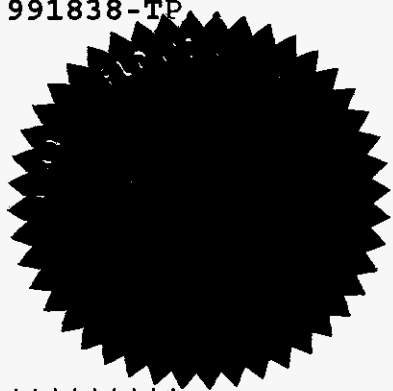


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 991838-TP

PETITION BY BLUESTAR NETWORKS, :
 INC., FOR ARBITRATION FOR :
 CERTAIN RESOLUTION ISSUES IN :
 INTERCONNECTION NEGOTIATIONS :
 WITH BELL SOUTH :
 TELECOMMUNICATIONS, IN. :



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PROCEEDINGS: PREHEARING CONFERENCE

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

DATE: Monday, February 21, 2000

TIME: Commenced at 9:30 a.m.
 Concluded at 12:50 p.m.

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

REPORTED BY: KORETTA E. STANFORD, RPR
 Official FPSC Commission Reporter

DOCUMENT NUMBER-DATE

02531 FEB 24 8

FPSC-RECORDS/REPORTING

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P R O C E E D I N G S

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COMMISSIONER JACOBS: We'll call the hearing to order.

Counsel, read the notes.

MS. CLEMONS: By notice issued February 8th, 2000, this prehearing conference has been set for the time and place, the purpose is as set forth in notice.

COMMISSIONER JACOBS: Take appearances.

MR. GOGGIN: Michael Goggin and Phil Carver for BellSouth Telecommunications.

MS. KAUFMAN: Good morning.

Vicki Gordon Kaufman of the McWhirter Reeves law firm on behalf of BlueStar Networks, Inc.

And with me is Mr. Norton Cutler, general counsel for Bluestar.

COMMISSIONER JACOBS: The first name is Mort?

MS. KAUFMAN: Norton, N-o-r-t-o-n.

MS. CLEMONS: Donna Clemons, staff counsel on behalf of the PSC.

COMMISSIONER JACOBS: Very well.

Counsel, how would you like to proceed?

MS. CLEMONS: Commissioner, we have some preliminary matters.

The first one is BlueStar's Motion to Compel, which was filed on January 20th, 2000.

1 If the Commissioner would like to hear from the
2 parties.

3 COMMISSIONER JACOBS: Okay. Yeah, we have a
4 series of motions here. Do we need to argue them each
5 individually?

6 MR. CARVER: I think we do. Actually, I guess I
7 have one matter I'd like to raise preliminary before even
8 getting into the motions, which is this:

9 At 4:35, Friday afternoon, BlueStar served on
10 BellSouth, basically, with some sort of small book-sized
11 motion. And they have indicated that previously that they
12 plan to argue this today.

13 I don't believe it's appropriate to file
14 something at 5:00 Friday and then argue it first thing
15 Monday before BellSouth has had a chance to respond to it
16 in writing, and there's some other circumstances.

17 So, I object to that being argued. And I don't
18 need to go into my objection at length now, but I'd just
19 like to note that I would like to know whether or not they
20 intend to raise this today, because if they do, I would
21 like to argue my objection to hearing it today before the
22 motion begins.

23 COMMISSIONER JACOBS: Which motion is this?

24 MS. KAUFMAN: Commissioner Jacobs, as Mr. Carver
25 said, we filed a motion on Friday to strike portions of

1 Mr. Varner's rebuttal testimony. We don't have any
2 intention of requesting that we argue it today.

3 We understand Bell's time for response has not
4 run. And I'm not sure where Mr. Carver's getting his
5 information. Nonetheless, we are happy to argue it at the
6 beginning of the hearing on March 2nd, if that's your
7 pleasure.

8 MR. CARVER: I appreciate that. Just to
9 clarify, we had a deposition last Wednesday. And at that
10 time, Mr. Cutler told me that they were going to argue
11 this today. And I haven't heard back from him, so I
12 thought they still intended to. So, I appreciate their
13 giving us the extra time.

14 COMMISSIONER JACOBS: Okay. Sounds like we have
15 a happy result.

16 MR. CARVER: Yes.

17 MR. CUTLER: I would point out, Mr. Carver
18 received a letter on Friday, which certainly said we did
19 not intend to argue this today.

20 COMMISSIONER JACOBS: Okay, but we've got that
21 resolved.

22 MR. CUTLER: Okay.

23 COMMISSIONER JACOBS: We won't argue it today.
24 We were about to argue it anyway, but we won't.

25 Let's see. So, then we're going to argue each

1 of these individually. Don't want to get -- sounds like
2 we're full of energy this morning. I don't want to get
3 too long-winded here.

4 Why don't we go with the motion for
5 reconsideration first. And that's your motion, BlueStar?

6 MS. KAUFMAN: You talking about the motion for
7 reconsideration of your ruling not allowing the issue on
8 liquidated damages, sir?

9 COMMISSIONER JACOBS: Right.

10 MS. KAUFMAN: Okay. Essentially, and I can be
11 very brief, we believe that this Commission clearly has
12 authority to include liquidated damages and penalties in
13 an interconnection agreement. We are aware, however, that
14 this issue has come up before.

15 So, we're not unaware of the Commission's
16 precedent on the issue. However, we would point out to
17 the Commission that recently the Georgia Public Service
18 Commission, who had a position similar to the Florida
19 Commission's position, has looked at that issue again and
20 has decided that they do have the authority to include
21 these sorts of penalties and liquidated damages in
22 interconnection agreements.

23 The state of the industry makes it critical that
24 there be some sort of penalty for nonperformance.
25 Otherwise, the LECs, then in this case, BellSouth, don't

1 have any incentive to perform.

2 But having said all that, we recognize the
3 Commission's position on this. And to the extent that you
4 intend to deny our motion for reconsideration, what we
5 would ask is that you clearly include that denial in the
6 final order in this case for purposes of appeal.

7 Really what we're trying to do is to be sure
8 that that issue is preserved, because right now it would
9 be our intent to appeal that.

10 COMMISSIONER JACOBS: Mr. Carver? I'm sorry,
11 Mr. Goggin.

12 MR. GOGGIN: By way of quick response, we think
13 the Commission has got it right. We noted in our response
14 to their motion for consideration that the standard for
15 reconsidering such an order is whether the Commission has
16 overlooked or failed to consider any of the arguments that
17 were raised by BlueStar in its original response to our
18 motion.

19 And the order, very clearly, sets forth each of
20 BlueStar's arguments, states that they have been
21 considered; and nevertheless, rules that the issue should
22 be removed from arbitration. Under the circumstances, we
23 don't think that a motion for reconsideration would be in
24 order.

25 On the matter of whether or not Georgia has seen

1 fit to include such provisions in its agreements, I guess
2 our first point would be that what Georgia has done or not
3 done would not necessarily be relevant here, in any event,
4 but we're not aware of any decision by Georgia to compel
5 the inclusion of such provision in an agreement in
6 Georgia.

7 And secondly, to the extent that they request
8 reconsideration to ensure that the order removing this
9 issue be included in the final order for purposes of
10 taking up the matter for appeal, it's our understanding
11 that they could certainly appeal that order, even if it
12 were included in a prehearing order or an order
13 establishing procedure.

14 So, we don't think that there's any need to
15 grant a motion for reconsideration for that reason.

16 COMMISSIONER JACOBS: I am -- I'm persuaded that
17 what I'd like to do is defer ruling on the motion to
18 consideration to the panel. While I think it could be
19 disposed of today, I think it would be -- we do have the
20 discretion to let the panel rule on that.

21 So, that will be the ruling is we'll defer that,
22 and then let it be ruled on by the panel at hearing.

23 Okay. Next is the Motion to Compel. That's
24 BlueStar's motion?

25 MS. KAUFMAN: Yes, Commissioner. Mr. Cutler

1 will argue that motion.

2 COMMISSIONER JACOBS: Okay.

3 MR. CUTLER: Good morning, Your Honor. My name
4 is Norton Cutler. I'm the general counsel for BlueStar
5 Networks. Most of the issues in this Motion to Compel
6 resolve around BellSouth.

7 Thank you very much. I'm unfamiliar with the
8 microphone system here.

9 Most of the issues to compel that we're pressing
10 on with involve BellSouth's objections to producing a
11 large number of documents relating to their provision of
12 ADSL services. And we should probably sort of go all the
13 way back to the beginning, I think, since this is our
14 first appearance in this case.

15 This -- BlueStar is a so called data LEC, which
16 provides, generally speaking, data services to mainly
17 small and medium businesses in the state of Florida,
18 although we do anticipate that there might be some
19 residential services as we move forward.

20 In order to provide these services, BlueStar
21 provides so called DSL services over copper loops, which
22 it obtains as unbundled network elements from BellSouth,
23 among other ILECs.

24 BellSouth provides services itself which it
25 calls ADSL, and that stands for Asynchronous Digital

1 Subscriber Line services. The services that BellSouth
2 provides to itself are provided via a wholesale tariff,
3 which BellSouth filed at the FCC, claiming that there was
4 no state jurisdiction over it. And BellSouth then
5 purchases from that wholesale tariff services which it
6 sells to its customers.

7 I think in most states, and Florida as well,
8 these services are supposedly sold by something called
9 BellSouth.net.

10 COMMISSIONER JACOBS: So, your contention is
11 that BellSouth provides the -- basically, the loops for
12 ADSL at wholesale to its subsidiary, and then the
13 subsidiary actually offers the service to the public.

14 MR. CUTLER: I believe that's the position they
15 take. I think BlueStar would say the fact of the matter
16 is BellSouth.net is not a separate subsidiary. And under
17 any stretch of the imagination, it's really part of
18 BellSouth.

19 But that's the position that BellSouth takes,
20 and it's summarized in Mr. Varner's rebuttal testimony, is
21 that BellSouth is providing these services to another arm
22 of BellSouth via a wholesale tariff.

23 Now, what BlueStar is seeking in Interrogatories
24 2, 3, 5, 9, 16, and 18 and document requests 5, 6, 7, and
25 12 is cost studies --

1 MR. CARVER: I'm sorry, could I have those
2 numbers again?

3 MR. CUTLER: Sure. 2, 3, 5, 9, 16, and 18.
4 That's of the interrogatories. And then document requests
5 5, 6, 7, and 12.

6 MR. CARVER: Thank you.

7 MR. CUTLER: The cost studies are the cost
8 studies that underlie the wholesale tariff that was filed
9 at the FCC.

10 And then the rest of those interrogatories and
11 document requests deal with various technical parameters
12 and plans and other issues surrounding what BellSouth
13 currently offers itself or what it plans to offer itself.

14 We could go through them in detail, if you would
15 like, Your Honor. I am trying to be quick, but I mean,
16 that's the essence of the issue there.

17 And BellSouth's own testimony says that the real
18 issue here is parity. So, BlueStar's just trying to
19 explore what BellSouth provides for itself.

20 COMMISSIONER JACOBS: The -- I don't have the
21 parity provisions in the act with me.

22 What do they specify in terms of what the
23 entering CLEC measures against? Do you measure against
24 the services that the ILEC provides itself or that it will
25 provide itself or any of its subsidiaries?

1 I'm not sure where the language for that is.

2 MR. CUTLER: I think you're dealing with parity
3 vis-a-vis performance measures.

4 And again, this, I think, is parity in terms of
5 actual service or UNE offering.

6 COMMISSIONER JACOBS: Okay.

7 MR. CUTLER: But -- just, for example, on the
8 cost study, the FCC's recent line-sharing order made it
9 clear that it was very important to look at the cost study
10 that was filed by the ILEC for the services that the ILEC
11 provides itself to see what that cost is.

12 And that's the principle document that BlueStar
13 wants out of all these requests is that cost study, but
14 there are a number of other requests and interrogatories
15 there, which deal with the technical parameters of what
16 BellSouth provides itself that BlueStar wants to explore.

17 For instance, going forward there, obviously,
18 needs to be something done about fiber loops here. And
19 one of the solutions that other RBOCs have talked about
20 and, indeed, BellSouth has discussed on occasion with
21 BlueStar, is putting so called line cards in the, what I
22 would call, a serving area interface.

23 I'm not sure that's the right BellSouth
24 terminology, but basically at the end of the fiber where
25 the copper begins. And put a -- there's a terminal that

1 various ILECs have talked about installing there.

2 And again, that's just a technical parameter
3 issue about what are BellSouth's plans in that area and
4 how is it going to work.

5 For another issue, the question arises will
6 there be loop conditioning on various types of loops going
7 forward and what will that cost? And that's, obviously, a
8 key issue in this case is loop conditioning.

9 And BlueStar's just trying to explore what are
10 BellSouth's plans for conditioning loops for itself. And
11 how does BellSouth plan to cost that out?

12 Another one of BlueStar's contentions in this
13 case is that loop conditioning is a perfectly ordinary
14 part of normal maintenance. Whenever somebody goes out
15 and maintains loops, they take out bridge taps and load
16 coils. And therefore, that loop conditioning is already
17 in the cost factor dealing with maintenance. And BlueStar
18 shouldn't have to pay separately for that.

19 That's another issue that is addressed in these
20 document requests.

21 The next -- and that's Interrogatory Number 2 --
22 sorry.

23 COMMISSIONER JACOBS: Excuse me.

24 MS. CLEMONS: Commissioner, may I interject?

25 Staff was under the impression that BlueStar had

1 withdrawn Interrogatories Numbers 2, 3 and 20. That's
2 what was stated in your Motion to Compel, footnote two on
3 page one.

4 MR. CUTLER: I believe that was a proposal to
5 completely resolve the issue; that if -- if the rest of
6 the interrogatories and document requests were answered,
7 we would resolve those.

8 However, we certainly are not going to back away
9 from that, and we would be willing to not press on with
10 those.

11 COMMISSIONER JACOBS: So, let me make sure we
12 understand. You are pursuing your request for responses
13 to Interrogatories 2 and 3? And what was the -- there was
14 another one that wasn't in my list here; 2, 3 --

15 MS. CLEMONS: And 20.

16 COMMISSIONER JACOBS: -- and 20. So, you are
17 pursuing responses to those three?

18 MR. CUTLER: Could I have a moment to have a
19 quick look at those?

20 COMMISSIONER JACOBS: Okay.

21 MR. CUTLER: Please, Your Honor.

22 That's fine. We will not -- we will stand by
23 that. And I'm sorry, I was really meaning to explain more
24 that --

25 COMMISSIONER JACOBS: Proceed.

1 MR. CUTLER: It was more the general issue of
2 the -- of BellSouth's objection that BlueStar can't
3 receive anything dealing with so called retail cost
4 studies.

5 COMMISSIONER JACOBS: Okay.

6 MR. CUTLER: But to summarize on that point,
7 what BlueStar really wants to gain from pressing on with
8 this Motion to Compel is the cost studies that BellSouth
9 did that underlie its own wholesale ADSL tariff filed at
10 the FCC and any other studies that were done dealing with
11 loop conditioning, whether or not it was for that service
12 or any other service provided by BellSouth.

13 And I don't believe those are covered by 2, 3,
14 and 20.

15 COMMISSIONER JACOBS: The information that would
16 -- that you would receive in response to those, that's
17 going to give you, essentially, background on how they
18 came up with their cost; is that correct?

19 MR. CUTLER: Or, indeed, what the costs were.

20 COMMISSIONER JACOBS: And the purpose of that is
21 so that you can understand whether or not you're being
22 assessed something that's comparable to what Bell would
23 assess itself to provide the same service?

24 MR. CUTLER: Yes, Your Honor.

25 COMMISSIONER JACOBS: Okay. If I recall in the

1 issues, you accepted BellSouth's testimony as to cost.

2 MR. CUTLER: Well, that gets us to another
3 interesting problem that probably belongs more to the
4 motion for surrebuttal testimony, but I'd be happy to
5 address it now.

6 COMMISSIONER JACOBS: Okay. And you did have a
7 motion on that, right?

8 MR. CUTLER: Yeah. The issue there is even
9 though we accept those particular proposed rates,
10 BellSouth seems to have taken them back.

11 COMMISSIONER JACOBS: Okay. We'll address that
12 then.

13 MS. CLEMONS: Commissioner, if I may make a
14 suggestion. It appears to me that it would be more
15 efficient if we went through each of these one by one,
16 because I think there are distinctions between each of the
17 interrogatories and the production requests.

18 COMMISSIONER JACOBS: Okay, that sounds fine.

19 MR. CARVER: Could I ask for one clarification?
20 I apologize, but I'm just not clear at this point of which
21 parts of its Motion to Compel BlueStar is requesting.

22 Originally, by my count, they were moving to
23 compel 9 Interrogatories and something like 10 or 11 PODs.
24 And it sounds like what they're after now is a much
25 smaller universe of material.

1 And for my own clarification, I'm just trying to
2 match up what they want with the particular request so
3 that I can respond to it. So, if they can clarify that, I
4 would appreciate it.

5 MR. CUTLER: I believe there was a letter sent
6 to you on Friday that clarified that, but let me just go
7 through it from start to finish.

8 COMMISSIONER JACOBS: Okay, that would be good.

9 MR. CUTLER: Okay.

10 Again, we are seeking all the information, which
11 was covered by the so called retail objection.

12 Now, I believe that is -- and again, 2 and 3,
13 which are covered by that objection we have, obviously,
14 given up on and I appreciate Ms. Clemons pointing that
15 out, and I apologize for the confusion there. But our
16 opinion is 5, 9, 16 and 18 are covered by that objection.

17 COMMISSIONER JACOBS: Okay.

18 MR. CUTLER: As are document requests 5, 6, 7
19 and 12.

20 COMMISSIONER JACOBS: Now, on my document I see
21 11 as well, but it's not included in your --

22 MR. CUTLER: 11 is also covered by that. And I
23 have it sort of separately broken out, because that deals
24 with one particular issue.

25 COMMISSIONER JACOBS: Okay. So -- okay. And

1 then the production request -- was that all the
2 interrogatories?

3 MR. CUTLER: Then we would also like
4 Interrogatory Number 17 seeks, basically, information on
5 loop make-up of which BellSouth has provided quite a bit.

6 And there's one more issue that hasn't been
7 recalled there and that is that BlueStar would like to
8 review LFACS, which -- I think it's called Loop Facilities
9 Assignment something or other. And as will become more
10 obvious as this case goes on, I think it's already in the
11 testimony.

12 BlueStar is seeking so called loop make-up
13 information. That, basically, tells you how long is the
14 loop, what's the wire gauge, is it fiber, is it copper,
15 does it have load coils, does it have bridge taps, does it
16 have things like that.

17 COMMISSIONER JACOBS: Okay.

18 MR. CUTLER: BellSouth has offered to make LFACS
19 available to BlueStar and basically testify that that
20 should provide us with enough information. And I guess
21 BlueStar simply wants to look at LFACS.

22 COMMISSIONER JACOBS: They've offered it to you,
23 and you haven't had a chance to review it yet.

24 MR. CUTLER: Well, I believe that we had an
25 informal conference where I asked to review it to

1 contemplate accepting that offer, but I just haven't had
2 an opportunity to look at it.

3 We don't resolve the issue completely, I'd
4 certainly like to look at it before the case goes forward.

5 COMMISSIONER JACOBS: I see.

6 MR. CARVER: If I may, Commissioner, I'm sorry
7 to interrupt, but Mr. Cutler has had some conversations
8 with our negotiators, and I don't know what he said to
9 them, but I just wanted to clarify on this one, access to
10 this particular document or this database has not been
11 requested.

12 I think what he's saying, although he didn't say
13 it directly, is that if you look at Interrogatory Number
14 17, in response to it, we identified a particular
15 database.

16 And now what he's doing is in effect making an
17 impromptu request to produce the database, even though he
18 has not previously asked for it. And again, I can't say
19 what he did or didn't talk to our negotiators about, but
20 this is the first time I've heard about this.

21 COMMISSIONER JACOBS: Okay.

22 MR. CARVER: So, I don't think this is properly
23 part of the Motion to Compel.

24 COMMISSIONER JACOBS: I don't have a copy of 17.
25 Could you give me a copy of that?

1 MS. CLEMONS: Yes, Commissioner.

2 I did not understand 17 to be one of the
3 interrogatories that were in dispute. It was not listed
4 in the Motion to Compel.

5 MR. CUTLER: I believe, on page 4 it's listed in
6 paragraph 8.

7 COMMISSIONER JACOBS: Let's review what we have.
8 We have 5, 9, 16, 17, 18, 20 -- I'm sorry, 20, right. 20
9 was withdrawn. And 21 and 23?

10 MR. CUTLER: We are no longer seeking 21 and 23.

11 COMMISSIONER JACOBS: Okay. So --

12 MR. CUTLER: 19 --

13 COMMISSIONER JACOBS: So, just up to -- got it.

14 MR. CUTLER: The other one that we're seeking to
15 press on with is document request number 19.

16 COMMISSIONER JACOBS: Okay. There were some
17 document production requests here, a list of them. Let me
18 find that.

19 Okay. Production Requests. Let's confirm those
20 as well.

21 Well, why don't you tell me. Which ones are you
22 pursuing?

23 MR. CUTLER: Okay. On the document request we
24 are seeking responses for 5, 6, 7 and 12. And then number
25 11 and number 17 and number 19.

1 And by the way, on those last three document
2 requests, the reason why we're pressing our Motion to
3 Compel is because two of the BellSouth witnesses who were
4 deposed last week said that documents existed in those
5 categories, even though -- I think BellSouth took the
6 position that they don't exist.

7 COMMISSIONER JACOBS: So, 5, 6, 7, 11, 12, 17
8 and 19 are your document production requests that you're
9 pursuing.

10 MR. CARVER: If I understand counsel correctly,
11 he's saying there are some things that are not included
12 within his Motion to Compel and based upon something he
13 thinks he heard at a deposition last week, he's now added
14 some new ones.

15 Again, news to me, but if that's what it is, if
16 he could just identify the new ones here. I mean, which
17 are the ones that were not included within the motion that
18 he's now trying to add?

19 COMMISSIONER JACOBS: 11, 17 and 19?

20 MR. CUTLER: Well, I think 17 was in there
21 before.

22 COMMISSIONER JACOBS: I'm sorry, 11 and 19 then?

23 MR. CARVER: I don't think 17 was.

24 If I could clarify something about 17. Under
25 the Commission's rules we, of course, have to file

1 objections within ten days and then the responses are due,
2 in some instances, in 20 days, in some in 30; in this
3 case, in 20.

4 So, what inevitably happens is that you look at
5 a request on the face of it some particular things look
6 objectionable, and then as you get into the documents it
7 turns out that it's not a problem.

8 What happened was that we filed an objection to
9 17. Immediately after we filed our objection before
10 waiting for the 20-day response, BlueStar filed a Motion
11 to Compel on Interrogatory Number 17.

12 Subsequently, we answered Interrogatory Number
13 17. And in our response, we said, okay, we think this is
14 resolved, because we've withdrawn our objection and we've
15 answered it.

16 Now, as I understand counsel is saying is that
17 in our answer we put something that he didn't know about
18 before. So now, in effect, he's sort of coming to you
19 today and under the general umbrella of a Motion to Compel
20 saying plus I want more documents I haven't even asked for
21 yet.

22 And I will respond to that when we get to that
23 point, but on 17, I just want to make clear, this is not
24 something that was included in their motion. This is
25 something that a different objection was made -- I'm

1 sorry, a different motion was made or different aspect of
2 their motion addressed our objection. We withdrew our
3 objection. And 17 is completely new.

4 MR. CUTLER: I think we're getting confused
5 between Interrogatory Number 17 and document request
6 number 17.

7 COMMISSIONER JACOBS: You did say interrogatory
8 request, Mr. Carver.

9 MR. CARVER: I did. And maybe that's my fault.
10 Let me look again.

11 COMMISSIONER JACOBS: But you did ask for
12 Interrogatory 17 as well.

13 So, your argument was going back to when we said
14 -- you were going back in time for a moment.

15 MR. CARVER: No, actually I was confused, but I
16 think I inadvertently made an argument that goes to the
17 interrogatory.

18 MS. CLEMONS: Commissioner, if I may try and
19 clarify. Interrogatory 17 was included in the Motion to
20 Compel, but BellSouth did respond to it in their
21 responses.

22 COMMISSIONER JACOBS: Okay.

23 MS. CLEMONS: So, I did not think that it
24 remained as one of the disputed requests.

25 COMMISSIONER JACOBS: Okay.

1 MR. CUTLER: And the one thing we want that we
2 did not get there -- and we did ask for all the documents
3 that dealt with the interrogatory. And a document, as
4 defined, which is the electronic database itself, is
5 LFACS.

6 And we'd be happy to accept a couple of sample
7 printouts here. But, I mean, BellSouth has testified that
8 our loop make-up information request is going to be taken
9 care of via electronic access to LFACS. And we certainly
10 think we ought to have an opportunity to look at LFACS.

11 COMMISSIONER JACOBS: Let me just see. Let us
12 get some clarity here. If I understand it, the original
13 objection to Interrogatory 17 was withdrawn. And you
14 provided a response.

15 MR. CARVER: Yes.

16 COMMISSIONER JACOBS: You've reviewed that
17 response. And your position now is that the response is
18 not complete?

19 MR. CUTLER: Yes.

20 MR. CARVER: If I may.

21 COMMISSIONER JACOBS: Mr. Carver.

22 MR. CARVER: To go to POD number 17, our
23 response to produce number 17 is that we have no
24 responsive documents. We, obviously, can't produce what
25 we don't have.

1 Now, on this point --

2 COMMISSIONER JACOBS: On interrogatory or the
3 document?

4 MR. CARVER: I'm talking about the document
5 request now.

6 COMMISSIONER JACOBS: Okay.

7 MR. CARVER: Our response to number 17 is that
8 there are no responsive documents.

9 Now, what Mr. Cutler is saying for the first
10 time -- again, I have not heard this before, is that based
11 on something he thinks he heard in a deposition last week,
12 he believes we do have documents.

13 So, in effect, he's sort of making an ore tenus
14 Motion to Compel us to produce something that we say
15 doesn't exist. I think in fairness, if that's what he
16 wants to do, then he needs to file a written motion, I
17 need to look at the deposition transcript, and I can make
18 a determination as to whether or not he's right.

19 But for him to bring this up now, simply make a
20 representation as to what a witness said when neither of
21 us have the deposition transcript in front of us and
22 expect BellSouth to respond to that on the spot with no
23 advance notice, I don't think that's fair.

24 MR. CUTLER: I would add that I think Mr. Pate
25 and Mr. Varner put in their written testimony that these

1 documents exist, too.

2 Now, I wasn't quite sure what the written
3 testimony meant, so I explored it with Mr. Pate; haven't
4 had an opportunity to depose Mr. Varner yet.

5 MR. CARVER: Well, again, this was a motion that
6 counsel is sort of making up as he goes along today, and I
7 don't believe that this is appropriate. If he wanted to
8 compel production of something, because he thought we had
9 neglected to produce it, he should have filed it.

10 And upon looking at it, I mean, who knows,
11 there's a chance that he's right. And if he is, I'll give
12 him the document, if he simply overlooked it. But if he's
13 wrong, we should have an opportunity to file a response to
14 that.

15 And I just object generally to this process of
16 filing a Motion to Compel that identifies some items as
17 being at issue and then coming to the prehearing
18 conference and trying to raise all sorts of matters that
19 aren't encompassed within that motion.

20 I don't think that's consistent with the
21 Commission's rules, and I really don't think that should
22 be allowed.

23 COMMISSIONER JACOBS: Just a moment.

24 MR. CUTLER: Your Honor, could I suggest that
25 even though I was trying to speed things up, I don't think

1 it's helping.

2 I'll take up Ms. Clemons on her suggestion. I
3 think we need to go one by one here, because we're getting
4 quite confused.

5 COMMISSIONER JACOBS: I agree. And what I want
6 to do is I want to go through your motion to do that.

7 MR. CUTLER: Okay.

8 COMMISSIONER JACOBS: Okay.

9 MR. CUTLER: Okay. Now, can we start with
10 paragraph 4, okay, on page 2 of the motion.

11 COMMISSIONER JACOBS: I'm there.

12 MR. CUTLER: Okay. Now -- okay. Number one,
13 we give up on. Okay? We're no longer pressing on with
14 that.

15 Now, let's go to number 5.

16 COMMISSIONER JACOBS: For now, I don't want to
17 argue each individual one. What I'd like to do is just
18 confirm that you are pursuing a response to that.

19 In other words, you want to pursue a Motion to
20 Compel as to that interrogatory.

21 MR. CUTLER: Okay. We do want to pursue 5, 9,
22 16, and 18.

23 COMMISSIONER JACOBS: Okay.

24 MR. CUTLER: And 11, too. I'm sorry.

25 COMMISSIONER JACOBS: Okay. So then, your

1 motion is withdrawn as to 1, 21 and 23.

2 MR. CUTLER: That's as what is covered in
3 paragraph 4.

4 COMMISSIONER JACOBS: Okay.

5 MR. CUTLER: My co-counsel points out that --
6 why don't we go paragraph by paragraph, okay?

7 And part of the problem here, Your Honor, as is
8 not unusual in a case like this. We filed this Motion to
9 Compel about three weeks ago. And the case has changed a
10 little bit since then. And certain documents have been
11 produced.

12 So, again --

13 COMMISSIONER JACOBS: That's exactly the point
14 of today is to come up-to-date.

15 MR. CUTLER: And I'd be happy to give you a copy
16 of the letter that I wrote to Mr. Carver on Friday.

17 COMMISSIONER JACOBS: That brings everything
18 up-to-date as exactly what you're looking for?

19 MR. CUTLER: I tried to, yes.

20 COMMISSIONER JACOBS: Okay. Well, then, perhaps
21 maybe that -- do you have a copy of that letter, Mr.
22 Carver?

23 MR. CARVER: No, I have not been given a copy of
24 that letter. I haven't received any correspondence from
25 BlueStar in a couple of days. If I had the letter, that

1 might help things.

2 COMMISSIONER JACOBS: Why don't we take a moment
3 and get a copy of that, then.

4 MR. CARVER: One thing I did want to note,
5 though. Counsel said that he was pursuing number 11, and
6 we produced documents in response to number 11.

7 Again, 11 is where we made a preliminary
8 objection, and then once we looked at it we withdrew the
9 objection and we produced documents. And in the response
10 that we filed, paragraph 18 says very plainly that we made
11 production in response to 11. So, I think 11's off the
12 board.

13 COMMISSIONER JACOBS: What I want to do is I
14 want to put this in -- we need to get some closure on
15 exactly what it is we want to argue about. And we need to
16 do that quickly.

17 So what I want to do, if this letter can do
18 that, is what you're telling me, let's get this letter.
19 Let's figure out then where we are in terms of what we
20 actually are going to pursue.

21 Now, then, in terms of whether or not there are
22 disputes over whether or not a response has been given and
23 whether or not that response is complete; that, in my
24 mind, we can argue about as to the Motion to Compel, but
25 we have to get clear on what's included on the motion for

1 the moment.

2 So, we'll go off the record for a moment and
3 we'll get the letter and we'll come back.

4 (Recess taken)

5 COMMISSIONER JACOBS: Go back on the record.

6 All righty. Okay. Where are we now?

7 MS. CLEMONS: Commissioner, the parties have
8 agreed that these are the discovery requests that they're
9 going to pursue: Interrogatories Numbers 9, 16, 17, 18,
10 and 11.

11 MR. CUTLER: I dropped 11, I thought.

12 MS. CLEMONS: You want to drop 11?

13 MR. CUTLER: Yes.

14 COMMISSIONER JACOBS: So --

15 MR. CARVER: Just so I'm clear, it's 9, 16, 17
16 and 18?

17 MR. CUTLER: Yes.

18 MS. CLEMONS: Yes.

19 MR. CARVER: Okay.

20 MS. CLEMONS: With regards to the document
21 requests: 5, 6, 7, 12, 17, and 20.

22 COMMISSIONER JACOBS: Okay. All right.

23 Now, what I'd like to do, let BlueStar argue,
24 and make this as quick as possible, why you think
25 responses are still due on these, and then we'll go back

1 to BellSouth.

2 MR. CUTLER: All right. Unfortunately, I think
3 we need to go one by one, since I tried it the other way,
4 and we didn't get very far, and some of them do go
5 together.

6 First, let's turn to number 9, Interrogatory
7 Number 9.

8 COMMISSIONER JACOBS: Okay.

9 MR. CUTLER: That's the one where BlueStar is
10 seeking their evidence of what BellSouth charges itself.
11 There is a cost study that, again, in lieu of writing and
12 answer to that, all we want to see is that cost study.

13 COMMISSIONER JACOBS: Okay.

14 MR. CUTLER: Okay.

15 Now, 16 and 18 deal with, basically, the same
16 subject.

17 It's our understanding that when BellSouth
18 attempts to so-called qualify a loop for one of its own
19 customers, they use something called LQS, which is the
20 loop qualification, I think, system or something like
21 that.

22 And we're seeking evidence on what plans they
23 have for changing that in the future. And the particular
24 item that we'd like to see, if they're going to do, is
25 currently the so-called LQS is only searchable by working

1 telephone numbers.

2 In other words, you put in a telephone number,
3 and it feeds back some data. We would like to see that
4 database modified so that you could search it via
5 something else, if the -- if that -- if the circuit wasn't
6 hooked up.

7 We've suggested the circuit I.D. number might be
8 something reasonable in some way. In other words, if
9 there's an unused loop between a central office and
10 premise why, there's no way to look that up with LQS. And
11 we're just trying to inquire whether BellSouth has plans
12 to do that in the future.

13 COMMISSIONER JACOBS: Okay.

14 MR. CUTLER: And then 17 is that issue that we
15 were discussing earlier about whether or not we can review
16 LFACS.

17 And I believe that document request number one
18 certainly asks for all the documents relied upon in
19 preparing the interrogatory answers.

20 And I presume they relied upon LFACS.

21 MR. CARVER: I'm sorry, I thought one was off
22 the list. Is one back on the list now?

23 MR. CUTLER: Okay. Your Honor, I'm trying to
24 stay away from procedural activity here, but basically, we
25 want to see LFACS. We think we asked for it in 17,

1 interrogatory request number 17.

2 COMMISSIONER JACOBS: Okay.

3 MR. CUTLER: Now, if Mr. Carver wants to hide
4 behind a claim that we didn't technically move to compel
5 on document request number one, I suppose he can do that.
6 It doesn't seem to get us to the end of a simple question
7 here, which is can BlueStar review LFACS.

8 MR. CARVER: No, actually, I'm just trying to
9 find out what's in from one minute to the next so I can
10 respond. And that was the only point of my question was I
11 just want to know if one is in now or if one is still out.

12 COMMISSIONER JACOBS: Okay. We understand that
13 one is not in. You think that you -- the substance of 17
14 gets you to the LFACS --

15 MR. CUTLER: Yes, Your Honor.

16 COMMISSIONER JACOBS: -- data? Okay.

17 MR. CARVER: Thank you.

18 MR. CUTLER: Okay. Now, should we go through
19 the document requests or would you like to hear from
20 BellSouth on the interrogatories first?

21 COMMISSIONER JACOBS: Let's go ahead and go
22 through the documents requests.

23 MR. CUTLER: Okay. Now, number 5 deals with all
24 documents that BellSouth has relating to their policies
25 and procedures for removing load coils and bridge taps

1 when they're providing ADSL service themselves. That's
2 the retail objection, once again.

3 COMMISSIONER JACOBS: Okay.

4 MR. CUTLER: Number six deals with any cost
5 studies and guidelines that were done on that same
6 subject.

7 Number 7, again, specifically requests the cost
8 study filed at the FCC to support BellSouth's wholesale
9 ADSL tariff.

10 Number 12 refers to documents dealing with the
11 subject of modifying LQS in the future and/or any other
12 mechanizing of the process of providing ADSL loops to
13 itself.

14 COMMISSIONER JACOBS: Okay.

15 MR. CUTLER: I want to make sure my notes are
16 right. Did we agree that 17 was fair game here?

17 COMMISSIONER JACOBS: I have 17 as one.

18 MR. CUTLER: 17 is another parity issue. We'd
19 like to see the provisioning intervals for what BellSouth
20 does for itself on ADSL and ISDN loops.

21 COMMISSIONER JACOBS: And then 20.

22 MR. CUTLER: Number 20 deals with repair
23 intervals, another issue in the case.

24 In fairness, BellSouth took the position that it
25 was too burdensome to produce everything. And BlueStar's

1 position is that there must be something we can look at on
2 that subject, which isn't burdensome.

3 COMMISSIONER JACOBS: So, you've gotten a
4 response to 20, but in your mind it's nonresponsive.

5 MR. CUTLER: There was an objection that it was
6 too burdensome.

7 COMMISSIONER JACOBS: Okay, I understand. Okay.
8 That completes your argument?

9 MR. CUTLER: Yes, but I mean, just briefly to
10 summarize it, it seems like a lot of requests, but we're
11 really not talking about a lot of items here.

12 We're talking about the ADSL cost study that was
13 filed at the FCC, a review of LFACS in some format. And
14 even if we just have some printouts or something or other
15 to look at as to what LFACS printouts look like, the plans
16 for modifying LQS, if any, and loop conditioning cost
17 studies to the extent they exist on the retail side.

18 And I think that sort of generally summarizes
19 what we're looking for.

20 COMMISSIONER JACOBS: Okay.

21 BellSouth.

22 MR. CARVER: Thank you. I think I can group
23 some of these together, because I think the fundamental
24 point and the fundamental reason why we believe that this
25 is not an appropriate request applies to all of them. And

1 that's because they've asked for information.

2 In some instances -- well, information relating
3 to our retail services. In some instances, they've asked
4 for information as to our future plans. And their overall
5 justification is that they're trying to get to parity.

6 But if something doesn't currently exist in our
7 network, and at this point I don't see how they can look
8 to something that's nonexistent to try to determine
9 whether or not there's parity.

10 So, I think right off the bat, any request that
11 goes to our future request or our business plans or what
12 we intend to provide to our customers in the future is
13 something that is not really appropriate.

14 The other thing, I mean, parity, generally
15 speaking under the act, is that we have to give them the
16 same thing that we make available to our retail customers.
17 And it's a pretty broad concept that there's some
18 difficulty sometime in applying it.

19 I think in this particular instance, again,
20 misapplied for this reason. Much of what they've asked
21 about, and this really goes to Interrogatories 9, 16, 18
22 and request to produce 5, 6, 7, and to some extent, 12.
23 They've asked us for information that really relates to
24 how we develop our cost for retail services.

25 Now, a retail service is always going to have a

1 different cost than a UNE. I mean, to give you a very
2 basic example, if you look at voice-grade service, which
3 includes things like, you know, operator services or
4 whatever, when we sell someone a 1-FR, there are items in
5 that that are not in the loop that's used to provide the
6 1-FR. So, fundamentally, there are different costs for
7 the 1-FR than there would be for the two-wire type of loop
8 that's usually used to provide that service.

9 So, what we have done is we've gone through, and
10 to the extent they've asked us for cost studies that
11 relate to true wholesale offerings or UNEs, we've provided
12 them. I think that's an important point, and it's one
13 that I don't want to get lost in the shuffle.

14 We provided to BlueStar a little bit short of
15 5,100 pages of documents. I think the actual number is
16 5,065. They looked at them in our offices, and they
17 requested us to copy for them about 3,100 pages of
18 documents.

19 Of those documents, I would say roughly 3,000
20 pages of those are cost studies. And we have given them
21 studies that relate to UNEs for ADSL. We've given them
22 studies that relate to UNEs for UCL. And we've given them
23 studies that relate to network terminating wire.

24 When you look at the actual cost studies that
25 are really at issue here, which are the ones that support

1 the rates in Mr. Varner's testimony, all of that's been
2 provided.

3 The only thing that we have refused to provide
4 are the, essentially, irrelevant cost studies and some of
5 the other information that goes to how we technically
6 provision things that are services as opposed to UNEs and
7 that are not at issue.

8 Now, in general, that's our position. One thing
9 I do want to clarify though, and Mr. Cutler made a couple
10 comments about the FCC tariff.

11 Essentially, there is a service, I believe it's
12 an ADSL service, that we have tariffed federally in much
13 the same way that access service is tariffed; in other
14 words, it's bought by the person who sells to the
15 customers, but is ultimately used by the customer.

16 We don't necessarily consider that to be a
17 retail or wholesale tariff. It's kind of a hybrid,
18 because of the way it's purchased. But again, it's not
19 what we're talking about here. And to the extent that we
20 are talking about ADSL as a UNE, we produced those cost
21 studies.

22 Now, here's where it doesn't, but here's where
23 that might come into play. Under paragraph 138, I believe
24 it is, or 139 of the FCC's line-sharing order, they say
25 that when you're trying to determine the appropriate cost

1 for the high-frequency portion of the loop that's used for
2 line sharing, then you can look at that federal tariff.
3 And that tariff, or ADSL service, since it has a
4 comparable functionality, should serve as the ceiling for
5 any charge that's made.

6 Now, the position we took originally was that
7 that's not really something that we should produce to
8 them, because we haven't proposed a rate. What we say in
9 Mr. Varner's testimony is that we're trying to respond to
10 the UNE remand order and its provisions relating to line
11 sharing.

12 We have until sometime in June to do that. And
13 we will do that once we work through it, once we figure
14 out what we're going to offer, then we'll know what we're
15 going to provide. And at that point, we'll have a cost
16 figure. Now we don't.

17 So, for that reason, we don't think that's
18 really relevant. Now, that was the position. And
19 frankly, I'll admit, that's a close call. I don't think
20 it's a close call any longer, because looking at the
21 prehearing statement of BlueStar that we got toward the
22 end of last week, they now have removed issue number 2 and
23 issue number 11. Those are the line-sharing issues. And
24 what they have placed in the prehearing order is a
25 statement that they agree to having those resolved in a

1 generic docket.

2 So, the only possible relevance that the ADSL
3 tariff, the federally filed tariff, had to this proceeding
4 related to that issue, which they've now removed.

5 So, once you get rid of that, then you're back
6 to the more general situation that I talked about earlier,
7 which is a simple apples and oranges comparison between
8 retail services that are developed on one cost basis and
9 UNEs that are developed on another.

10 And again, we've produced all the UNE studies --
11 excuse me a moment -- that's not at issue. It's just the
12 retail ones that are at issue.

13 So, that's my general position. And I know this
14 has gone on for a long time, so I won't go through each
15 one specifically, but that relates to 9, 16, 18 of the
16 Interrogatories; 5, 6, 7 and 12 of the PODs.

17 Now, as to the other three, Interrogatory Number
18 17, essentially, we gave an answer to that. They asked a
19 question, we gave them a complete answer. And the answer,
20 it related to a database. And Mr. Cutler's position, as I
21 see it now, is that they want that database.

22 In other words, what he's doing is he's sort of
23 formulating an impromptu request to produce today, which
24 is the first we've heard about it.

25 And across the board, I don't think that's

1 appropriate. It was not encompassed within the Motion to
2 Compel. It's not been the subject of any discovery
3 requests. It's something that having looked at our
4 interrogatory answer, he's decided he wants this, and then
5 he chooses today to bring it up for the first time.

6 So, I mean, I guess, we're well passed the
7 discovery deadline at this point. So, how he would get
8 that information is an issue, but the point is it's not
9 part of his motion, and it shouldn't be considered.
10 That's all for the Interrogatories. I believe those are
11 the only ones.

12 On the PODs, there are two remaining. POD
13 Number 17 was one where they filed the request. We
14 objected initially. This was at the 10-day point. Then
15 BlueStar immediately filed a Motion to Compel.

16 Our response really preempted the motion,
17 because we said we don't have any documents. They just
18 don't exist. Now, in the letter that Mr. Cutler gave me a
19 few minutes ago, which I've seen today for the first time,
20 he states that he believes that in the deposition of Ron
21 Pate taken last time, he gave information that suggests
22 that these documents do exist. I have not seen a
23 transcript. I have no idea what he's talking about. I
24 don't know whether he's right or whether he's wrong.

25 But again, it's not part of his original motion.

1 And it's not something that I think it's appropriate for
2 him to raise for the first time today and, in effect, say,
3 even though we have adequately responded the first time
4 and even though we have taken care their objection and
5 even though that's not an issue, they now want to move on
6 to something else regarding Number 17 and put that into
7 it.

8 Again, if, you know, when we look at the
9 deposition, he wants to send me a letter and tell me the
10 part of the deposition that he thinks reveals that there's
11 some document, I will be happy to look at that letter and
12 look and see if there's a document.

13 If there is, I'll produce it, but I don't think
14 it's appropriate to raise that within the context of the
15 Motion to Compel that doesn't include it.

16 The final one is Number 20. And taken on its
17 face, Number 20 is literally a response for every repair
18 record having to do with every customer of BellSouth, both
19 retail and wholesale, in the entire nine-state region
20 since the beginning of time.

21 I mean, as burdensome responses -- as requests
22 that are burdensome go, this one really has to win some
23 kind of prize, because it is so far beyond impossible. I
24 mean, essentially, they want every repair record.

25 Two responses to that. I think the burdensome

1 party is obvious, and I think it's obvious to BlueStar,
2 because Mr. Cutler's response was, well, there must be
3 something we can give him.

4 The answer to that is even if it were relevant,
5 I don't know what he means by there must be something we
6 can give him. I think the way the process is supposed to
7 work is they make requests and then we respond.

8 The request they made, and the only one they've
9 made before this morning, was for this huge, you know,
10 mass of information that I don't think we could even find.
11 And that's all that's on the table right now. There's
12 nothing else.

13 However, I don't think it's relevant, in any
14 event, because the issue -- and this really goes to Number
15 9, which is expedited repair, is that BlueStar has asked
16 -- and I'm not sure. They've changed their testimony.

17 In direct testimony, their witness says that
18 they wanted their repairs to be done in one hour. And on
19 rebuttal, they said they wanted it to be in two hours.

20 But either way, we have told them that that is a
21 level of expedition, if you will, that's a level of
22 acceleration that we simply cannot do; we don't do that
23 for them, we don't do it for anyone else.

24 So, rather than asking us for documents that
25 would show, you know, whether or not we've done that for

1 anyone else, they've asked for documents that show the
2 repair we offer to customers under the standard repair
3 intervals.

4 In other words, they've asked for information
5 that relates to the repair standards and the application
6 of those standards that they've rejected.

7 And given the fact that the issue is not the
8 standard repair intervals or whether they're adequate or
9 whether BlueStar gets what it needs, the issue is whether
10 they can have this special treatment. I think the
11 standard intervals are irrelevant.

12 Again, though, that's only one of the two
13 reasons why we can't -- why we shouldn't have to comply
14 with the response. The other one is that to the extent
15 they're asking for all repair records anytime, anywhere of
16 anyone, it's just not possible.

17 And that concludes my argument.

18 MS. CLEMONS: Commissioner, with regards to
19 Interrogatory Number 9, which seeks information relating
20 to the cost of the loop BellSouth attributes to its own
21 retail ADSL service, staff is in agreement with BellSouth.

22 We don't see the relevance of retail cost
23 information to this preceding. The cost of providing a
24 loop as a UNE bears no relevance to the cost of providing
25 a service utilizing -- using a loop to a retail customer

1 since the former, the UNE loop, has to be based on Telric.

2 So, we just don't see that there is a cost nexus
3 and therefore, don't believe that the request is
4 reasonably calculated to lead to admissible evidence.

5 With regards to Interrogatory Number 16,
6 however, that seeks the process that BellSouth uses to
7 determine if specific customer locations qualify for
8 BellSouth's retail ADSL service. Staff does believe that
9 this request is reasonably calculated to lead to
10 admissible evidence.

11 In this preceding, BlueStar is complaining that
12 it needs greater access to loop qualification make-up
13 information as a wholesale purchaser of the unbundled
14 loop.

15 And, therefore, we believe that the inquiry goes
16 to the, you know, the heart of the parity issue and that
17 BlueStar wants to make the comparison of whether it's
18 receiving comparable service and comparable information in
19 making that decision.

20 With regards to Interrogatory Number 18,
21 BlueStar seeks information relating to BellSouth's future
22 plans to expand mechanization of its retail DSL ordering
23 capabilities.

24 And initially, staff felt that this was
25 reasonably calculated to lead to admissible evidence,

1 because again, you know, it seems to go at the parity
2 issue, but we have since changed our recommendation,
3 because it is asking for future information. And so, that
4 really has no bearing on whether BellSouth is offering
5 nondiscriminatory service to BlueStar at the present.

6 With regards to Interrogatory Number 17, that
7 interrogatory was answered by BellSouth. And therefore,
8 staff agrees with BellSouth that it's not included in the
9 Motion to Compel.

10 What BlueStar is essentially saying is that we
11 don't like the answer that was given. And I think that
12 should be the subject of a different motion at this point
13 since BellSouth has given them an answer on 17.

14 Turning to the production requests. Number 5
15 seeks BellSouth's procedures and guidelines regarding its
16 policies and practices relative to line conditioning.
17 Staff believes that this information is reasonably
18 calculated to lead to admissible evidence. Again, it goes
19 to parity, whether BellSouth will provide the same
20 services to BlueStar, the same line-conditioning services.

21 COMMISSIONER JACOBS: I'm sorry, that was which
22 one?

23 MS. CLEMONS: That was production request number
24 5.

25 COMMISSIONER JACOBS: Okay.

1 MS. CLEMONS: Production request numbers 6 and
2 7, BlueStar is seeking cost recovery plans associated with
3 line conditioning and cost study that BellSouth has
4 developed to determine its cost to provide retail ADSL
5 service. And for the same reasons that staff expressed
6 with regards to Interrogatory Number 9, we do not believe
7 that that's reasonably calculated to lead to admissible
8 evidence.

9 Again, an unbundled local loop has to be based
10 on Telric; whereas, retail prices do not. So, we don't
11 see that there is any cost nexus.

12 Request number 12 seeks BellSouth's
13 documentation related to plans to mechanize any portion of
14 BellSouth's systems and processes.

15 Again, this seems to be seeking future
16 information. And for the reasons expressed previously, we
17 do not believe that's reasonably calculated, because it
18 has no bearing on the services that BellSouth will provide
19 to BlueStar at the present.

20 Request number 17 seeks documents measuring
21 provisioning intervals for retail digital services.
22 BellSouth has answered that this document does not exist.
23 And therefore, I do not believe that -- staff does not
24 believe that that's going to be encompassed within the
25 Motion to Compel, because BellSouth has already given its

1 answer.

2 With regards to number 20, BlueStar seeks all
3 documents reflecting repair interval measurements on
4 repair services provided by BellSouth through retail and
5 wholesale customers.

6 Staff believes that this is reasonably
7 calculated to lead to admissible evidence. However, there
8 is a concern that the request is overly broad. So,
9 BlueStar would need to tailor that request to something
10 that is manageable.

11 Repair intervals is an issue within this case.
12 And staff does not agree with BellSouth that just because
13 BlueStar is seeking one-hour intervals that it cannot
14 discover information that cannot repair intervals of more
15 than one hour.

16 So, the information is reasonably calculated to
17 lead to admissible evidence, but the request is overbroad.

18 COMMISSIONER JACOBS: Okay. Very well.

19 MR. CUTLER: Your Honor, may I be heard one more
20 time on parity, because I think we kind of missed the
21 parity point here.

22 COMMISSIONER JACOBS: Um --

23 MR. CUTLER: Solely on the cost issue.

24 COMMISSIONER JACOBS: Well, actually, I think
25 you have an opportunity for that on the next motion. Is

1 that the one that you're looking for to file in your
2 information, nonsupplemental testimony?

3 MR. CUTLER: Certainly. I don't think that's
4 quite the same point. This will take all of one minute,
5 Your Honor.

6 COMMISSIONER JACOBS: Okay.

7 MR. CUTLER: Okay. The same loop that BellSouth
8 wants us to pay over \$300 for, we believe they're charging
9 themselves less than a dollar for that. That's why we
10 want to see that cost study.

11 COMMISSIONER JACOBS: Okay.

12 Okay. Here's what we'll rule. As to
13 Interrogatory Number 9, which requests, "Please state the
14 cost of the loop BellSouth attributes to its own retail
15 ADSL service and any cost analysis, please identify the
16 specific cost analysis referenced in your response."

17 I think there is some relevance. I am concerned
18 that the data sought is specifically for retail service.
19 I am going to deny the motion as to that request with
20 leave for BlueStar to narrow its request to data that's
21 relevant; more relevant, I should say, to the service it
22 seeks to acquire from BellSouth.

23 And I think some of the argument today may be
24 given some guidance on that, but I would deny it as to
25 that one on those grounds.

1 As to Interrogatory Number 16, it's my
2 understanding that the information being sought here is
3 available now, but you would like to see it referenced in
4 a different -- by a different search key.

5 I don't think this was in the scope of discovery
6 to seek some kind of reordering of the data that you
7 request. If you seek a request, you get it as it is, and
8 then you may seek some leeway to study it as you choose to
9 see fit. But as I understand it, this is relevant data.
10 And so, I'm going to grant the motion as to Interrogatory
11 16.

12 As to Interrogatory 17, I am persuaded that you
13 have -- you did get a response, as I understand,
14 initially, but you didn't think it was complete. I was
15 unclear. Did that response come before the filing of the
16 motion or after?

17 MR. CUTLER: After, Your Honor.

18 COMMISSIONER JACOBS: Quite frankly, from what I
19 understand, it does sound like that's more appropriate for
20 request for production.

21 So, I'm going to deny it as to the interrogatory
22 request. You have identified the information that you
23 need to be identified. You did choose whether or not you
24 want to see that information.

25 As to Interrogatory 18, I'm going to deny. I

1 agree with staff. That's looking for future information,
2 but I'm going to deal with that in some fashion in
3 production request.

4 Now, in the production request, I'm going to
5 grant that. I think it's narrow enough. I'm going to
6 grant the motion as to POD Number 5, POD 6 and 7.

7 Actually, let me go to 7 first. Is the data
8 that you're looking for here, is it the same data that was
9 filed with the FCC?

10 MR. CUTLER: I believe so, Your Honor.

11 COMMISSIONER JACOBS: And it's not available to
12 you from them? You can't go to the FCC and get it?

13 MR. CUTLER: I have asked both the FCC and the
14 BellSouth. I informally requested it from -- there's some
15 docket manager, I think, at the FCC who they sent me to
16 who said that since the tariff was approved, we can no
17 longer have access to it there.

18 COMMISSIONER JACOBS: Mr. Carver?

19 MR. CARVER: Well, the point I was going to
20 make, I think this one was the one I was talking about,
21 about the FCC tariff that related to the rate for line
22 sharing.

23 And, as I said earlier, I think there's an
24 argument that is relevant to begin with. But since
25 they've now removed issue 11, which is line sharing, I

1 don't think it has any further relevance.

2 MR. CUTLER: There's still an enormous disparity
3 between that rate and the one we're being charged. And
4 that's why we would like to present some evidence on that
5 to the Commission.

6 If we can reach a simple agreement that it's
7 below \$2.00, which is what I think it is, that would solve
8 any burden issue.

9 COMMISSIONER JACOBS: Is there a generic docket
10 on this, on line sharing?

11 MS. CLEMONS: No, not at this time.

12 COMMISSION STAFF: No.

13 MS. CLEMONS: No, Commissioner.

14 COMMISSIONER JACOBS: Here's what I'd like to
15 do.

16 If you can pursue a stipulation on that, that
17 would be wonderful. Again, relative to the issues that
18 are in this docket can't resolve that issue so that you
19 guys can come up with -- if you guys, which I'm being
20 very, very hopeful here, that you can sit down and come up
21 with some kind of a stipulation on that, as to this
22 request.

23 There is some merit, quite frankly, to the
24 argument raised by BellSouth that by deferring this issue,
25 its continued relevance becomes -- but I think there is

1 sufficient issues that remain.

2 And it's my understanding that you deferred
3 issue one, or I shouldn't say deferred, but you said that
4 as to issue one, and your position would be you would move
5 the issue to a different proceeding?

6 And issue 1-A and 1-B.

7 MS. KAUFMAN: Commissioner Jacobs, I think
8 there's just one part to issue one, and the parties have
9 resolved that.

10 COMMISSIONER JACOBS: I'm sorry, issue one.
11 This is issue two, issue 2-A and 2-B.

12 MR. CARVER: Commissioner, I believe it's issue
13 2, in general, and issue 11 are the two that this relates
14 to.

15 COMMISSIONER JACOBS: I'm going to grant it in
16 part and conform it. The information should be conformed
17 to issue 10.

18 Now, let me understand what issue 10 is asking
19 for. It says, "What are the tariff-based rates for the
20 two-wire ADSL compatible loop?"

21 So, to the extent that you want to inquire to
22 ensure that whatever rates come out of issue 10 are
23 compatible to what BellSouth is offering or seeking to
24 provide itself, then that's what this has to be conformed
25 to.

1 Understood? Am I clear? I'm not.

2 MR. CUTLER: I believe that's our point, which
3 is what we use to compete. And it's really the UCL, not
4 the ADSL compatible loop, which is at issue for the
5 moment, but what we use to compete with BellSouth is a
6 UCL.

7 COMMISSIONER JACOBS: I understand. I
8 understand, but what I'm saying is what you're asking for
9 in issue 10 is not that.

10 MS. KAUFMAN: Issue 10 has several subparts to
11 it, and subpart "C" relates to the UCL the.

12 COMMISSIONER JACOBS: Okay.

13 MR. GOGGIN: Commissioner, I'm just trying to
14 make sure that we have it clear.

15 The discovery request, as I understand it,
16 relates to cost studies filed with the FCC for a service
17 which does not include the provision of separate UNEs,
18 like loops.

19 COMMISSIONER JACOBS: Okay. Your digital filing
20 with the FCC does not have UNEs in it; is that what you're
21 telling me?

22 MR. GOGGIN: That's right. It's a service that
23 can be bought and resold as a service by an ISP, for
24 example, or BellSouth also sells it at retail.

25 What issue 10 involves are the provision by

1 BellSouth to the ALEC community of certain UNEs, and in
2 particular to BlueStar.

3 COMMISSIONER JACOBS: The UNEs that would make
4 up a similar offering, is it the UNEs that would make up
5 an offering similar to your wholesale offering?

6 MR. GOGGIN: It's similar, but not the same in
7 the sense that BellSouth would not provision, for example,
8 an ADSL compatible loop in connection with the wholesale
9 offering of ADSL service.

10 Issue 10 really relates to the following UNEs,
11 ADSL compatible loops, ADSL compatible loops, unbundled
12 copper loops, and the loop conditioning cost that relate
13 to those three UNEs.

14 So, I guess we're -- and I understand that the
15 cost studies that relate to those UNE offerings have been
16 produced.

17 COMMISSIONER JACOBS: Okay. Are you in
18 agreement with that?

19 MR. CUTLER: I think so.

20 COMMISSIONER JACOBS: Okay.

21 MR. CUTLER: It was a large mass of paper, and I
22 haven't yet had time to depose Mr. Varner on exactly what
23 it is, but they certainly tried to produce them.

24 COMMISSIONER JACOBS: Okay. So, what does 6 and
25 7 get you beyond that that you need?

1 MR. CUTLER: When BlueStar wants to serve
2 customer "X," BlueStar orders up either an ADSL compatible
3 loop or if it doesn't -- if BellSouth doesn't have one on
4 that route, a UCL.

5 COMMISSIONER JACOBS: And what he's saying is
6 that for you to -- that could be exactly true, and that's
7 fine, but what he's saying is for you to get their studies
8 that they filed with the FCC gives you no guidance as to
9 what their cost would be for; am I correct, Mr. Goggin?

10 MR. GOGGIN: That's correct.

11 COMMISSIONER JACOBS: Because --

12 MR. CUTLER: Here's where I'm coming from.

13 Whether or not this Commission decides in our favor on
14 this subject, I certainly think that it ought to have a
15 look and see what BellSouth charges itself for the
16 service.

17 COMMISSIONER JACOBS: For a similar service.

18 MR. CUTLER: For the service, the highly-similar
19 service which they sell to the same customer to decide
20 whether BellSouth's cost studies are reasonable.

21 We may well lose that argument, but I think the
22 Commission ought to at least have a look at that study.

23 COMMISSIONER JACOBS: Sounds like they're
24 provisioning the service in a different way.

25 MR. CUTLER: They certainly -- yes. And I would

1 contend that we'll present evidence that the way they
2 provision it should cost much more than what they're
3 paying if they're charging themselves much less.

4 Therefore, there must be something funny going on here.

5 COMMISSIONER JACOBS: Your argument is going to
6 be that first -- well, let me not even do that. Okay.
7 Let's deal with this.

8 It doesn't sound like the data that you're going
9 to get from this -- from POD 6 and 7, is going to provide,
10 based on what they're saying, you're not going to get data
11 that's going to give you cost information for a
12 DSL-compatible loop from the data that you're getting
13 here.

14 What you will get is data that will say here's
15 how they provision the service at the wholesale level and
16 approximately what it costs. That's not how your document
17 request is stated.

18 I'm going to deny it and give you leave to come
19 back to narrow that, okay? I'm going to deny it as to 6
20 and 7. And maybe you all can sit down and hopefully work
21 through this; again, being very hopeful, but I'm going to
22 deny it as to 6 and 7 as presently stated.

23 Now, actually -- I'm just reading here, let me
24 make sure that I have 17 stated correctly, "Please provide
25 a complete copy of any cost data BellSouth has developed

1 for submission for any state or federal regulatory agency
2 to determine cost to be provided retail ADSL service or
3 any other xDSL-based technology deployed for retail
4 purposes. Please identify any differences and methodology
5 between the cost and service provided."

6 Let me not say that, but I don't -- I stand by
7 my original rationale, and that is that even if you were
8 to get the cost study that was provided to the FCC, which
9 is my understanding what has been identified as the only
10 thing that responds to this request.

11 Let me make sure of that. Is that the case,
12 that the study that was filed at the FCC is the only item
13 that is deemed to be responsive to this request?

14 MR. CARVER: I'm not -- I lost you. Are we
15 talking about 17 now or 12?

16 COMMISSIONER JACOBS: I'm sorry, I'm still on 6
17 and 7.

18 MR. CARVER: 6 and 7.

19 COMMISSIONER JACOBS: What I'm hearing is that
20 the study filed with the FCC is the only document
21 responsive to these two requests.

22 MR. CARVER: I think that's true. To tell you
23 the truth, I'm not sure. There may be ADSL offerings that
24 BellSouth offers on a retail basis other than that.

25 COMMISSIONER JACOBS: Okay. My ruling is based

1 on what you're telling me about the FCC study.

2 MR. CARVER: Right.

3 COMMISSIONER JACOBS: If there are, I would
4 suggest that those be responsive to those requests.

5 MR. CARVER: No, those would -- well, I guess
6 the bottom line is I'm not sure if there are others that
7 are responsive. I think this is the one that's at issue.

8 And I want to say no, there are no others. I
9 know the wholesale ones we've produced.

10 COMMISSIONER JACOBS: Okay.

11 MR. CARVER: The thing I'm not entirely clear on
12 is if there is any, and I have the information, I just
13 don't have it at my fingertips, whether other than the
14 service that was tariffed at the FCC, whether there is any
15 other retail ADSL type service which has a cost study.
16 But my understanding was that was not what they were
17 asking for.

18 COMMISSIONER JACOBS: Okay.

19 MR. CARVER: I mean, I could find that out, but
20 I mean, again, it would be the same type situation where
21 to the extent it's retail service, it has a different
22 basis.

23 COMMISSIONER JACOBS: Okay. Let me go off the
24 record for a moment.

25 MR. CARVER: Commissioner, I have an answer to

1 your question. The study filed with the FCC is the only
2 one. There is no state analogous study.

3 COMMISSIONER JACOBS: Okay.

4 Okay. I'm going to go ahead and stand by my
5 original ruling and deny production for request 6 and 7.

6 As to production for request 12, I'm going to
7 grant it. I'm going to reform it to follow staff's
8 recommendation as to interrogatory number -- which number
9 is that, 18. Let me be clear about that.

10 Essentially, what I'm granting is a narrowing of
11 12 to request data on future plans to expand mechanization
12 of retail DSL ordering capabilities.

13 So, it would not -- and that will be the limit
14 of what I'm granting. So, granting in part your motion as
15 to POD number 12.

16 MS. CLEMONS: Commissioner, just for
17 clarification, with regards to Interrogatory Number 12, we
18 denied it, because it related to BellSouth's future plans.
19 And I think this request for production is seeking the
20 same. It's seeking the documents as to future plans as
21 well.

22 COMMISSIONER JACOBS: You're right. I was
23 thinking present plans.

24 MR. CUTLER: Your Honor, may I be heard on that
25 for a second?

1 COMMISSIONER JACOBS: Briefly, very briefly.

2 MR. CUTLER: The problem I'm having is -- oops,
3 thank you.

4 BellSouth's response to our request for make-up
5 information, as reflected in their testimony, is we plan
6 to give you on-line access to LFACS in the third quarter
7 of this year. Now, BlueStar simply wants to know whether
8 there are some plans to do something similar to LQS.

9 COMMISSIONER JACOBS: Yeah, we understand, but
10 what we're saying is that you can't -- those plans have to
11 be in existence now; i.e., present plans. We can't impose
12 on them a requirement to come back to you with future
13 plans at the time they're developed.

14 MR. CUTLER: Present plans are fine with us.
15 That's certainly what 12 is looking for.

16 COMMISSIONER JACOBS: So, you would modify your
17 request to say "present plans" rather than "future plans."

18 MR. CUTLER: I don't see the word "future." I
19 think 12 simply said "plans."

20 "Please provide a complete copy of all internal
21 documentation related to plans to mechanize any portion of
22 BellSouth's systems and processes to qualify loops for its
23 retail ADSL service."

24 COMMISSIONER JACOBS: Okay. So, we can clarify
25 that and say "present plans," not anything in the future.

1 MR. CUTLER: That would be fine with us.

2 COMMISSIONER JACOBS: Okay. I'm going to grant
3 number 12, then.

4 17. I'm kind of on the fence with this thing,
5 but I think I'm persuaded by staff's recommendation. So,
6 I'll follow their recommendation, and as to 20 as well.

7 So, as to 17 and 20, we're denying, right?

8 MS. CLEMONS: Yes, Commissioner. With regards
9 to 20, staff had a concern that the request was overly
10 broad.

11 COMMISSIONER JACOBS: Right.

12 MS. CLEMONS: What BlueStar was seeking was all
13 documents reflecting repair intervals. I agree with
14 BellSouth that that would be almost impossible to produce
15 all documents.

16 COMMISSIONER JACOBS: I looked at the issue on
17 this. I'm just trying to remember. I'll go ahead and
18 deny it.

19 MS. CLEMONS: You're going -- okay. So, 20 is
20 denied.

21 And then just to clarify staff's recommendation
22 with 17 was to grant, not to deny.

23 COMMISSIONER JACOBS: Now, my problem here is
24 that the issue is relevant. My only concern here is that
25 it's overbroad.

1 I would entertain -- and I know we're getting
2 short on this case, but I think the parties ought to sit
3 down, and I'll just give this to both sides.

4 I think you ought to sit down and try to narrow
5 this request. The issue is absolutely irrelevant. I
6 think you ought to sit down and try to narrow it down to
7 something you can agree on that will be specifically and
8 directly pertinent here.

9 MR. CUTLER: May I suggest, Your Honor, I
10 believe that BellSouth has a proposed parity measurement
11 in the state of Florida on this item, and we would be
12 happy to get access to either the results of that or
13 something resembling that.

14 COMMISSIONER JACOBS: Well, here's what I'll do.
15 I'll let you guys sit and discuss that. I'm not going to
16 rule on that.

17 MS. CLEMONS: Commissioner, one more
18 clarification.

19 With regards to 17, what staff said earlier was
20 that BellSouth already answered that the documents did not
21 exist.

22 COMMISSIONER JACOBS: On 17 they did?

23 MS. CLEMONS: Yes.

24 COMMISSIONER JACOBS: Okay. If they say they
25 don't exist, they don't.

1 MR. CARVER: And if I may, excuse me, as I said
2 earlier when I was arguing, if counsel thinks that there
3 is something in Mr. Pate's deposition that indicates that
4 they do exist and he wants to show it to me, I'll be happy
5 to discuss it with him. As far as I know, there aren't
6 any, so...

7 COMMISSIONER JACOBS: All right. Very well.
8 That takes care of BlueStar's Motion to Compel. Am I
9 correct?

10 Okay. So, we're on the motion to file
11 supplemental rebuttal testimony. You can go ahead,
12 Ms. Kaufman.

13 MS. KAUFMAN: Thank you, Commissioner.

14 I hope, in contrast to the last time we spent, I
15 can make this one fairly simple.

16 We had filed a motion asking to be able to file
17 supplemental rebuttal testimony of our cost witness, who
18 will now be Dr. Ankum. And our request is very simple.

19 We sent discovery to BellSouth at the beginning
20 of January as we heard extended discussion about. Part of
21 what we asked for involved cost studies. Initially,
22 BellSouth objected and then they did provide some of them.

23 Representatives from BlueStar traveled to
24 BellSouth's office in Atlanta on February 2nd, looked at
25 the cost studies and requested copies of them as well as

1 electronic copies, which we had requested when we
2 initially propounded our discovery. That was on
3 February 2nd.

4 As of the date the motion was filed, which was
5 February 10, we had not received any cost study
6 information. On February 11th, I did receive in my office
7 in Tallahassee a small excerpt of the cost studies.

8 After continued and subsequent discussion,
9 finally at the end of the day, I believe on the 11th, the
10 entire cost study, along with the CDs, was sent to our
11 witness in Houston, Texas. And he received them on
12 Saturday, which I believe was February 12th.

13 Our rebuttal testimony in this case was due that
14 Monday, February 14th. We filed to the extent that we
15 could, but in that brief a time frame, the cost witness
16 was unable, obviously, to do any sort of thorough analysis
17 of the cost studies that we were provided with.

18 We've been very prejudice, and our witness has,
19 in regard to not being able to take a thorough look at
20 these cost studies. I'm sure you know they're very
21 voluminous, they're very complicated. They take some time
22 to analyze.

23 COMMISSIONER JACOBS: And you use that as for
24 five days, the --

25 MS. KAUFMAN: Yes. Of course, five days has

1 already run, because I think that would have been on
2 Thursday, but we can be prepared to file this week,
3 tomorrow or Wednesday.

4 COMMISSIONER JACOBS: Okay.

5 MS. KAUFMAN: I wanted to also let you know that
6 in response to our motion, Bell says, well, gosh, they
7 don't need to file any supplemental rebuttal, we have
8 agreement on these rates.

9 It's kind of interesting to us. We thought we
10 had agreement, because we had agreed when we saw
11 Mr. Varner's direct testimony, we said these rates look
12 good to us. This isn't an issue anymore.

13 However, now in Mr. Varner's rebuttal testimony,
14 he has totally changed his story and provided different
15 rates and references a cost study that has never been
16 provided to us.

17 So, we're somewhat dismayed by that. Some folks
18 would say we've sort of been sandbagged without the
19 opportunity to respond to rates that are just coming up on
20 the first-time rebuttal. And I understand we're not
21 arguing the motion to strike Mr. Varner's testimony, so I
22 won't go into that at this time.

23 Suffice it to say that I don't think there's any
24 agreement on the rates, unless Bell agrees we can utilize
25 Mr. Varner's rates that he supplied on direct.

1 And with the delay in getting the cost studies
2 and the timing of our rebuttal testimony, we believe that
3 it's only fair that we have the opportunity to address the
4 information in the cost study as well as these new rates
5 that have appeared for the first time in rebuttal.

6 And I want to make one more comment on
7 BellSouth's response to our motion. At the very end of it
8 they say, well, if you let BlueStar file rebuttal
9 testimony on the cost issue, then we should be allowed to
10 file supplemental rebuttal in regards to Ms. Hassett's
11 testimony.

12 Well, Ms. Hassett doesn't have anything do with
13 cost studies or cost testimony. And in our view, that's
14 sort of a non sequitur, though I know BellSouth has
15 another motion that I'm sure you're going to take up.

16 The bottom line is we request that we be
17 permitted to file supplemental testimony on the cost
18 issues that still, as far as we know, remain outstanding
19 in this case. And we can be prepared, I believe, to file
20 it by close of business Wednesday.

21 COMMISSIONER JACOBS: BellSouth?

22 MR. CARVER: First of all, I just want to make a
23 note that some of the facts that counsel represented to
24 you are certainly in dispute.

25 There was some confusion, which we set out at

1 length in our response relating to the delays in getting
2 documents to BlueStar.

3 Basically, what happened is Mr. Cutler came to
4 our office. We made available to him the 5,000 pages of
5 documents and asked him to mark what he wanted copied.

6 He marked about 200 pages of documents. We sent
7 those to him. But after he received them, he said well,
8 he not only wanted the one copies that he marked, but the
9 ones copied that he didn't mark, which was news to us.
10 But after we found that out, we got the documents and we
11 made them available to their local counsel in Atlanta in
12 about 12 hours.

13 We got a phone call from him 6:00 on Thursday
14 night, and they were available actually, I guess, maybe 15
15 hours, 9:00 the next morning. And I'm not going to take
16 up a lot of time going through the chronology, but you
17 look at our response, you can see that the pattern is, is
18 that BlueStar, you know, we respond to discovery and we
19 say the documents are here if you want to look at them or
20 if you want to pay for copy, we'll send them to you.

21 Nine days later, they come and look at them and
22 they don't count that into the delay. So, we don't
23 believe that there has been any sort of delay attributable
24 to BellSouth.

25 The second point I want to make is that

1 Ms. Kaufman made the representation to you that they have
2 never seen the UCL cost study that Mr. Varner references
3 in his rebuttal testimony. And that is not correct.

4 That is among the 3,000 pages of cost studies
5 that were produced ten days ago. They have seen that.
6 That was sent on to their expert, and he's reviewed that.

7 Finally -- here's the part about this that
8 mystifies me. Even under their calculation, they got
9 everything they needed by February 11th. So, even if you
10 believe that all of the delays were BellSouth's fault,
11 then they had everything they needed by February 11th.
12 And they asked for five days from February 11th, which was
13 last Wednesday.

14 Now, ten days later, ten days after they've had
15 the documents, and five days after what they asked for in
16 their motion, they still haven't filed anything.

17 So, they're now asking you to give them two or
18 three more days. It just seems to me like if they wanted
19 to file something within five days, they should have filed
20 it last week, but now we're at the point where their
21 witness, Mr. Ankum, is to be deposed Thursday.

22 When they say that they want to file the
23 supplement at the end of business Wednesday, and if they
24 typically don't deliver things to us, you know, very
25 regularly, it seems that in all likelihood, I'm not even

1 going to have Mr. Ankum's supplemental rebuttal testimony,
2 if you let them do this, at the time I try to take his
3 deposition on Thursday.

4 So, again, I wouldn't have minded if you had
5 granted their original request and let them file something
6 last week, but apparently what's happened, and frankly,
7 coming to the hearing today I thought it was moot, since
8 last week is gone, but now they've asked you for the five
9 days that they wanted in their motion plus an additional
10 five days. And they want to file something where,
11 essentially, it'll be too late for me to depose their
12 witness.

13 And I think if you look at facts of the case,
14 you can see that BellSouth has done everything they can to
15 get documents to BlueStar promptly. And, you know, and
16 even if you believe that the delays were attributable to
17 us, what they asked for was to file last week.

18 So, I just don't think it's appropriate for them
19 to continue to ask for more and more time, particularly
20 given the fact that if they file Wednesday then at this
21 point they're prejudicing BellSouth's ability to take a
22 deposition to find out what their experts filed.

23 MS. KAUFMAN: Can I respond, Commissioner
24 Jacobs? Briefly?

25 COMMISSIONER JACOBS: Very briefly.

1 MS. KAUFMAN: I only have two points.

2 I think Mr. Carver either misunderstood or
3 misspoke.

4 The study that has yet to ever be provided to us
5 is the North Carolina study referenced in Mr. Varner's
6 testimony in which he intends to rely, it appears. We
7 have never been provided with that study to this day.

8 COMMISSIONER JACOBS: I understand.

9 MS. KAUFMAN: Secondly, he's correct. We did
10 not want to be presumptuous and file supplemental rebuttal
11 testimony, which we recognize is out of the ordinary here
12 at the Commission, without first being granted permission
13 to do that.

14 And so we -- if our motion is granted, we will
15 do it as expeditiously as possible. We filed our motion
16 as quickly as we could. We knew we were having the
17 prehearing conference today, and we await your ruling on
18 that.

19 MR. CARVER: And I'd just like to add, I think
20 the typical procedure that parties follow is that they
21 file something and ask for permission sort of at the same
22 time, and then it's either allowed or it's stricken.

23 And if they had followed that, we would have had
24 the testimony since last Wednesday. And we would have had
25 time to have our experts look at it, and I'd have time to

1 prepare for the deposition.

2 As it is though, again, they're proposing to
3 basically file a supplement so late that it will prejudice
4 us, if they do that.

5 And again, what they ask for is five days. I
6 don't think it's appropriate for them to show up today and
7 say, well, we don't really want five days, we really want
8 12 days, even though that's not what we ask for.

9 MS. KAUFMAN: And I would just respond,
10 Commissioner Jacobs, that if the studies had been timely
11 provided to us, we wouldn't be in the situation that we're
12 in today.

13 COMMISSIONER JACOBS: I got it.

14 MS. KAUFMAN: Thank you.

15 COMMISSIONER JACOBS: Thank you.

16 Let me make sure I understand. You filed your
17 request. There was an objection filed.

18 MS. KAUFMAN: I'm sorry. Could you repeat that?

19 COMMISSIONER JACOBS: Your original discovery
20 request was -- the response was an objection.

21 MS. KAUFMAN: Back in January.

22 COMMISSIONER JACOBS: Now, BellSouth, your
23 objection --

24 MR. CARVER: No, sir, there was no objection.

25 Here's what happened. They sent a request. We

1 responded to the request on the day it was due, and we
2 said the documents are here. Do you want to come look at
3 them or do you want to pay us to copy them and send them
4 to you?

5 COMMISSIONER JACOBS: So, you did not object on
6 the --

7 MR. CARVER: Not to the documents at issue. I
8 mean, we objected to some things, but the documents they
9 were talking about now, we did not object to producing.

10 We simply --

11 COMMISSIONER JACOBS: The documents that we're
12 talking about now, you did not object to?

13 MR. CARVER: No, sir. We said there are 5,000
14 pages, do you want to come look at them or do you want to
15 pay to have 5,000 pages copied?

16 And about a week later they got back us to and
17 they said Mr. Cutler will be there in 24 hours to look at
18 them. And we said can you give us 48, we need to find a
19 room. So, he basically came nine days after we told him
20 that the documents were available.

21 Then there was some confusion about what was to
22 be copied, because what we did was we gave him some
23 stickies and basically said tab whatever you want copied.
24 And he told our paralegal that he wasn't sure if he wanted
25 them copied.

1 There was a lot of confusion, and I'm not going
2 to get into a lot of who shot John, but the bottom line,
3 by Monday the following week, we clarified what they
4 wanted. We got it to him by Thursday of that week in
5 Tallahassee.

6 I don't even think Ms. Kaufman even had to come
7 get the documents. I think we carried them to her and
8 said here's a proprietary agreement, sign it, and we'll
9 turn them over to you. That was Thursday, I believe, if
10 I've got my facts straight, about 11 days ago.

11 About three hours later, we got a phone call
12 from yet another attorney representing BlueStar in Atlanta
13 who said that's not what we want. We don't want the 200
14 he pages marked, we want 3,000 pages he didn't mark. We
15 said it doesn't sound right to us, but whatever.

16 And then as I say, by early the next morning,
17 they were ready go. So, by the 11th, at this point we've
18 copied another 3,000 pages of documents, we've cut six
19 CDs, and we've made them all available on less than 24
20 hours' notice.

21 Now --

22 COMMISSIONER JACOBS: The original response, was
23 that by the 25th of January?

24 MR. CARVER: Yes, sir, it was. And it was nine
25 days after that before BlueStar even came to look at the

1 documents.

2 So, I mean, all together, there's about a
3 two-week process between the time we said here are the
4 documents, if you want to look at them and the time they
5 actually got them.

6 But my point is, first of all, that I think the
7 delay, if you look at the facts, are attributable to
8 BlueStar. But even if you think it's somehow BellSouth's
9 fault, the relief they ask for is five extra days. And
10 those five days expired, at this point, six days ago or
11 five days ago.

12 So, I mean, even if they had a legitimate basis
13 to argue that the delay was somehow attributable to
14 BellSouth, this -- today is the first I've heard that they
15 don't really want five days, they really want 12 days, and
16 they're not going to be able to file their testimony
17 until, basically, so late that I won't be able to depose
18 their witness.

19 COMMISSIONER JACOBS: Thank you.

20 MS. KAUFMAN: Commissioner Jacobs, I just want
21 the record to be clear. There is -- we use the word
22 confusion in quotes. And Mr. Cutler was there. And he
23 can address it, if you want.

24 Bottom line is we looked at those documents on
25 February 2nd. They were not in the hands of our cost

1 expert until February 12th. We would assert to you that
2 it was entirely clear what we wanted, it's entirely clear
3 from our original production request. So, that's about a
4 little less than two weeks in there that it's unclear, to
5 me, where these documents were.

6 What was delivered to me on the 11th was a very
7 small subset of the cost studies and, of course, the CDs
8 were not provided to us until we made numerous requests
9 and had to get another attorney involved to escalate it up
10 the line.

11 COMMISSIONER JACOBS: Okay. Thank you. I got
12 it, I got it. I think I got it.

13 MR. CARVER: I just want to say that the delay
14 was not in production, the delay was in copying, because
15 there was confusion about what he wanted copied. So...

16 COMMISSIONER JACOBS: Okay. I got it.

17 Staff?

18 MS. CLEMONS: Commissioner, unless staff
19 misunderstands, but our understanding of the situation is
20 that the orders establishing procedure required a response
21 to the discovery request by January 25th.

22 BellSouth objected to production request number
23 8. And then not until January 26th did it file an
24 amendment to its discovery response saying that it changed
25 its mind and would now produce this information.

1 Therefore, in staff's opinion, the information
2 was due by January 25th and was not provided by the 25th
3 in accordance with the order on procedure which,
4 recognizing the expedited nature of this proceeding, said
5 that the information had to be faxed, hand-delivered or
6 expressed so that the parties would have it in an
7 expedited time frame.

8 And I don't, you know, we can't figure out
9 exactly what happened after that point, but if BlueStar
10 was to have the information as contemplated by the order
11 within 20 days, then it seems to me that BellSouth's
12 objection, original objection, is what delayed BlueStar
13 getting that information within the 20 days.

14 And if BlueStar did not travel to Atlanta 'till
15 February 2nd to actually review documents, their request
16 did call for all computerized models.

17 So, staff believes that at the very least, you
18 know, if BellSouth had not filed that objection, which
19 apparently had no merits since they withdrew it without a
20 ruling from the prehearing officer, that at the very least
21 BellSouth should have provided cost studies and CD-rom --
22 on CD-rom by the 25th.

23 COMMISSIONER JACOBS: Okay.

24 Here's what I'll rule. I'll grant the motion,
25 and I will instruct BlueStar to file that testimony by the

1 close of business tomorrow.

2 MS. KAUFMAN: We can do that, Commissioner.

3 COMMISSIONER JACOBS: And please have it in the
4 hands of BellSouth by tomorrow as well, so that they can
5 have a chance to review it. I'll bet not as sufficiently
6 as you would like, but have a chance to review it by the
7 time of their deposition.

8 And if they want to revise their notice to give,
9 I guess, another day, I know that might not be possible,
10 in advance, I'll indicate that I think that's appropriate.

11 MR. CARVER: If they file tomorrow, I can make
12 do. I would just request that they do one thing, and
13 that's in addition to hand-delivering it as required by
14 the procedural order, if they can also fax to it my
15 office, because I'll be taking the deposition, and I'd
16 like to get it the same day that it's hand-delivered.

17 MS. KAUFMAN: We'd be glad to do that.

18 MR. CUTLER: Well, actually, I think Mr. Carver
19 and I will be in the same deposition tomorrow, and
20 provided it's finished by the time the deposition
21 finishes, I'll hand it to him.

22 COMMISSIONER JACOBS: Okay.

23 So, tomorrow is -- either the deposition or
24 close of business, one of the two.

25 MS. CLEMONS: Commissioner, did BellSouth -- I

1 understood from their response to the motion that they
2 also wanted to file supplemental rebuttal?

3 MR. CARVER: Well, I think actually, there are
4 two different issues that arise. And I think one of them
5 -- well, we can probably address that in the context of
6 our motion to strike, because what we have asked is that
7 certain testimony of Ms. Hassett be stricken. And we
8 believe it should be.

9 If it's not stricken, then we have a problem,
10 because we don't have time to respond. And filing some
11 sort of late rebuttal might be a remedy would work in
12 better there. So, I think we can probably take that up --

13 MS. CLEMONS: But it would not be supplemental
14 rebuttal in relation to what the Commissioner has granted
15 BlueStar?

16 MR. CARVER: No, I don't think it would be.

17 I'd like to ask for one point of clarification,
18 though. And this is sort of related to this motion, and
19 it's sort of on something different.

20 I think that the procedure that both BlueStar
21 and BellSouth have taken is to say if the documents
22 requested are huge, if they're voluminous, that rather
23 than shipping you thousands of pages of documents, you
24 know, we'll make them available for inspection.

25 And that's what we tried to do, in our view, is

1 that by making them available we had responded, and there
2 was some delay in looking at them, and there was some
3 delay in copying them.

4 I have another problem though. Now that -- if
5 the standard is on the day responses are filed the
6 documents are to be made or actually sent to the party on
7 that day, then I have a problem, which is this: BlueStar
8 had discovery responses that were due to us last Thursday.

9 On Monday, in anticipation of that date, I sent
10 them a letter, and I said I'll pay whatever it takes to
11 copy these; please copy them, and send them to me. That
12 was a week ago. I have to take depositions tomorrow, and
13 so far the only documents that I have from them are these.

14 Now, again, we produced 5,000 pages to them.
15 That's all they've given us. And in the actual response
16 they filed, they designated, I believe, seven different
17 categories of documents that they agreed to produce, they
18 did not object to, and that were not proprietary.

19 But I find myself in a position where I'm going
20 to have to take a deposition tomorrow, and this is all
21 I've got. And I have no idea when they're going to give
22 me anything else.

23 And I understand that I'm bringing this up and
24 it wasn't -- because frankly, they told me they were going
25 to send me all the documents on Friday, so I didn't really

1 have time to file a motion.

2 But the problem I have now is, I guess, the
3 standard is that on the day they file the response,
4 they're supposed to get the documents to me. They
5 basically did the same thing we did, which is to say
6 they're here; if you want to come look at them, come look
7 at them. And I have to take a deposition tomorrow, and I
8 don't have documents.

9 So, what I would like to request is that under
10 the circumstances that BlueStar, anything that they have
11 agreed to produce that they have not sent to me, even
12 though I have said I would pay the cost of copying, that
13 they would bring to the deposition tomorrow in Nashville.

14 At least that way I'll have the documents there.
15 And I guess the deposition may take all day, but I can go
16 through them as I do the deposition, because otherwise,
17 what I have is a situation where despite my sending a
18 letter a week ago and saying I'll pay for the copying
19 costs, I want everything copied, please send them to me, I
20 guess they have declined to do that. And I guess I don't
21 have whatever I need.

22 MR. CUTLER: Your Honor, I think --

23 COMMISSIONER JACOBS: Excuse me.

24 We've allowed ourselves to go into a new Motion
25 to Compel. I think what I need to do first is finish

1 today's matters. And if we need to come back to that,
2 we'll come back to that at the end.

3 MR. CUTLER: May I make a suggestion?

4 COMMISSIONER JACOBS: Yeah.

5 MR. CUTLER: I believe that Mr. Carver can be
6 satisfied that short of all of BlueStar's interconnection
7 agreements, which do fill up six file drawers or, I don't
8 know, several file drawers, we have produced to him all
9 the documents that we have.

10 We've never -- what I'm trying to say is we've
11 never conferred on this issue.

12 COMMISSIONER JACOBS: Excuse me, that's exactly
13 what I'm suggesting is that at the end of today's issues,
14 what I'll give you is a moment to confer. And if we need
15 to come back to this, we will.

16 MR. CARVER: Thank you, Your Honor.

17 COMMISSIONER JACOBS: All righty.

18 We are on BellSouth's motion.

19 Just a moment. Do you need to take a break?

20 Why don't we take a 10-minute break for the court
21 reporter.

22 (recess taken)

23 COMMISSIONER JACOBS: Let's go back on the
24 record.

25 Mr. Carver.

1 MR. CARVER: Thank you.

2 BellSouth has filed a motion to strike a portion
3 of the direct testimony of BlueStar's witness, Carty
4 Hassett. And we've also filed, in conjunction with that,
5 a motion to protective order that relates to two different
6 depositions. And in the alternative, we're hoping you
7 will grant those two, but in the alternative we've moved
8 to continue the hearing.

9 And essentially, here's the crux of the matter.
10 Issue 15 involves dispute resolution. BlueStar, their
11 request has changed at various times, but they want some
12 sort of form of alternate dispute resolution that would be
13 administered by the Commission.

14 And in our testimony, we've tried to address
15 what we think is the real issue, questions like whether
16 that could be done for specific parties or whether it
17 should be done generically, whether the complaint process
18 that's in place now works, whether you need to do
19 something as an alternative. We believe that that's
20 really the proper scope of that topic.

21 Ms. Hassett, in her testimony, addresses those
22 types of issues for less than one page. She does spend
23 about four pages or five pages, however, making a lot of
24 general allegations about BellSouth.

25 They claim that we did something in Kentucky.

1 And although we're not sure what, they claim that we've
2 delayed their orders in Florida, although there's no real
3 detail. They have claimed that there is a problem with
4 collocation.

5 In essence what they've done is they've raised a
6 variety of very specific complaints that are the type of
7 thing that belong in the complaint hearing. They really
8 don't have anything to do with the ADR issue.

9 And as BellSouth said in its motion, I think the
10 parties can pretty much stipulate the disputes occur. And
11 we don't believe that there's any merit to the particular
12 issues that they are raising, but ultimately, that's not
13 the issue, because whether there is merit or whether there
14 isn't merit really doesn't have very much to do with the
15 question of whether the Commission's complaint procedure
16 is appropriate or whether you need to change it.

17 So, what we have asked you to do is to strike
18 those portions of the testimony. If BlueStar does have a
19 legitimate complaint, they can certainly file a complaint.

20 And point of fact, they filed a complaint about
21 collocation, one that BellSouth believes was frivolous,
22 and that was dismissed a couple of weeks ago.

23 What they've done now though is they've taken,
24 at least some of the allegations from that and they've
25 tried to put them into this issue. And they've also

1 requested the deposition of two different BellSouth
2 employees. And when we inquired as to why they wanted to
3 depose them, we were just told that they knew something
4 about ADR. In their answer though we get a little more
5 information.

6 And basically, what we find is that they have
7 information that BlueStar believes relates to the
8 situation that was the subject of the collocation
9 complaint that has now been dismissed.

10 So, in effect, what we have is we have a motion
11 to arbitrate one issue. And what they have done is
12 they've sort of appended to that a lot of allegations of
13 conduct by BellSouth that really has nothing to do at all
14 with the core issue.

15 So, for that reason, what we have done is we
16 have asked you to strike the portion of Ms. Hassett's
17 testimony where she talks about that. And we've also
18 asked you to issue a protective order saying that BlueStar
19 cannot depose those two individuals.

20 And at the same time, of course, if you do that,
21 it would be appropriate for BellSouth to withdraw the
22 portions of its rebuttal testimony where we do the best we
23 can to respond to her allegations. And that's -- I should
24 say, that's primarily what we're seeking. Excuse me.

25 COMMISSIONER JACOBS: Okay.

1 MR. CARVER: I'm sorry, I was just going to go
2 to the next part of it, which is the motion to continue.

3 If you grant that, then I think the issue will
4 be properly focused, and we can move forward without
5 delay. My concern though is that if these allegations
6 remain in the case, then BellSouth is placed in a position
7 where we just can't respond to them.

8 Basically, the testimony was filed, the direct
9 testimony was filed, which raised these allegations for
10 the first time on January 25th. Three days later -- we
11 didn't get the testimony until the next day.

12 Two days after that we sent out discovery to try
13 to find out something about the allegations so they could
14 respond, because as you can see in our rebuttal testimony,
15 in some instances, we really have no idea what she's
16 talking about. And that discovery was due the 17th.

17 Now, the production portion of it is what I
18 brought up a little bit earlier. We really don't have
19 very much information, and it's difficult to go forward.

20 The interrogatory answers, however, though were
21 very telling, I think. In those, BlueStar identified 16
22 individuals that they claim have some knowledge about
23 these incidents. And there are three different incidents.

24 One of them they identified four individuals
25 with knowledge, and Ms. Hassett is not one of them. The

1 other incident, they identified four individuals, and
2 Ms. Hassett was not one of them. And the third incident
3 they identified eight individuals. She was one of them,
4 but there's seven others.

5 So in addition to her, we've now been told that
6 there are 15 other BlueStar employees who know the
7 specifics of what she's alleged.

8 And our position, again, is that this should not
9 be treated as a complaint proceeding, that this is an
10 arbitration, and it should be kept narrow and focused.

11 But if BlueStar is going to be allowed to turn
12 this into a complaint proceeding and to raise these
13 allegations and to ask the Commission to rule based on
14 them, then in all fairness, BellSouth needs to have the
15 opportunity to do the discovery that's necessary to
16 respond to those.

17 And since BlueStar has said that there are 15
18 people who have information, I think, basically, we have
19 to depose those 15 people, which is impossible to do,
20 given the fact that the discovery deadline is Thursday.
21 We have three days left. And we already have depositions
22 every day.

23 So, again, our preference is for you to strike
24 the testimony and narrow the issue, but if you're going to
25 allow BlueStar to broaden the issue and to argue things

1 that we don't think are proper, then in fairness, we need
2 more time.

3 We need at least 30 days to take those
4 depositions and a 30-day delay in the hearing so that we
5 can respond to these sort of complaint type allegations.

6 Thank you.

7 COMMISSIONER JACOBS: Okay.

8 Ms. Kaufman.

9 MS. KAUFMAN: Thank you, Commissioner.

10 I want to try and start in reverse order, and I
11 want to respond to Mr. Carver's comment that BlueStar's
12 collocation complaint was frivolous.

13 What happened in that matter is that BellSouth
14 changed their procedures, and upon the proper procedures
15 being employed, we withdrew our complaint.

16 But I want to respond to the motion proper.
17 Issue 15, in this case, deals with BlueStar's contention
18 that we need to include in the interconnection agreement
19 some sort of an expedited dispute resolution process,
20 because currently BellSouth has no incentive and, in fact,
21 a disincentive to deal with things quickly.

22 And just given that this Commission's own
23 calendar, sometimes it takes quite a while to get a
24 hearing actually before the Commissioners.

25 That issue has been in this case since our

1 petition.

2 COMMISSIONER JACOBS: I'm sorry.

3 MS. KAUFMAN: That's okay. That issue is in our
4 petition on day one, was included in the issue
5 identification. There's never been a dispute as to
6 whether or not that is an appropriate issue.

7 Basically, what I hear BellSouth saying is they
8 don't like Ms. Hassett's testimony. They don't like that
9 she's described to the Commission situations where an
10 alternative or an expedited dispute mechanism would be
11 very helpful in opening up the market to local
12 competition.

13 And I want to be clear here. We are not asking
14 this Commission to resolve, if you will, disputes or
15 specific situations that she describes. What she
16 describes in her testimony are real-world situations that
17 occur every day with BellSouth and are illustrative of the
18 critical need to have some sort of an expedited process to
19 deal with these situations. That's the point of her
20 testimony.

21 Mr. Carver says, gosh, BellSouth would have to
22 depose all these witnesses. We don't know what she's
23 talking about. I suggest that Mr. Carver discuss this
24 with his own employees.

25 And I would further tell you, Commissioner, that

1 BellSouth is scheduled to take the deposition of
2 Ms. Hassett tomorrow, I believe, where they are free to
3 inquire in regard to her testimony.

4 I would also point out to you that BellSouth
5 address issue 15, the expedited dispute resolution issue,
6 both in its direct and its rebuttal, the issue as joined.
7 And we think that it's one that is appropriate for the
8 Commission's consideration, and Ms. Hassett's testimony to
9 which Bell objects, goes to the very heart of that.

10 The second matter is the deposition of two Bell
11 witnesses that Bell has objected to producing, even though
12 their depositions were noticed for last Friday, I believe,
13 Bell refused to produce them. And we have not yet had an
14 opportunity to depose them.

15 These two witnesses, again, like Ms. Hassett,
16 are familiar with a lot of these situations in which an
17 expedited dispute resolution process is critical.

18 Again, not for the Commission to decide whether
19 in situation "A," Bell is right or BlueStar is right. The
20 point is these are facts that the Commission ought to have
21 before it when it decides whether or not some kind of an
22 expedited process would be the way to go.

23 And finally, I would say to you that BellSouth
24 has shown absolutely no basis for any continuance in this
25 case, as I said earlier, since she's been on the table

1 since this case started.

2 It's been the same issue since the case started.

3 And all the witnesses that should have addressed this
4 issue have addressed it. Bell will have the opportunity.

5 As he said, they've already received our
6 discovery responses. They will depose Ms. Hassett, and
7 they can inquire to the areas in her testimony. So, we
8 would tell you that her testimony is entirely proper,
9 should not be stricken.

10 We should have the opportunity to depose the two
11 Bell employees that Bell has refused to produce. And we
12 should go forward to hearing March 2nd and 3rd.

13 MR. CARVER: May I respond briefly?

14 COMMISSIONER JACOBS: I have a couple questions.
15 Mr. Solon and Mr. Aguayo --

16 MS. KAUFMAN: Yes, sir.

17 COMMISSIONER JACOBS: They are -- what their
18 depositions would you hope would produce for you?

19 MS. KAUFMAN: What I hope their depositions
20 would produce are factual circumstances that have occurred
21 between BlueStar and BellSouth, situations that have
22 arisen where dispute was not resolved for "X" number of
23 days.

24 What happened, you know, we wrote you a letter,
25 you didn't respond. It's illustrative of the continuing

1 problem that a lot of the competitive carriers have with
2 getting any kind of a speedy resolution from BellSouth.

3 These two witnesses, it's my understanding, are
4 in the Florida area. And they have knowledge of some of
5 the situations that we think could be addressed by an
6 expedited dispute resolution process.

7 COMMISSIONER JACOBS: Okay.

8 MR. CARVER: Just a couple points I'd like to
9 respond to.

10 First of all, I think you can see that one of
11 the keys to this is in the response that BlueStar filed.
12 On page 2, paragraph 7, they say, "BlueStar is pleased to
13 find that BellSouth agrees that there are disputes between
14 BellSouth and competitive carriers that require
15 resolution. The correct procedure to quickly resolve
16 these disputes may well be a legal question that does not
17 require testimony."

18 Then you turn to the next page -- I'm sorry,
19 it's two pages. And they say, "BlueStar does not oppose
20 the Commission instituting some form of a generic
21 proceeding on expedited dispute resolution."

22 Now, the issue that's been in the case all along
23 is dispute resolution, and it's changed somewhat. I mean,
24 initially BlueStar filed a petition, and they asked for a
25 private mediator.

1 Our response was that we didn't think that was
2 appropriate. They then asked for the Commission to come
3 up with a form, in effect, that's sort of like a special
4 complaint bureau for carrier complaints that's sort of
5 like consumer complaints. In the motion, they also
6 mentioned a procedure that Georgia has.

7 So, I mean, the proposal that they've made has
8 changed somewhat, but the issue all along has been the
9 proposal. And the issue all along has been the question
10 of whether the Commission's current complaint procedure is
11 appropriate or whether you need to develop some sort of
12 alternate dispute resolution through staff or otherwise.

13 And that's a topic for generic docket. We agree
14 with BlueStar on that. But we also think that it's an
15 issue that has to do with legal questions, it has to do
16 with policy questions, and it has to do with procedural
17 questions. It doesn't have to do with getting into the
18 specifics of some dispute that may have occurred and
19 reaching a determination that BlueStar was right or that
20 BellSouth was right or that someone else was right.

21 COMMISSIONER JACOBS: Okay.

22 MR. CARVER: And I think when Ms. Kaufman
23 answered your question about these two witnesses, I think
24 that shows the point.

25 These two witnesses know absolutely nothing

1 about alternative dispute resolution. She wants to depose
2 them, because she believes that they have knowledge about
3 the collocation dispute that was the subject of the
4 complaint that's now been dismissed.

5 COMMISSIONER JACOBS: Okay. I understand.
6 Staff?

7 MS. CLEMONS: Commissioner, Issue 15 states as
8 follows: "What, if any, provision should the agreement
9 include for alternative dispute resolution?"

10 Because the issue is worded, "if any," there
11 seems to be a question of whether or not an ADR provision
12 would be appropriate. And staff believes that the
13 evidence that BlueStar wants to provide gets to the
14 question of whether or not an ADR provision would be
15 appropriate.

16 What we hear BlueStar saying is that it wants to
17 provide this evidence, not for the purpose of adjudicating
18 the rights between the parties as it relates to those
19 collocation issues, but just to illustrate the types of
20 disputes that are occurring between the parties that would
21 be right for ADR.

22 And based on that, staff believes then that the
23 evidence would be appropriate within the proceeding.
24 Therefore, staff recommends that BellSouth's motion to
25 strike be denied and also its motion for protective order

1 against the depositions of Mr. Solon and Mr. Aguayo.

2 Additionally, staff does not believe that
3 BellSouth -- that a continuance is going to be
4 appropriate, because BellSouth needs it to conduct further
5 discovery.

6 Again, BlueStar's purpose for the evidence is to
7 illustrate the need for alternative dispute resolution and
8 not adjudicate the rights of the parties. Therefore,
9 BellSouth is not going to have a need to prove or disprove
10 the allegations.

11 Further, BellSouth has stated that it has
12 received some responses to discovery requests, I believe,
13 on the 17th. And staff was further persuaded by the fact
14 that Ms. Hassett's deposition is upcoming and BellSouth
15 can gain additional information from the deposition.

16 COMMISSIONER JACOBS: Just a moment, please.

17 Okay. As to the motion to strike, I'm going to
18 deny that. As to the protective orders, I'm going to
19 grant those.

20 I agree that Mr. -- that those witnesses are
21 going to probably just add further facts as to specific
22 instances and they won't -- and the reason I'm going to
23 deny is the testimony goes to why present procedures are
24 inadequate. And I don't think those witnesses will
25 further that.

1 They may give you some specific facts that you
2 can then attribute to that, but they won't specifically
3 say why an expedited dispute resolution process would have
4 been better in that particular instance or not. I don't
5 think that will happen.

6 So, I'm going to deny the motion for
7 continuance. The case has already been prefiled. I don't
8 think we need to go with a continuance on the case.

9 All righty. That gets us to the actual
10 prehearing order. Want to do this fairly quickly. The
11 procedure is to go through and come up with any
12 corrections. As we go through, we'll go section by
13 section.

14 First of all, any modification as to the
15 appearances in front?

16 Okay. And let's go to section one, conduct of
17 proceedings. This is boilerplate.

18 Section 2, the case background.

19 MS. CLEMONS: Excuse me, Commissioner. I did
20 have one question for BellSouth. Did we need to add
21 Douglas Lackey?

22 MR. CARVER: No, he won't be trying the case.

23 COMMISSIONER JACOBS: Okay.

24 Section 2, case background, no changes?

25 Section 3, procedure for having confidential

1 information. That's pretty much boilerplate.

2 Section 4, post-hearing procedures.

3 Section 5, prefiled testimony and exhibits.

4 Okay. To section 6, order of witnesses.

5 MS. KAUFMAN: Commissioner, BlueStar does have a
6 change there.

7 We filed, I believe it was last week, in regard
8 to substitution of a witness. Mr. Starkey is listed
9 there, but he has a conflict. And instead of Mr. Starkey,
10 we'll have appearing Dr. Gus, G-u-s, Ankum, A-n-k-u-m. He
11 will replace Mr. Starkey and adopt Mr. Starkey's
12 testimony.

13 COMMISSIONER JACOBS: Okay. Are you still
14 planning on calling Mrs. Solon and Aguayo?

15 MS. KAUFMAN: I think, Commissioner, in light
16 of your ruling, it would be safe to delete them. And
17 additionally, Commissioner, we would offer to speed things
18 along to combine the direct and rebuttal of Ms. Hassett,
19 so she takes the stand one time.

20 COMMISSIONER JACOBS: I'm sorry, say again.

21 MS. KAUFMAN: We would offer to combine the
22 direct and rebuttal, only though of Ms. Hassett. So, she
23 will take the stand one time.

24 COMMISSIONER JACOBS: Okay.

25 MS. KAUFMAN: But we would prefer that Dr. Ankum

1 appear twice at this point and time.

2 COMMISSIONER JACOBS: Okay.

3 MR. CARVER: Actually, I was just --

4 COMMISSIONER JACOBS: Any objection to that?

5 MR. CARVER: Well, actually, I was just going to
6 suggest that we combine the direct and rebuttal for all
7 the witnesses. I think that's a practice that's typically
8 followed. It makes the proceedings move a lot more
9 quickly.

10 We have, basically, five witnesses and each of
11 them have filed direct and rebuttal. So, instead of
12 having those five witnesses each get up twice, I think if
13 each got up once, it wouldn't result in prejudice to
14 anyone, and would certainly streamline the proceeding.

15 COMMISSIONER JACOBS: I don't tend to rule that.
16 I will leave it to the discretion of the parties. If you
17 are inclined to do that though, that would be certainly up
18 to you.

19 MS. KAUFMAN: I think at this -- we'll consider
20 it, Commissioner, but right now our inclination is to have
21 Dr. Ankum take the stand twice.

22 COMMISSIONER JACOBS: Okay. You also want to
23 have your witnesses come up for rebuttal and for direct?

24 MR. CARVER: For now. We'll look at the
25 possibility of combining some of them, but if we're not

1 going to do it across the board, I'd like to think a
2 little bit more about who we'd want to combine.

3 COMMISSIONER JACOBS: Maybe we can reach a happy
4 medium by then. Okay. Any other changes to the order of
5 witnesses?

6 Okay. Then we'll go to section 7, basic
7 positions.

8 MR. GOGGIN: Commissioner, we have one change on
9 line 2 of BellSouth's position. The word "represent," I
10 believe, should be "represents" to agree with the subject
11 "each."

12 COMMISSIONER JACOBS: Okay. Any other changes?
13 Okay. Section 7, issues and positions.

14 Okay, we'll just go issue by issue. Issue one
15 is, I'll take it, resolved.

16 Now, I note that there are several issues in
17 here that are resolved, but I haven't seen a stipulation.
18 Will you all do a stipulation on those or do we need one?

19 MR. CARVER: Let me try to address that. I'm
20 not sure at this point what's resolved. Here's what's
21 happened. We originally had 16 issues. Four of them were
22 resolved before the issues were identified. So, that left
23 us 12.

24 One was removed by a legal ruling. Of those
25 other 11, I think BlueStar has unilaterally removed two,

1 which is number 2, line sharing, and number 11, which also
2 relates to line sharing, which leaves us 9.

3 On those other 9 issues, we don't have a
4 stipulation and we don't have a settlement agreement and
5 I'm not sure if we're going to have one. And a lot of
6 those, BlueStar has listed them as being resolved, but I'm
7 not sure why, because we don't have a settlement on them.

8 COMMISSIONER JACOBS: Okay.

9 MR. CARVER: So, I think the ones that BellSouth
10 -- I'm sorry, the ones that BellSouth has listed as being
11 resolved, I think, are the ones that have been resolved
12 for a while, except for 2 and 11.

13 MR. CUTLER: Your Honor, there are numerous
14 issues where BellSouth has sent us language. We've said
15 fine. And we don't seem to be able to get it signed and
16 stipulated to. There are other issues where we're very
17 close, and we just need to go a little bit farther. And
18 that may be the reason why the stipulation isn't signed.

19 COMMISSIONER JACOBS: Okay. For today's
20 purposes, absent a signed stipulation, the issues that
21 remain, you're free to present a stipulation from now
22 until trial, from now until the the time of the hearing,
23 and those issues can be removed.

24 Is that --

25 MS. CLEMONS: That's fine, Commissioner.

1 COMMISSIONER JACOBS: I think that's by our
2 procedure, but I'm not going to remove something, if we
3 don't have an agreement that's pretty ironclad to remove
4 it.

5 MR. CARVER: Yes, sir. Except for 2 and 11, to
6 the extent that BlueStar wants to remove this to some
7 future generic proceeding, I think that they can probably
8 do that unilaterally.

9 COMMISSIONER JACOBS: Is it your position that
10 you want to withdraw those issues?

11 MR. CUTLER: Yes, Your Honor.

12 COMMISSIONER JACOBS: Okay. And you understand
13 there is no, at the moment, there is no generic --

14 MR. CUTLER: All we're making clear is that it's
15 basically the court equivalent of a withdrawal without
16 prejudice.

17 COMMISSIONER JACOBS: Okay.

18 MR. CUTLER: In other words, BellSouth has, as
19 we requested, started generic line-sharing negotiations.
20 Whether or not those end in an agreement, we don't know.
21 If they don't, we presume they'll be generic dockets in
22 various states, and we intend to participate in those.

23 COMMISSIONER JACOBS: Okay.

24 MR. CARVER: Basically, we're trying to handle
25 line sharing through industry meetings. And BlueStar and

1 a number of other new entrants have attended those.

2 So, we're hoping we can work all that out
3 informally, but if we can't, then I'm sure somebody will
4 file a petition for a generic proceeding.

5 COMMISSIONER JACOBS: Okay.

6 So, issue one is resolved, but remains until
7 formally stipulated. And parties can file positions. If
8 you want to have positions on those, I'd like to have
9 those in pretty quickly. So, if it's not going to go away
10 by written stipulation, I'd like to have positions on
11 those.

12 MR. CUTLER: Issue one, Your Honor, is the
13 subject of the disputed amendment where we're having
14 trouble deciding what the meaning of it is.

15 COMMISSIONER JACOBS: I can understand that.

16 MR. CUTLER: The language in the amendment,
17 which both parties I think signed, deals with the terms
18 and conditions for provision of a UCL. And I don't think
19 there's any disagreement about that.

20 COMMISSIONER JACOBS: Yeah, but definition can
21 always be a problem. So, I'll leave that for now. Unless
22 you're prepared to stipulate to it, I'll leave the issue.

23 MR. CUTLER: Again, we are happy to accept the
24 language in there. What is disputed is the pricing.

25 COMMISSIONER JACOBS: Oh, I understand. I'm

1 sorry, I misunderstood. So, the actual definition that's
2 being proposed is acceptable to you.

3 MR. CUTLER: Yes, Your Honor.

4 MR. CARVER: Commissioner, there are actually
5 four issues that when the procedural order came out, the
6 issue list attached to the order had those listed as being
7 resolved. And I think both parties have treated those as
8 pretty much being out of the case. Those are issues
9 number 1, 8, 12, and 13.

10 COMMISSIONER JACOBS: Okay.

11 MR. CARVER: And I'm not sure that we have a
12 signed stipulation, but I think we can pretty much agree
13 that the understanding we have on those is not going to
14 fall apart.

15 COMMISSIONER JACOBS: Okay. If that's
16 acceptable to you all, then that's fine with me and
17 acceptable to staff. Okay. And then 2-A and B are
18 withdrawn.

19 So, we're at 3. Any revisions to the positions
20 of the parties there?

21 MR. CARVER: None for BellSouth.

22 COMMISSIONER JACOBS: Okay.

23 Issue 4, no revisions?

24 MR. CARVER: No.

25 COMMISSIONER JACOBS: Issue 5. I assume issue 5

1 is one where it is not mutually resolved on both parties.
2 BellSouth, you indicate that.

3 MR. CARVER: Yes, sir.

4 COMMISSIONER JACOBS: Okay.

5 MR. CUTLER: Well, I -- is there any way to get,
6 with the assistance of staff, something to get this taken
7 off the table?

8 We have passed language back and forth that
9 BlueStar has said yes to about four different times, and
10 it never seems to end up in a signed document. I guess
11 I'm puzzled about why we need to put on evidence about it.

12 MR. CARVER: If I may.

13 What occurred is that we set down and we thought
14 we had an agreement in principle. And on, I believe, on
15 the 11th we wrote up what we thought the agreement was,
16 and we sent it to BlueStar.

17 Last week, after the deposition, Mr. Cutler gave
18 me back their response, which changed what he had written
19 up substantially. In fact, during the deposition at a
20 break, I think, staff asked the parties if we were likely
21 to settle these. And I said yes, because I thought we
22 were going to just get back a signed agreement; that what
23 we got back instead was something that was changed. So,
24 now I guess we're going have to negotiate those some more,
25 because BlueStar --

1 MR. CUTLER: There was absolutely no change in
2 the language on that issue, other than the fact that it
3 originally had a promise to complete something by the end
4 of January. And since it was February 10th, and it hadn't
5 been done, we simply took that deadline out.

6 COMMISSIONER JACOBS: Okay. Here's what I
7 resolve. Again, I'm not going to remove it. I'm going to
8 leave it here, but you guys are absolutely free to present
9 a stipulation on that which, in your mind, resolves it.
10 For today's purposes, I'm not going to remove it.

11 Okay, issue --

12 MS. CLEMONS: Commissioner, in case the parties
13 can't reach a stipulation, then I think BlueStar needs to
14 file a position.

15 COMMISSIONER JACOBS: Yeah, you want to make
16 sure you get a position in, if you don't resolve it before
17 trial, before hearing.

18 Okay. Issue 6, any changes there? It includes
19 subparts A and B. Same on issue 6-B, I assume.

20 MS. KAUFMAN: I think that's in the same
21 situation. We think it's resolved and, I guess, Bell does
22 not.

23 MR. CARVER: No, it's not resolved.

24 COMMISSIONER JACOBS: Okay. Same situation
25 there. And C.

1 MR. CUTLER: Your Honor, is it too late for a
2 formal request for a mediation in this case?

3 COMMISSIONER JACOBS: It's my understanding that
4 what the process we've handled is that you go through all
5 the mediation that's necessary. When we go to trial, the
6 assumption is that you have reached an impasse.

7 Is that not the process?

8 MS. CLEMONS: I believe, Commissioner, that the
9 parties can mediate anytime up until the trial.

10 COMMISSIONER JACOBS: You're free to mediate up
11 until trial. And if you reach an agreement, then that's
12 fine, but we go to hearing, arbitration hearing, and
13 interconnection agreement, which I personally have always
14 kind of had some issues with, but that's the process we
15 follow.

16 But we go to hearing and arbitration for
17 interconnection agreement assuming that the parties are at
18 an impasse on an issue. In fact, part of the purpose of
19 today is whatever mediation the Commission can do, it does
20 do.

21 But in the role of a mediator you don't
22 postulate resolutions to issues. What you do is you
23 motivate the parties to come to an agreement. And my
24 understanding of mediation, if they don't come to an
25 agreement, then that issue remains.

1 MR. CUTLER: Well, there are at least three
2 different issues in this case where things have been
3 offered in settlement discussions that we've said yes to
4 that don't seem to be resolved here, including things that
5 witnesses have already testified to..

6 And I don't want to get to the merits, but I
7 think that we could save the Commission quite a bit of
8 time here if next week after discovery is finished we at
9 least have a conference call with someone present from the
10 Commission, perhaps staff, to mediate these issues. And
11 all these ones that BlueStar says are resolved should fall
12 off the table.

13 COMMISSIONER JACOBS: Okay. Give me a moment.

14 MS. KEATING: Commissioner, I just want to point
15 out, we do have certificated mediators here at the
16 Commission.

17 And I realize there is a short amount of time
18 before the hearing, but if the parties are truly
19 interested in pursuing that along a twin track with the
20 hearing process, we can certainly put them in touch with
21 David Smith, who heads up our appellate division. And he
22 does have some attorneys that are mediators.

23 COMMISSIONER JACOBS: Okay. Is there any formal
24 notice requirement for that?

25 MS. KEATING: No. There are some forms, I

1 believe, but there's no notice requirement.

2 COMMISSIONER JACOBS: Okay. Then, Mr. Cutler,
3 will you get with Ms. Keating afterwards, and I'm sure
4 she'll fill you in on the details. And you can pursue
5 that at your convenience and schedule.

6 MR. CUTLER: Thank you, Your Honor.

7 COMMISSIONER JACOBS: Okay. Very well.

8 So, we were at, let's see, 6-A, B, C, D. All of
9 those issues seem to be in the same posture.

10 Issue 7, same again, same kind of posture there.

11 MR. GOGGIN: I just have a very small correction
12 to make in BellSouth's position. And it looks as if there
13 was something that was incorrect in the prehearing
14 statement that we filed, but if you could strike the
15 bracket word "sic" and add the word "of," I believe that
16 would correct the sentence.

17 COMMISSIONER JACOBS: Above?

18 MR. GOGGIN: The sentence should read,
19 "BellSouth proposes to include a time interval for the
20 provisioning of xDSL loops and UCLs."

21 COMMISSIONER JACOBS: I see.

22 MR. CUTLER: Your Honor, issue 7 is the perfect
23 example of something that I can't understand.

24 They have sent us language which, basically,
25 says there's a nonguaranteed interval. We said, yes. Why

1 we can't get it signed by both parties, I can't figure
2 out.

3 MR. CARVER: I can't respond to that. I have
4 not been directly involved in negotiations, but I spoke to
5 our negotiator Friday, and I mentioned to her that we had
6 a prehearing conference coming up and I'd like her to
7 clarify what's settled and not settled.

8 And her response was that we wrote up what we
9 believed was a settlement agreement and that we sent it to
10 Mr. Cutler and he changed every issue.

11 Now, I don't have personal knowledge of that,
12 but that is what a BellSouth representative has told me.
13 So, I mean, I guess, if Mr. Cutler wants to talk about
14 this everytime we get to a new issue, we can, but across
15 the board that's my response. We just don't have a
16 settlement.

17 COMMISSIONER JACOBS: Okay.

18 MR. CUTLER: I think this Commission is being
19 faced with what borders on bad faith, and it should try to
20 do something about it to get the issues off the table.

21 COMMISSIONER JACOBS: Okay.

22 Well, the issues will be gotten off the table by
23 our decision, our final decision. As to those issues that
24 remain, when we go to hearing we will take evidence on
25 those, and we'll make a decision as to resolve the issues

1 that remain to be decided.

2 That's how we resolve them, but in terms of
3 before hearing and the parties not wanting to put on
4 evidence on the issue that, again, we're going to leave
5 that pretty much in your court. And again, we'll offer
6 the assistance that we've done already.

7 Okay. Issue 8 is on -- that was on the list
8 that is, indeed, resolved.

9 Issue 9, okay. No changes there.

10 Issue 10, subparts A, B, C, D.

11 Now, in this instance, it's my understanding
12 that you're going to revise -- you're going to file
13 supplemental testimony. Will you also revise your
14 positions on these issues as well?

15 MS. KAUFMAN: I don't think that our positions
16 are going to be revised, no.

17 COMMISSIONER JACOBS: Okay. All righty.

18 Issue 11 is on the list. I'm sorry, no, it's
19 not.

20 Issue 11.

21 MR. GOGGIN: Issue 11 is one of the two issues
22 that I believe BlueStar has to withdraw. Issue 2 and
23 Issue 11, they're related to line sharing.

24 COMMISSIONER JACOBS: You're right. That's
25 correct, is it, Mr. Cutler?

1 MR. CUTLER: Yes, Your Honor.

2 COMMISSIONER JACOBS: Okay. And 12 is resolved
3 and 13.

4 Issue 14. That stays pending, ruling upon a
5 ruling on a reconsideration.

6 And Issue 15, no changes there.

7 Issue 16, no changes there.

8 Okay. We'll move to section 9, the exhibit
9 list. Any modifications? I assume responsive for
10 Mr. Starkey's exhibits will also be Dr. Ankum?

11 MS. KAUFMAN: That's right.

12 MR. GOGGIN: I'd just like to note, for the
13 record, that BellSouth would have no objection to
14 substituting Mr. Ankum's resume for Mr. Starkey's. And it
15 would be helpful if we could get a copy of it, in fact,
16 before Thursday's deposition.

17 MS. KAUFMAN: We will do our best to include it
18 in the supplemental testimony.

19 MR. GOGGIN: Thanks.

20 COMMISSIONER JACOBS: Okay. Any other revisions
21 to the exhibit list?

22 And under proposed stipulations, we can put
23 issues 1, 8, 12 and 13.

24 And on the pending motions, they are resolved as
25 per our rulings today.

1 Any other matters that come before?

2 MS. KAUFMAN: Commissioner, we have one small
3 matter, and that is there's a request for a qualified
4 representation pending for Mr. Cutler in this case.

5 COMMISSIONER JACOBS: Okay. We'll grant that.

6 MR. CUTLER: Thank you, Your Honor.

7 COMMISSIONER JACOBS: And did we resolve our
8 other issue?

9 MR. CARVER: The discovery issue?

10 COMMISSIONER JACOBS: Yeah.

11 MR. CARVER: No, but -- no. We didn't resolve
12 it, but I'm not sure we're going to get it resolved today.

13 I think probably I'll have to talk to
14 Mr. Cutler, and then I'll have to decide whether to file a
15 Motion to Compel.

16 COMMISSIONER JACOBS: Okay. I'm available.

17 MR. CARVER: Thank you.

18 COMMISSIONER JACOBS: If there's nothing else,
19 prehearing is adjourned.

20 MS. KAUFMAN: Thank you, Commissioner.

21 (Adjourned at 12:50 p.m.)
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STATE OF FLORIDA)

:
COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, KORETTA E. STANFORD, RPR, Official FPSC
Commission Reporter,

DO HEREBY CERTIFY that the Prehearing Conference
in Docket No. 991838-TP was heard by the Florida Public
Service commission Staff at the time and place herein
stated; it is further

CERTIFIED that I stenographically reported the
said proceedings, that the same has been transcribed by
me; and that this transcript, consisting of 112 pages,
constitutes an accurate transcription of said proceedings.

DATED this 24th day of February, 2000.

Koretta E. Stanford

KORETTA E. STANFORD, RPR
FPSC Official Commission Reporter

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