 days notice and start negotiating
16 it, yes.

17 COMMISSIONER DEASON: So if they adopt that, aren't
18 they obligated, if there is a change in law, to begin a
19 negotiation within 30 days or whatever the language in the
20 agreement states?

21 MS. WHITE: Right. But they did that, their
22 agreement, their old agreement had that same provision, too.
23 So if you just keep adopting, you know, an agreement that lasts
24 longer, you know, every 30 days, then you are never going to --

25 COMMISSIONER DEASON: Hold on. As I understand the

1 change in law provision, it doesn't matter when the agreement
2 expires, until it does expire there is a requirement to
3 negotiate changes in the law provision.

4 MS. WHITE: I know. And we have already given Z-Tel
5 that notification. We have given them change of law
6 notification. We have given all the CLECs change of law
7 notification and we have asked to negotiate.

8 COMMISSIONER DEASON: And they will have that
9 obligation if they adopt the other agreement, will they not?

10 MS. WHITE: Yes. But they could argue that that time
11 limit starts over again, that we have to give them a new notice
12 under that new agreement. I don't know what they are going to
13 argue, but, I mean, that is a possibility.

14 COMMISSIONER DEASON: And what is that period, 30
15 days?

16 MS. WHITE: It is 30 or 60. Some agreements have 30,
17 some have 60, and I'm not sure what the Network Telephone one
18 has.

19 COMMISSIONER DEASON: So when are you going to be
20 concluded with all the change of law negotiations, with all of
21 your outstanding agreements, so there is not another agreement
22 they can adopt into?

23 MS. WHITE: Well, that is problem, and that is one of
24 the reasons why we filed the petition for change of law
25 proceeding with the Commission saying we need to get everybody

1 n here, thrash it all out, and have it done with once and for
2 ll.

3 COMMISSIONER DEASON: And what has the Commission
4 done with that?

5 MS. WHITE: Well, several of the CLECs have moved to
6 dismiss the change of law petition. We have responded to that,
7 so I would presume that the motion to dismiss would be on an
8 upcoming agenda. Once that's decided, hopefully in BellSouth's
9 favor, by not dismissing the petition, then a CASR would be
10 set. I have to admit I have not looked at the CASR lately, so
11 I don't know when it is set for hearing. Perhaps staff might.

12 COMMISSIONER DEASON: Does staff know what the time
13 frame for that is?

14 MR. DOWDS: I don't believe we have reserved hearing
15 dates yet for that. But Ms. White is correct, my understanding
16 is that a recommendation is forthcoming on the motions to
17 dismiss.

18 CHAIRMAN BAEZ: Let me understand. I want to
19 understand the mechanics of the change in law negotiations. As
20 the law stands now, either Z-Tel's current agreement, the
21 agreement right now that concerns your relationship and the
22 agreement attempting to be adopted, or that is the subject of
23 the adoption, would they both wind up in the same place?

24 MS. WHITE: Well, they will with the change of law.
25 Yes, they will with the change of law.

1 CHAIRMAN BAEZ: So then the only question, the only
2 question that -- the only thing that is at issue is whatever
3 the effect of extension of negotiation time?

4 MS. WHITE: That's true. I should take that back,
5 what I said about will they end up in the same place with
6 change of law. I guess that would be true. Yes, they would
7 end up in the same place, but I believe if the Commission
8 doesn't dismiss -- if the Commission dismisses BellSouth's
9 petition, then it is strictly negotiation. It is not -- you
10 know, and if somebody refuses to negotiate, then you would
11 start threatening to cut them off.

12 CHAIRMAN BAEZ: Exactly. Once the change of law
13 docket -- and, again, assuming it goes to maturity and --

14 MS. WHITE: Yes. Essentially they are extending
15 their time, yes.

16 CHAIRMAN BAEZ: And that really is the only --

17 MS. WHITE: They are extending their time. I mean,
18 the bottom line is that I don't believe that BellSouth has any
19 intentions of cutting anybody off because their agreement has
20 expired so. What they are doing is just extending their time.
21 And if everybody keeps extending their time it will never be
22 over.

23 CHAIRMAN BAEZ: And I have one question jotted down,
24 and I may have heard you wrong, but when the change in law
25 negotiations -- and we are talking about Agreement A, just as a

1 hypothetical. When you renegotiate for the change of law
2 provision or through the change of law provision, does that
3 normally include an extension of term?

4 MS. WHITE: I'm not directly involved with the
5 negotiations, but I believe that it must. Because I don't know
6 of any CLEC that we have just unilaterally cut off.

7 CHAIRMAN BAEZ: Right. So that you are not left
8 negotiating change in law provision or a change of terms under
9 a change of law that would affect an agreement that is only
10 going to last six more months, or three more months, or
11 whatever the time happens to be.

12 MS. WHITE: Right.

13 CHAIRMAN BAEZ: So it would be fairly assumed that
14 there is an extension of the contract term?

15 MS. WHITE: Yes.

16 CHAIRMAN BAEZ: And to your knowledge do the rules --
17 either the interim rules, or whatever you would anticipate in
18 the final rules from the FCC have any effect as to how -- I
19 mean, the rules would always be respective of or respectful of
20 the term of a given agreement that is in existence, or that is
21 not anticipated?

22 MS. WHITE: I really --

23 CHAIRMAN BAEZ: Could a phaseout occur before any
24 given agreement?

25 MS. WHITE: Yes, a phaseout could occur. But, I

1 mean, I really -- I know we like to try to say all the time
2 what the FCC is going to do, both sides like to do that, but I
3 don't know. I would doubt that the FCC would say if an
4 agreement comes to an end during the transition period you can
5 cut people off. I would doubt that would happen.

6 CHAIRMAN BAEZ: Okay.

7 COMMISSIONER DEASON: Mr. Chairman.

8 CHAIRMAN BAEZ: Commissioner Deason.

9 COMMISSIONER DEASON: If Z-Tel is not allowed to
10 adopt this agreement, how does that affect any change of law
11 provision in their prior agreement? And what is the status of
12 that? You are saying they are just trying to perpetuate
13 something. It seems to me at some point a decision has got to
14 be made and we go forward from there. So, in your viewpoint,
15 what are Z-Tel's options at this point?

16 MS. WHITE: Well, Z-Tel could have asked for
17 arbitration of any element of any piece of a new contract.

18 COMMISSIONER DEASON: What's the status -- are they
19 operating under any agreement now with BellSouth? And, if so,
20 what is the agreement?

21 MS. WHITE: Well, I believe BellSouth is treating
22 them as operating under the existing Z-Tel agreement, the MCI
23 agreement they had adopted back in 2003, I believe. I do not
24 believe BellSouth is treating them as having adopted the
25 Network Telephone agreement.

1 COMMISSIONER DEASON: Okay. Now, what is your -- if
2 they are allowed to continue to operate under that agreement
3 until there is some disposition of the change in law
4 proceeding, what is their advantage to switching over to
5 another agreement?

6 MS. WHITE: Because I guess they could argue that if
7 that agreement -- if the next agreement that they adopt goes to
8 2008, is that agreement would trump any FCC rules and they get
9 to keep ordering UNE-P through 2008.

10 COMMISSIONER DEASON: But you just said that it is
11 position that it will not trump FCC rules.

12 MS. WHITE: Well, I don't know because I don't know
13 what the order is going to say, that's the problem.

14 COMMISSIONER DEASON: So we are here because of the
15 uncertainty of the FCC, what they are going to do. That is the
16 only reason for this dispute, is it not?

17 MS. WHITE: Well, unfortunately, we find ourselves in
18 that position far too often and far more than I would like.

19 CHAIRMAN BAEZ: Commissioner Davidson, you had a
20 question, and I will also remind the Commissioners that Mr.
21 Hazzard has yet to provide us with his input.

22 COMMISSIONER DAVIDSON: The response to Commissioner
23 Deason's question about arbitration was not especially
24 encouraging to me. Adoption of agreements was created as a
25 vehicle so the parties could avoid a lengthy process of

1 arbitration, I understand that. So if the choice is between
2 arbitration and adoption, adoption seems to make better sense.
3 But I also think, I mean, we need to be cautious about
4 encouraging companies to sort of in this state of flux just go
5 out and adopt new agreements. And my question for BellSouth is
6 would BellSouth agree, sort of expressly agree to continue the
7 Z-Tel agreement until such time as the final rules are issued,
8 and recognizing whatever Z-Tel's rights would be during the
9 transition period, if that agreement had continued? Would you
10 all expressly agree it has expired, but we will continue it
11 until such time as the final rules are issued?

12 And I ask that because Z-Tel needs some type of --
13 every company probably needs some type of agreement. And the
14 law is in a state of flux, but I think we are faced with the
15 choice of either continuing the agreement, adopting a new
16 agreement, or arbitrating a new agreement.

17 MS. WHITE: Unfortunately, I don't have an answer for
18 that right now. I would have to do some checking.

19 COMMISSIONER DAVIDSON: Thank you, Chairman.

20 MS. WHITE: If the Commission was willing, if Z-Tel
21 was willing to defer this until the February 2nd agenda, maybe
22 that could be resolved in the interim, or I could have an
23 answer for you with the understanding that nothing would happen
24 definitely until that agenda.

25 CHAIRMAN BAEZ: Mr. Hazzard, before you answer the

1 question, if you have any prepared remarks, but I guess maybe
2 you need to answer something before. I don't know.

3 MR. HAZZARD: Right. I would have to defer on that
4 and check with my client. But I think that the way -- we have
5 gone through two different staff opinions or staff
6 recommendations in this matter, both of which came down on the
7 Z-Tel side on all of the issues that BellSouth's counsel has
8 raised. So I don't believe there has been anything
9 particularly new raised by BellSouth's counsel.

10 The one thing I would point out is that really from
11 BellSouth's perspective, the option for Z-Tel is not to stay in
12 the MCI agreement until it is modified. The way the BellSouth
13 agreements I'm aware of work, is that once the agreement
14 expires you default off of your existing contract into whatever
15 the most current BellSouth template agreement is. And in my
16 experience with eight years of negotiating agreements with the
17 various Bell Operating Companies, the template agreements are
18 really fairly onerous and, in my view, don't really comply with
19 the existing obligations or existing law. And you go through
20 kind of this negotiation and/or arbitration process in order to
21 take the agreement, you know, from down here and bring it up to
22 the standard of the law.

23 Another point I would like to make expressly clear to
24 you all is that the Network Telephone agreement was a
25 negotiated agreement by BellSouth and Network Telephone, and

1 they reached that agreement, again, through the ordinary
2 negotiation process. And it goes without question that the
3 parties can't agree to an interconnection agreement without
4 regard to the specific obligations of 251(b) and (c).

5 So to the extent that the law isn't exactly synced up
6 with where it was when they negotiated that agreement, that was
7 part of the give and take of the negotiation process. All that
8 Z-Tel is attempting to do is get the same exact agreement, the
9 agreement in its entirety that Network Telephone is currently
10 operating under.

11 And we agree, as well, there has been a significant
12 state of flux with the unbundling rules over the last year. We
13 wish that was not the case, and we are fully committed to
14 negotiating any change of law with BellSouth as the law
15 evolves. Unfortunately, over the last year there have been --
16 you know, I deal with the USTA I decision. The USTA II
17 decision, the FCC's interim rules, and over the course of that
18 time we have been kind of forced to deal with rolling
19 interconnection agreement amendment proposals from BellSouth.

20 And, as an example, when we attempted to work with
21 BellSouth to adopt the Network Telephone agreement, BellSouth
22 said, well, you can adopt that, except you can't adopt the UNE
23 section. Well, that is kind of a significant portion of the
24 agreement. And our view was, look, the FCC just came out with
25 this, or is poised to come out with this all or nothing

1 adoption rule. Your position before the FCC is that we need to
2 adopt interconnection agreements in their entirety, and all we
3 want is the whole thing that Network Telephone is currently
4 getting.

5 And, again, as the law changes we will amend it. As
6 this Commission or other commissions convene generic
7 proceedings to implement FCC orders or otherwise, we are
8 committed to participate in that process and to take amendments
9 as they come thereafter.

10 CHAIRMAN BAEZ: Commissioners, questions?

11 COMMISSIONER DAVIDSON: A couple of questions,
12 Chairman. Would Z-Tel concede that if the adoption of the
13 Network Telephone agreement was allowed, that Z-Tel has, in
14 fact, validly received notice of a change in law provision, or
15 is it Z-Tel's position that any notice they have received to
16 date would not apply to this new agreement and there would have
17 to be a new change of law process implemented?

18 MR. HAZZARD: I think the easiest way to answer that
19 question is to say that upon receipt of agreement proposals
20 from BellSouth we are committed to responding to those
21 proposals and implementing those proposals.

22 COMMISSIONER DAVIDSON: Has Z-Tel received a change
23 of law notice from BellSouth?

24 MR. HAZZARD: I don't know whether we have received a
25 change of law notice from BellSouth related to the USTA II

1 decision or the FCC's interim rules. I believe we have
2 received one on the original triennial review order, and I'm
3 not aware of an amendment being implemented to give effect to
4 the original triennial review order. And that said, given that
5 it has been substantially vacated, I'm not sure that anybody
6 would suggest that we need to implement an amendment based on
7 the original triennial review order.

8 Subject to check with Z-Tel, to the extent that we
9 have received a change of law notice from BellSouth regarding
10 the USTA II decision or the interim regime, I believe that,
11 again, subject to check, I believe that Z-Tel would honor the
12 date of that notice from BellSouth.

13 COMMISSIONER DAVIDSON: Fair enough. On a more
14 substantive question, would Z-Tel agree that it would not
15 assert a right to continue UNE-P longer than it would have had
16 the right to do so under the final rules and its current
17 agreement? Meaning -- what I'm looking for is Z-Tel's position
18 on whether if under the final agreement, if under its current
19 agreement UNE-P continues until December 2005, but if for some
20 reason the Network Telephone agreement was adopted, UNE-P would
21 continue until December 2006, would Z-Tel concede that that is
22 not what we are seeking. Our right to rely on UNE-P, we will
23 concede that that stops as of the date in our current
24 agreement. We are not seeking to extend reliance on this,
25 however, we just need some type of an agreement in place.

1 MR. HAZZARD: Again, subject to check, I believe my
2 recollection of both agreements is that we would be required to
3 implement any new FCC unbundling rules such as those coming out
4 in the current order or the perspective order, and I believe at
5 a minimum Z-Tel would agree that it is -- and commit that it
6 has not moved into or attempting to move into the Network
7 Telephone agreement nor to extend UNE-P. It really is to
8 bridge the gap from the expiration of the prior agreement to
9 the time in which it could get a new agreement or an agreement
10 that can be amended to implement the forthcoming FCC rules.

11 COMMISSIONER DAVIDSON: And just if I can jump over
12 to Ms. White. Ms. White, you have heard the responses to both
13 of those questions. If Z-Tel, in fact, agreed that it would --
14 if it has received a notice of a change of law provision
15 relating to USTA II, it would honor that, and it is not seeking
16 to somehow extend its reliance on UNE-P beyond that which it
17 currently has. Would those two provisions satisfy BellSouth
18 such that it would okay the adoption of the Network Telephone
19 agreement?

20 MS. WHITE: It would help, but it would not totally
21 satisfy us.

22 COMMISSIONER DAVIDSON: What else is out there?

23 MS. WHITE: Because I think there are two things we
24 are looking at here. One is the fact that essentially you are
25 going from one agreement that is not consistent with the law as

1 .t stands today to another agreement that is not consistent
2 with the law as it stands today. Why is that going to be
3 allowed? I don't like the precedent that sets.

4 And, two, the fact that the agreement was filed
5 unilaterally. That it was just filed, one signature, one party
6 signing it, and that is approved and that is okay. I think
7 those are two major problems. I don't think as a matter of
8 principle, as a conceptual matter BellSouth can accept that.

9 CHAIRMAN BAEZ: Aside from -- and you struck a cord
10 with me, because I asked you a question beforehand, you alluded
11 to some kind of double standard being applied to the ILECs.
12 But my understanding of the adoption rule, it is not
13 necessarily to the ILECs' benefit as it functions. I mean, is
14 that fair to -- it is not there to protect you necessarily.

15 MS. WHITE: It is not there to protect us. But, I
16 mean, a contract is between two parties.

17 CHAIRMAN BAEZ: I know that. I'm not trying to
18 rewrite centuries of --

19 MS. WHITE: No, you're right. You're right. It's a
20 right for the CLECs to enter into agreements, either through
21 negotiation or arbitration.

22 CHAIRMAN BAEZ: And you have to understand that when
23 you say, well, it's not fair that I'm not allowed to say, hey,
24 Z-Tel adopts Agreement A even though they haven't signed it,
25 but, you know, it is okay with me that they adopt it. And it

1 is another thing entirely for Z-Tel to say we adopt an existing
2 agreement, all other things being equal. I mean, I know that
3 there are issues beyond that in this case, but do you see
4 functionally how that is different.

5 MS. WHITE: No, I don't, because I think the example
6 you used is wrong. What we are saying is that, say, Z-Tel and
7 BellSouth had agreed that they were going to adopt another
8 agreement. And usually for some reason it is the ILEC that
9 files the agreement. It has been from the beginning of the
10 act. So BellSouth has a letter and attaches the adoption
11 papers, but for some reason only BellSouth has signed the
12 adoption papers. Z-Tel has agreed to adopt it, they just
13 haven't signed it. Those are the ones that have come back to
14 us, too. So it is not that BellSouth is trying to unilaterally
15 file an adoption that they haven't agreed to.

16 CHAIRMAN BAEZ: And that is not what I would suggest.
17 But you can see the implications of the ILEC being able to name
18 the agreement that a CLEC is to adopt. Again, I'm not trying
19 to cast any aspersions, just as a matter of function and as a
20 matter of fairness it is an entirely different thing for
21 BellSouth to say Z-Tel and we adopt, you know, Agreement A
22 without some active part by the CLEC in saying, yes, that is
23 the one. And it is another thing entirely the other way --

24 MS. WHITE: But, no, then you are saying --

25 CHAIRMAN BAEZ: What you are suggesting by what you

1 are saying, or at least what I'm understanding by your words is
2 that somehow an ILEC has a right under normal circumstances --
3 and I know that there are issues way beyond this in this case,
4 but that under normal circumstances the ILEC could say, no, you
5 can't adopt an existing agreement. I mean, somehow that works
6 against the law.

7 MS. WHITE: No, I'm just saying that both sides
8 should be treated equally. If we file something that doesn't
9 have a signature of both parties, staff is right to turn it
10 back. When the CLECs file something without both signatures,
11 staff should turn it back. That's what I'm saying.

12 CHAIRMAN BAEZ: And as a ministerial --

13 MS. WHITE: CLECs aren't inherently more honest or
14 trustworthy than the ILECs.

15 CHAIRMAN BAEZ: In a ministerial sense I would agree
16 with you. But the problem is, or the issue with me is who has
17 the right to -- do you have a right to decline someone else's
18 adoption, again, all things being equal?

19 MS. WHITE: Yes, we do.

20 CHAIRMAN BAEZ: For what reason other than --

21 MS. WHITE: For whatever reason it may be. I mean, I
22 don't know what the reasons are.

23 CHAIRMAN BAEZ: No. If you would say, you know what,
24 the change in law, you know, obviously there is a discrepancy
25 in the law, it doesn't comport with the law. But my

1 hypothetical to you is devoid of all of that, if you had the
2 perfect up-to-date everything fancy agreement that was sought
3 to be adopted, you would still have a right to decline or
4 object to that adoption?

5 MS. WHITE: Probably not in that sense. So then it
6 is okay if they --

7 CHAIRMAN BAEZ: No, don't -- you know, I understand
8 as a ministerial -- look, I have seen contracts with two names
9 on them. You know, that is a -- but I think your suggestion
10 that somehow there is an unfair double standard, if that is
11 true it is only because the law operates to protect the CLECs
12 and not the ILECs necessarily in that kind of relationship.

13 Now, I could be wrong. But it doesn't seem to me
14 that that part of the law, the adoption rules are necessarily
15 skewed to protect the ILEC. Their very existence is not skewed
16 to protect the ILEC.

17 MS. WHITE: I understand your argument and I
18 understand your position. I don't like it, let's put it that
19 way. But I won't argue with it anymore.

20 CHAIRMAN BAEZ: Fair enough.

21 MR. HAZZARD: Mr. Chairman, if I may just briefly.

22 CHAIRMAN BAEZ: Mr. Hazzard.

23 MR. HAZZARD: You are exactly correct. Section
24 252(i) is labeled --

25 CHAIRMAN BAEZ: Finally someone thinks I'm right.

1 MR. HAZZARD: -- a most favored nations provision.
2 And it has been called by the FCC the primary vehicle of
3 precluding nondiscrimination. And what the FCC's new and
4 existing interconnection agreement adoption rules says, a CLEC
5 can take an entire agreement if they want to. And all we want
6 is the Network Telephone agreement in its entirety. That is
7 all we want.

8 CHAIRMAN BAEZ: But with all due respect, Mr.
9 Hazzard, I honestly don't think that -- certainly not for me
10 the decision on this hinges on whether I agree with Ms. White
11 that they are being treated unfairly by their disagreement to
12 adopt -- I mean, I understand the terms that you are trying to
13 adopt, and obviously there is some issue with that, so I don't
14 want to throw out the suggestion that just based on the fact
15 that I disagree with some purported double standard that that
16 should carry the day. It doesn't. I think the issues are much
17 more than that.

18 MR. HAZZARD: Correct. And at the end of day the
19 statutory provision is the statutory provision, and the FCC's
20 implementing rules are what they are. And they can and may be
21 modified in the future. But under the existing rules, Z-Tel is
22 entitled to adopt in its entirety at its selection the existing
23 interconnection agreement of another party, subject to some
24 very, very limited restrictions, all of which have been vetted
25 by both Z-Tel, by BellSouth, and by your staff. And we think

1 at the end of the day that the Commission should go ahead and
2 adopt the staff recommendation.

3 CHAIRMAN BAEZ: Thank you. Commissioner Deason had
4 lined up

5 COMMISSIONER DEASON: This is a question for Ms.
6 White. I understand your concern about the unilateral nature
7 of what is being proposed here. But given the assurances that
8 Commissioner Davidson has just elicited, why would you not be
9 willing to sign it and it be not unilateral, but a bilateral
10 agreement that is submitted to the Commission?

11 MS. WHITE: Well, I think it goes back to our
12 principle of adopting agreements that no longer comport with
13 the law. The law has changed --

14 COMMISSIONER DEASON: Let me interrupt you there. If
15 they are not in comport with the law, there is a change in law
16 process that we go through. And as soon as the FCC issues the
17 order and it all becomes crystal clear, then you can engage in
18 that process, can you not?

19 MS. WHITE: Which I'm sure won't be crystal clear,
20 but --

21 COMMISSIONER DEASON: Well, I was kind of facetious,
22 too.

23 MS. WHITE: I understand that, but that is not
24 BellSouth's position. BellSouth's position is that --

25 COMMISSIONER DAVIDSON: Has anyone determined that

1 these agreements are unlawful? Has anyone determined it? I
2 know it is BellSouth's position, but has a determination been
3 made by a commission or a federal agency, anyone that the
4 agreement is unlawful?

5 MS. WHITE: No. The agreements we believe -- and
6 what we are saying is that the agreements don't comport with
7 the law anymore, they provides for --

8 COMMISSIONER DAVIDSON: I understand that. I
9 understand. Sorry, I didn't mean to interpret you, Chairman.

10 MS. WHITE: No, I do not believe that a commission
11 has.

12 CHAIRMAN BAEZ: There is a fact that may have escaped
13 me. Is the Network Telephone agreement currently under changes
14 subject to the change in law?

15 MS. WHITE: Yes, and I believe we have given notice
16 to all the CLECs.

17 CHAIRMAN BAEZ: Mr. Hazzard, do you recognize that
18 the agreement that you are attempting to adopt is in flux?

19 MR. HAZZARD: We recognize that the entire industry
20 is in flux, and we would be willing --

21 CHAIRMAN BAEZ: No, no, that's not what I asked.

22 MR. HAZZARD: We would be willing to stand in the
23 shoes of Network Telephone with any notice they have received
24 from BellSouth regarding any changes of law that BellSouth
25 would like to negotiate.

1 CHAIRMAN BAEZ: Somehow that doesn't -- Ms. White, I
2 know that Mr. Hazzard probably said that before, why doesn't
3 that have the effect of saying, you know, we don't have an
4 outlier out there getting the benefit of -- getting more than
5 the normal benefit of an outdated agreement. Why did his
6 assurances --

7 MS. WHITE: Well, I mean, the first thing is Z-Tel's
8 existing agreement has expired, whereas Network Telephone's
9 goes on to 2006. So to that end, it is further out.

10 CHAIRMAN BAEZ: If the change in law -- if the
11 Network Telephone agreement were up to date today, would there
12 be an adoption problem?

13 MS. WHITE: Do you mean if it had included in it --

14 CHAIRMAN BAEZ: In the Network Telephone agreement as
15 of today had already gone through the change in law negotiation
16 such that, you know, such that the adoption would be clean, I
17 mean, would there still be a problem?

18 MS. WHITE: Yes, then would probably be no problem.

19 COMMISSIONER DAVIDSON: Chairman, I think we have had
20 a lot of good discussion and Z-Tel has sort of clarified its
21 position on the record. I think we have all of those comments
22 and will, I think, adhere to those. We really do have three
23 choices; either no adoption, adoption, or require all of these
24 to be arbitrated. I just hopped online to look at whether
25 252(i) had been specifically, sort of, somehow negated by

1 JSTA I/USTA II. It hasn't. We are in a state of flux. I know
2 Commissioner Deason is looking forward to really, sort of,
3 clarifying that. He has got great admiration and respect for
4 the FCC. So, with that I'm just --

5 CHAIRMAN BAEZ: But not for their timing, right?

6 COMMISSIONER DAVIDSON: Exactly. -- going to move
7 this along, I'm going to move staff.

8 CHAIRMAN BAEZ: Before there is a second, I just want
9 to say, you know, I think there are three choices. Two of them
10 are pretty distasteful to me. I don't think that we should be
11 going to arbitration on these, especially with the law in flux.
12 I mean, we have all been here and done the whole back and forth
13 and we have to retreat, and advance, and change, and so on.
14 And I think that some of the suggestions that I have heard here
15 in a mechanical sense kind of cripple the adoption rule. I
16 don't know if there is an attempt to stop the adoption
17 procedures dead in their tracks, because the law is in flux.
18 That is the trouble, that is the trouble that I'm having.

19 I'm comforted, I will say, by the fact that this has
20 thankfully some -- will all come to an end somehow and soon, so
21 there will be some discussion on them being valid. I just had
22 to put in my two cents worth.

23 Commissioner Bradley, I know that you wanted to say
24 something.

25 COMMISSIONER BRADLEY: Right. I just wanted to make

1 sure that I understand what we have agreed to here. It seems
2 as if we have somewhat clarified the intent, or our intent, and
3 is it that we have agreed that this agreement is -- well, for
4 lack of a better word, is an interim agreement subject to
5 change based upon actions that possibly may be taken by the
6 FCC, is that what we are agreeing to?

7 CHAIRMAN BAEZ: The FCC decisions to be finalized are
8 definitely going to have an impact on this agreement and all
9 others, I would expect.

10 Commissioner Davidson, on your motion did you
11 intend -- and there was one thing I heard that Mr. Hazzard
12 suggested on behalf of his client that I was particularly fond
13 of, and that is that they would stand in the shoes of Network
14 Telephone as to any notification or any change of law process.
15 Did that offer, you know, if your word is still good, then I
16 don't know how you --

17 COMMISSIONER DAVIDSON: Well, my view is --

18 CHAIRMAN BAEZ: I don't know if you could adopt that
19 into --

20 COMMISSIONER DAVIDSON: I don't know if we can.
21 252(i), I mean, I think we can indirectly. 252(i) doesn't have
22 a lot of specific, sort of, room for us to modify. You adopt
23 the agreement in its entirety. The way I would look at this is
24 that there have been several statements made that are on the
25 record, and I think we can rely on those going forward. And if

1 Z-Tel came in and did something that was inconsistent, I
2 believe they would be estopped from doing that based on their
3 representations here today.

4 CHAIRMAN BAEZ: Fair enough.

5 COMMISSIONER BRADLEY: And if the agreement is
6 adopted in the spirit such as what I just attempted to get
7 clear in my mind -- this is a question for staff -- how long or
8 what type of -- first of all, what type of agreement would
9 exist, and for how long, if the FCC changes its rules in such a
10 manner that this agreement would be inconsistent with the FCC
11 rules? How long would the agreement continue to exist during
12 the interim, and how long would it take to adopt an agreement
13 that is consistent with the anticipated FCC rule changes? Do
14 you understand what I'm getting at?

15 MR. ROJAS: Commissioner, the agreement would stay in
16 place for the duration of the contract, which I believe is set
17 to expire in July of 2006. For it to become compliant with the
18 FCC, the parties would have to initiate a change of law
19 proceeding.

20 COMMISSIONER BRADLEY: But 2006 would not be in the
21 spirit of it being interim, would it?

22 COMMISSIONER DEASON: I don't think this would be an
23 interim agreement. It would be only interim in the sense that
24 all agreements are subject to change in law. But this would
25 not have a certain special status different from other

1 agreements. That would be my understanding.

2 Let me ask this question, if I may. It may be more
3 of a statement than a question. I appreciate Z-Tel's
4 willingness to indicate that they consider themselves subject
5 to whatever change of law notice that has been provided, that
6 Z-Tel would put themselves and would comply with whatever
7 requirements that Network Telephone would have to. And I
8 appreciate them -- but it seems to me that if they adopt an
9 agreement that is just inherent.

10 I mean, they can't negotiate or give something more
11 than the agreement says to begin with. I mean, it seems to me
12 that if they want to adopt an agreement that they would be in
13 the shoes of Network Telephone when it comes to these type
14 of -- I don't think because they are adopting an agreement that
15 somehow they become exempt to any change of law notices or
16 proceedings. Maybe I'm missing something.

17 CHAIRMAN BAEZ: That's a good -- if I can put it in
18 the form of a question, and maybe I'm not getting it, but when
19 a change in law -- you know, agreements are adopted, and
20 adopted on down the line. When the underlying agreement
21 changes, does it have the effect -- or are we talking
22 individual negotiations on down the line? I'm assuming they
23 are individual negotiations, correct?

24 MR. HAZZARD: I would agree with you, Chairman. I
25 believe that you adopt the agreement as is and any further

1 negotiations --

2 CHAIRMAN BAEZ: It takes a life of its own.

3 MR. HAZZARD: Yes, sir.

4 CHAIRMAN BAEZ: So, I guess, Commissioner Deason,
5 that is probably the opposite of what --

6 COMMISSIONER DEASON: Then it seems to me that the
7 process would be much easier and we would eliminate a lot of
8 discussion and disputes, if you are going to adopt an
9 agreement, you take it for what it is. And when it gets
10 changed subsequently, that is the same agreement you have
11 because that is what you adopted into. But if that is not the
12 state of the law, so be it.

13 COMMISSIONER DAVIDSON: On this what gave me a little
14 comfort is it went further because it did exactly what you
15 contemplated it would do, but you have got a lot of contracts
16 out there. So basically what they are saying is it is not just
17 that this agreement applies, but we are -- it is as if we are
18 going to stand in the stead of Network. Not just have a new
19 agreement that we will litigate and arbitrate as we see fit,
20 but we are going to take it sort of as we get it right now as
21 it has been, sort of, procedurally developed by Network. So I
22 think the intent addresses what you said.

23 CHAIRMAN BAEZ: And Z-Tel is willing to do that?

24 MR. HAZZARD: That is correct.

25 COMMISSIONER BRADLEY: And let me see if I understand

1 what Z-Tel is agreeing to. What you are agreeing to is to
2 adopt this agreement subject to renegotiation based upon
3 certain changes that might occur within the FCC, or is it that
4 you are agreeing to adopt an agreement that lasts for the
5 duration of what has been called a unilateral contract?

6 MR. HAZZARD: Commissioner, if I may, I think what we
7 are stating is that we would take the Network Telephone
8 agreement subject to whatever change of law notifications that
9 BellSouth has provided under that contract to Network
10 Telephone, or perhaps other parties that may have adopted that
11 agreement and implement or go through the process of
12 implementing those changes of law in accordance with the
13 notices, or any subsequent FCC authority that comes out.

14 CHAIRMAN BAEZ: Commissioner Edgar, you had a
15 question, as well. You have been waiting patiently.

16 COMMISSIONER EDGAR: Yes. I would like to take a
17 step back for a moment and ask a more general question. We
18 have heard a lot of discussion this morning about the state of
19 the law being in flux. So as the new person I would like to
20 ask the staff, can you speak briefly to the rights and
21 obligations of an ILEC and a CLEC regarding adoption of an
22 existing agreement under 252(i) in light of USTA I, USTA II,
23 and the TRO.

24 MR. ROJAS: Commissioner, Section 252 creates an
25 obligation that, in this instance, I think, is unchanged by the

1 current state of flux in the law. I think that we lay out in
2 the recommendation that it is a unilateral right of the CLEC to
3 adopt these agreements. And the frame of time in which Z-Tel
4 has sought to adopt this was before the effective date of the
5 interim rules order which imposes a freeze time. Because of
6 the window of time Z-Tel sought to adopt this in, the original
7 notice of adoption was July 23rd of 2004, that they have a
8 unilateral right to adopt into this existing agreement. I'm
9 not sure if I answered your question.

10 COMMISSIONER EDGAR: Mr. Chairman.

11 Ms. White, could you respond to that, please?

12 MS. WHITE: USTA I, USTA II, TRO, they all changed
13 what is required to be unbundled and provided by the ILECs to
14 the CLECs. I'm the first to admit it is still changing since
15 all we have is the press release from the FCC vote on the final
16 rules. The problem is that 252(i) does allow CLECs to adopt
17 any other agreement.

18 The FCC ruled, I guess it was in July of 2004, that
19 they had to take all or nothing. Before that they could take
20 piece-parts, adopt piece-parts of an agreement. In July of
21 2004 the FCC ruled that they were changing their position on
22 that, and it meant now that they had to take either the entire
23 agreement or none of it.

24 Our position is that the entire agreement is not
25 adoptable because it is not compliant with the current state of

1 the law. Z-Tel's position is that 252(i) is an absolute right.
2 This issue is being argued before several state commissions in
3 BellSouth's region, but I don't believe any state commission
4 has made a ruling on it yet, at least as far as BellSouth's
5 region. I'm not sure of the others. But it is our position
6 that because there is such a substantial change of law, that
7 you cannot adopt all of the agreement and therefore you cannot
8 adopt any of it.

9 COMMISSIONER DEASON: Mr. Chairman, I believe there
10 is still a motion pending, and I would like to second that
11 motion.

12 CHAIRMAN BAEZ: There is a motion and a second to
13 approve staff's recommendation. All those in favor say aye.

14 (Unanimous affirmative vote.)

15 CHAIRMAN BAEZ: All those nay. Show it passed
16 unanimously. Thank you for your comments, all of you.

17 * * * * *

1 STATE OF FLORIDA)

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CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

4

5 I, JANE FAUROT, RPR, Chief, Office of Hearing
6 Reporter Services, FPSC Division of Commission Clerk and
7 Administrative Services, do hereby certify that the foregoing
8 proceeding was heard at the time and place herein stated.

7

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

10

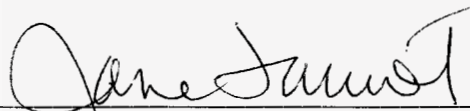
11 I FURTHER CERTIFY that I am not a relative, employee,
12 attorney or counsel of any of the parties, nor am I a relative
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DATED THIS 25th day of January, 2004.

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16

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Administrative Services
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