

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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COPY

GTE FLORIDA, INC.,
Petitioner,

CASE NO. 99-5368RP

vs.

PSC DOCKET NO. 980253-TX

FLORIDA PUBLIC SERVICE COMMISSION,
Respondent.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

CASE NO. 99-5369RP

vs.

PSC DOCKET NO. 980253-TX

FLORIDA PUBLIC SERVICE COMMISSION,
Respondent.

IN RE: Final Administrative Hearing
BEFORE Ella Jane P. Davis
Administrative Law Judge
DATE: Tuesday, April 25, 2000
TIME: Commenced at 9:30 a.m.
Concluded at 5:20 p.m.
LOCATION: 2727 Mahan Drive
Building 3, Room
Tallahassee, FL
REPORTED BY: SANDI DIBENEDETTO-NARGIZ
Certificate of Merit
Certified Realtime Reporter
Notary Public - Florida

ACCURATE STENOTYPE REPORTERS, INC.
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
850/878-2221

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PROCEEDINGS

1
2 THE COURT: Let us be in order. We are
3 here before the Division of Administrative
4 Hearings in Tallahassee, Florida, on the case of
5 GTE Florida, Inc., versus Florida Public Service
6 Commission and BellSouth Telecommunications versus
7 Florida Public Service Commission. These are
8 DOAH cases consolidated 99-5368RP and 99-5369RP.
9 I am Ella Jane Davis, I am the administrative law
10 judge assigned to this cause.

11 May I have appearances of those of you who
12 are here.

13 MS. CASWELL: Kimberly Caswell for GTE.

14 THE COURT: Is your address on the notice of
15 hearing?

16 MS. CASWELL: Yes, it is.

17 THE COURT: Madam Court Reporter, do you
18 have that?

19 REPORTER: Yes.

20 THE COURT: Would you fill it in, please.
21 And on behalf of BellSouth?

22 MS. CASWELL: It's Michael Goggin. I am
23 sure his address is also on the notice, but I
24 can't tell you what it is.

25 THE COURT: On behalf of the Public Service

1 Commission.

2 MS. BROWN: Good morning, Your Honor. My
3 name is Martha Carter Brown, and with me is Mary
4 Ann Hilton. We are associate general counsels for
5 the Division of Appeals at the Florida Public
6 Service Commission. I have Mr. Goggin's address.

7 THE COURT: Well, that is not really a
8 problem. We need to have Mr. Goggin as opposed to
9 his address. I am not trying to be ugly here. I
10 have no problem with waiting. Mr. Goggin is from
11 out of town?

12 MS. CASWELL: Yes.

13 THE COURT: And do you know if he is in
14 town?

15 MS. CASWELL: I believe he is.

16 THE COURT: This isn't the easiest address
17 to locate.

18 MS. CASWELL: Right. I asked him where it
19 was yesterday. He knew the address, but I am not
20 sure if he knew where the building was.

21 THE COURT: I am reluctant to proceed with
22 any, even with the pending motion or even opening
23 exercises until we see Mr. Goggin. How about it
24 if we take a recess, now that we are opened, and
25 see if you all can find him. Chances are he is

1 having the same problem everybody else does in
2 finding this address.

3 (Brief recess.)

4 MR. GOGGIN: I am Michael Goggin.

5 THE COURT: We are all reconvened,
6 Mr. Goggin is with us. I think I saw you give
7 your card to the court reporter. Would you like
8 simply to enter your name and address as your
9 appearance?

10 MR. GOGGIN: Yes, I would, thank you.

11 THE COURT: Very well.

12 Yesterday afternoon we had a conference call
13 that was truncated. That conference call was
14 designed for me to address the prehearing
15 stipulations which indicated that there would be a
16 motion in limine filed. I was informed at that
17 time that no motion in limine was going to be
18 forthcoming.

19 Is that everybody's representation,
20 Ms. Caswell?

21 MS. CASWELL: Yes.

22 THE COURT: And Ms. Brown?

23 MS. BROWN: Yes, Your Honor.

24 THE COURT: Mr. Goggin?

25 MR. GOGGIN: Yes, Your Honor.

1 THE COURT: I do have, however, GTE's motion
2 for protective order. It seems appropriate to
3 take that up at this time because there seems to
4 be some confusion as to what the representations
5 were in the motion.

6 Have the parties reached an agreement that
7 this is an appropriate order for me to enter?

8 MS. CASWELL: I believe we have, Your Honor.
9 I have spoken to Martha and I believe she, after
10 reviewing the portions of the transcript of the
11 depositions that were labeled confidential, she
12 would agree to hold those as confidential.

13 And in addition, if there are going to be
14 confidential numbers disclosed during the hearing,
15 she agreed we can clear the hearing room of those
16 people who are not parties or who have not signed
17 agreements.

18 MS. BROWN: Yes, Your Honor, I had the
19 opportunity this morning to review the exhibits
20 that I had not had the opportunity to review
21 before. I have also had the opportunity to hear
22 from Ms. Caswell the specifics of the portions of
23 the depositions that she considered to be
24 confidential.

25 I agree, and I agree to hold them

1 confidential to be treated as Your Honor sees fit.

2 THE COURT: Mr. Goggin, do I understand that
3 the petitioners have entered into a separate
4 contract for this protective measure?

5 MR. GOGGIN: Your Honor, first of all, I
6 would like to apologize for also missing the
7 teleconference yesterday. I was stuck in the air.

8 THE COURT: We were having one of our rare
9 rains in Tallahassee.

10 MR. GOGGIN: But we have no objection to the
11 granting of the order. We have apparently
12 received a copy of the protective agreement. I
13 have not yet seen it yet, but I am sure that it is
14 in a form that we can agree with.

15 In any event, we agree to treat any
16 information designated by GTE as confidential
17 confidential and pursuant to the direction of the
18 court.

19 THE COURT: There being agreement among the
20 parties, it would appear to me the only thing left
21 for me to work out is the logistics of this. I
22 understand what I am being asked to do is to
23 ensure the protection of certain trade secrets and
24 business documentation in three forms: Portions
25 of Martin and Tuttle's depositions, have they been

1 transcribed?

2 MS. CASWELL: Yes, Your Honor, I have looked
3 over Tuttle again, and I agreed with the witness
4 that nothing in there will be confidential, so
5 it's just portions of the Martin deposition. And
6 in particular I think there are four numbers, they
7 are market share numbers and line numbers, I
8 believe.

9 I expect those numbers will come out during
10 the hearing as well.

11 I have an exhibit that reflects those
12 numbers, but I may not introduce it if it's just
13 easier to have the information elicited --

14 THE COURT: I am not trying to control the
15 presentation of your case. I am trying to figure
16 out how I can ensure the protection that the
17 parties all seem to be in agreement is appropriate
18 under the law and based on the requirements of
19 Scientific Games against Dittler Brothers, I am
20 going to figure out how to do that, I hope.

21 I gather that the Tuttle deposition, no one
22 has any problems with. There are portions of the
23 Martin deposition, has it been filed?

24 MS. BROWN: No, Your Honor, it has not.

25 THE COURT: If it has not been filed, there

1 is nothing I can do about it.

2 MS. BROWN: Exactly. I was going to mention
3 I really don't anticipate at this point using
4 them. Something may come up, but I can assure the
5 court that I will avoid the use of the numbers, if
6 I need to.

7 THE COURT: Very well. That takes us then
8 to the second item. What I gather is Ms. Martin's
9 exhibit concerning third-party research and this
10 infringes on an agreement with the market research
11 firm; is that correct?

12 MS. CASWELL: Yes. GTE considers that
13 information confidential as well. Those are the
14 same numbers that are in the deposition.

15 THE COURT: I gather this is a demonstrative
16 exhibit?

17 MS. CASWELL: Yes, it's just a one-page --
18 it's just a piece of paper.

19 THE COURT: Then that should not be too hard
20 to protect. That can be resolved by sealing in
21 the file, and since all exhibits remain with me
22 until they are -- if transferred under final order
23 appeal -- they will remain in the sealed envelope.

24 Now, as to all testimony of Martin and
25 Tuttle, is there a way that this can be

1 accomplished without having to clear the
2 courtroom?

3 MS. CASWELL: I believe so. I think the
4 testimony will come in tomorrow, and I believe by
5 that time there won't be anybody in the room that
6 isn't covered by the protective order.

7 THE COURT: I am not too sure how you
8 expect me logistically to do that, ma'am, but let
9 me make a suggestion. There are several ways you
10 can accomplish this.

11 One is to submit portions of deposition and
12 the deposition be admitted in evidence in lieu of
13 live testimony and sealed.

14 Another way, of course, is to clear the
15 courtroom.

16 I would prefer not to have to go through the
17 entire audience and ask people to designate in a
18 public hearing whom they are here representing.
19 It may be we have somebody that just wandered off
20 the street who is interested in telephones. I
21 don't know.

22 But in order to avoid as much interruption
23 as possible, if you can at least organize your
24 direct evidence and cross examination and
25 rebuttal of -- will it be both Ms. Martin and

1 Ms. Tuttle?

2 MS. CASWELL: No, only Ms. Martin, and I
3 believe it's possible to introduce the deposition
4 transcript in lieu of public testimony.

5 THE COURT: The public has right to know
6 virtually everything that goes on in these
7 proceedings with the exception of those items that
8 are clearly trade secrets; and where you have a
9 separate marketing agreement, then I am satisfied
10 that it meets the test of Scientific Games, Inc.,
11 vs. Dittler.

12 But I don't want to go any further into
13 restricting access to information than is
14 absolutely necessary.

15 MS. BROWN: We have no disagreement with
16 introducing the depositions into the record in
17 lieu of live testimony.

18 THE COURT: That presumably is something you
19 all can work out in recesses. You have the gist
20 of what my ruling is with regard to the request
21 for protective order.

22 It will be, I guess, GTE's duty to watch
23 vigilantly to make certain that these things don't
24 come out, and alert me when you think it is
25 necessary.

1 Now, there are no other pending motions?

2 MS. BROWN: We have a motion for official
3 recognition. It's a stipulated motion. I don't
4 know if you want to take that up at present.

5 THE COURT: Let's wait until we -- it isn't
6 filed yet?

7 MS. BROWN: Yes, it has been filed. There
8 was --

9 MS. HELTON: Filed on the 21st of April,
10 unless my secretary messed up.

11 THE COURT: There are many things that I
12 find have not reached me, but if you would like to
13 bring me a copy, we'll file it in open court. If
14 you want me to cite the rule for that, I don't
15 remember it.

16 MS. HELTON: I don't know if I ever knew it.

17 THE COURT: Are GTE and BellSouth satisfied
18 that you have seen everything here?

19 MS. CASWELL: Yes.

20 MR. GOGGIN: Yes.

21 THE COURT: Do you want the opportunity to
22 look at it now to be certain I have everything,
23 and if there is no objections, to these being
24 officially recognized?

25 MR. GOGGIN: Your Honor, from looking at the

1 list that was presented to us, it appeared that
2 all of the items that they had included in their
3 official recognition list are decisions of
4 administrative bodies or courts that are published
5 decisions, and under the circumstances we don't
6 think that there will be any objection to having
7 it be officially recognized.

8 THE COURT: Under our rule these are
9 mandatory recognition. My concern only is that if
10 -- if requested. My only concern is you may want
11 to be certain I have all the pages that you all
12 have seen and agreed to and that there are no
13 gaps.

14 MR. GOGGIN: We'll assume that they are all
15 there.

16 THE COURT: Very well. Pursuant to the
17 parties' agreement and pursuant to the rule on
18 official recognition and statute, I will take
19 official recognition of respondent, Public Service
20 Commission's motion for official recognition by
21 date of April 21, 2000, not knowing when it may
22 have been stamped in with the clerk, and we'll
23 label it copy I have been provided officially
24 recognized, rather than labeling it for filing
25 with the clerk of the division.

1 If you have any concerns about filing with
2 the clerk of the division, you may need to take
3 that up with her.

4 Was there something else?

5 MS. CASWELL: I do have something. I was
6 not sure if I needed to file a motion for official
7 recognition.

8 I too have some state decisions that I would
9 like to be officially recognized if that's the
10 procedure. I plan to probably use these in
11 briefs. I discussed it with the lawyers from PSC
12 and Mr. Goggin, and I understand they don't have
13 any problem with officially recognizing these
14 documents. If I could move now for official
15 recognition.

16 THE COURT: Mr. Goggin, have you seen these?

17 MR. GOGGIN: I have not, but I am familiar
18 with the authorities she cited in past filings GTE
19 has made, and I guess for BellSouth's part, I
20 would like to request if there is no objection
21 from the Commission or from GTE, that we be
22 permitted to cite the same authorities that we
23 cited below before the Commission, which were
24 published opinions from other state commissions
25 and published opinions from courts of Florida and

1 the courts of the United States.

2 MS. CASWELL: One thing I need to point out,
3 is there is a California decision at the bottom of
4 the pile. When I asked for that to be copied, I
5 got only part one. The Fresh Look discussion is
6 in part 3, I will bring that tomorrow.

7 THE COURT: It's labeled -- you need part 3
8 of 9?

9 MS. CASWELL: Yes, that was part 1, I
10 believe, and I need part 3. Some of those cases
11 are very lengthy.

12 The Fresh Look discussion is very brief. In
13 those instances I tried to note that on the cover
14 page. I have done that for everybody's copies.

15 MS. BROWN: Your Honor, we have no objection
16 to the official recognition of these documents.
17 We think it demonstrates the use of Fresh Look
18 throughout the telecommunications regulatory
19 community, and we are happy to have them in the
20 record.

21 THE COURT: There being no opposition, I
22 would mark these as officially recognized as well.
23 Due to the voluminous nature of these items, it is
24 going to be very difficult for me to indicate for
25 purposes of the transcript precisely what is

1 included in here.

2 I think that's about the best that I can do
3 for you. The request to supplement, the way I do
4 that, you show it to everybody else; if there is
5 no objection, when we reconvene after some recess,
6 we'll take it up then as long as it doesn't
7 interrupt testimony.

8 MS. CASWELL: Thank you.

9 THE COURT: Mr. Goggin, as to your request
10 to cite items that were cited before the
11 Commission in public hearing, how am I going to
12 limit that and know what that is?

13 Let me explain my view of this, and it will
14 make it easier for you to respond and also make it
15 easier for everyone else.

16 Normally, for purposes of citing legal
17 authority, you can cite legal authority in your
18 proposed conclusions of law more or less with
19 impunity. The question is whether or not I can
20 find it and have access to it, and everyone knows
21 whether or not that is the decision you have
22 cited.

23 So if you are talking about something in a
24 standard federal or state reporter, I don't think
25 we have a problem.

1 You just do it.

2 But if we are talking about something that I
3 have no access to, which in some instances,
4 particularly considering the Division of
5 Administrative Hearings and my access to West Law
6 is vastly truncated by construction going on in my
7 office, I would appreciate having hard copies.

8 Now, let me ask Ms. Caswell and Ms. Brown,
9 is there -- and Ms. Helton, if I forget to name
10 you, it's not because I am ignoring you. It's
11 just we are not going to spend as much on this
12 transcript as perhaps we have to. We are going to
13 try to avoid costing the people any more money
14 than necessary.

15 Would anyone have objections that if a
16 proposed final order is filed by Mr. Goggin on
17 behalf of BellSouth, that citations therein simply
18 be attached?

19 MS. BROWN: We have no objection, Your
20 Honor, we'll do the same.

21 MR. GOGGIN: Your Honor, given the
22 voluminous nature of the citations, the cite of
23 authority, would it be acceptable to exclude those
24 authorities that are readily available in state or
25 federal reporters --

1 THE COURT: Surely.

2 MR. GOGGIN: -- court cases.

3 THE COURT: Surely. I am not telling you
4 you have to. I am giving all the parties an
5 opportunity to do this, if what you want to refer
6 to is not in those matters officially recognized.

7 MR. GOGGIN: I understand. Thank you.

8 THE COURT: Anything else we need to take
9 up?

10 MS. BROWN: Your Honor, I don't know if this
11 is the appropriate time. We have several
12 stipulated composite exhibits. Would you like to
13 wait to do that?

14 THE COURT: Not quite yet. Any other
15 preliminary matter?

16 MS. BROWN: Nothing.

17 THE COURT: Then if you would, be at ease.
18 I take a little bit longer to open than some other
19 folks and this can be very irritating to some and
20 is sometimes nice for others. And you are all
21 entitled to whatever your opinion is on this.

22 My view is the purpose of these hearings is
23 in order to determine the truth. Consequently,
24 making things difficult on the lawyers, witnesses,
25 or me serves no good purpose.

1 I would like to give you a little bit of an
2 overview of where we may be going with this.

3 You all have four days reserved for this
4 case and you indicated in your prehearing
5 stipulation that you may be able to get done in
6 three. Since this case was scheduled, however, I
7 have been appointed to the Second Circuit
8 Professionalism Committee which has decided to
9 meet between noon and 1:30 on Thursday.
10 Therefore, I want to give you some warning.

11 I am going to, unless we are at an extremely
12 touchy juncture of evidence, going to declare a
13 lunch recess from 11:30 until 2:00 on Thursday so
14 that I can attend that committee meeting.

15 In the event that we are at a crucial
16 juncture, if any of you feel that, speak up, we
17 are not going to divide out or prejudice anybody
18 by breaking in the middle of witness testimony or
19 anything like that, but having that information
20 may make it easier for you to govern whatever
21 evidence you are putting on.

22 Additionally, I recognize I assume at least
23 that you all know that the duty to go forward in
24 this case is upon the petitioners. After the
25 petitioners' case in chief is presented, subject

1 -- yes, ma'am?

2 MS. BROWN: I didn't want to break your
3 thought.

4 THE COURT: You look anxious.

5 MS. BROWN: I am anxious. I am, and I am
6 anxious because we and the parties have agreed
7 that the Commission will present its case first.
8 We have done that to accommodate our private
9 witnesses who have agreed on their own time to
10 testify before this proceeding. And therefore, we
11 were hoping to get through the Commission's
12 witnesses today.

13 MS. CASWELL: I would also point out --

14 THE COURT: You understand the '99 act
15 requires the petitioners to go forward.

16 MS. BROWN: Well, Your Honor, the way we
17 understood that was that they were -- they would
18 be going forward by filing their petition, by
19 giving their opening statements.

20 We have the burden of proof, as I
21 understand it, to prove by a preponderance of the
22 evidence that our rule is a valid exercise of
23 delegated legislative authority, and they would
24 have the opportunity after we went to fully
25 present their case.

1 THE COURT: You folks stipulated to this
2 order of proof?

3 MS. CASWELL: It wasn't exactly a
4 stipulation. I was not entirely sure what the
5 order would be. I had never done one of these
6 cases. I looked to the Commission, and it was
7 their understanding that they went first and we
8 agreed that was fine, with the additional
9 understanding that they had some witnesses that
10 could only testify today.

11 We, too, have one of our witnesses, one of
12 our three cannot be here until tomorrow. So --

13 THE COURT: I guess the question is are you
14 stipulating to this order of proof now?

15 MS. CASWELL: I am willing to stipulate to
16 it.

17 MR. GOGGIN: Yes.

18 THE COURT: The Commission really wants to
19 do this?

20 MS. BROWN: I understand the risks. We are
21 doing it to accommodate our witnesses. We were
22 hoping to reserve an opportunity for rebuttal. I
23 was going to bring that up later. I will bring it
24 up now in response to your question.

25 THE COURT: If you go first, I assume you

1 are entitled to rebuttal. I gather the
2 stipulation is that that's how we are going to do.
3 Is that your stipulation?

4 MS. CASWELL: I had not contemplated the
5 rebuttal part of the stipulation earlier, but I
6 suppose that's fine.

7 THE COURT: Mr. Goggin?

8 MR. GOGGIN: Could you clarify what you
9 meant by rebuttal? Are you talking about just
10 rebuttal in terms of the opening statements or --

11 THE COURT: No, sir.

12 MR. GOGGIN: -- putting on rebuttal
13 testimony --

14 THE COURT: Yes, sir.

15 MR. GOGGIN: -- at the end of our case?

16 MS. BROWN: Yes.

17 MR. GOGGIN: We are prepared to stipulate to
18 that.

19 THE COURT: If the parties are willing to
20 stipulate this, I am willing to go along with it.
21 But beats me.

22 That being the case, the agency will put on
23 its case in chief first, subject to cross
24 examination and objection by petitioners.

25 When the agency has rested, the petitioner

1 will have an opportunity to put on their case in
2 chief.

3 I assume that since you all have been
4 working together for a number of months, you all
5 can figure out what order you are going to go in,
6 whether it will be GTE and then BellSouth or vice
7 versa. What I will not permit is double teaming
8 in cross examination or presentation.

9 However, if you choose to put on the same
10 witnesses and each of you examine, then it has to
11 be in the appropriate order, the order that you
12 have agreed and it's not going to shift back and
13 forth as we go.

14 When the petitioners have completed their
15 case in chief, the agency will have an opportunity
16 to come back and do rebuttal.

17 And ma'am, let me explain that I take a very
18 narrow view of rebuttal. It is not an opportunity
19 to retry your case in chief all over again. It is
20 only an opportunity to address those matters that
21 have come up and could not have been addressed
22 previously in response to the case in chief of
23 petitioners.

24 Now, when we get to the conclusion of all
25 evidence, I usually do what I refer to as asking

1 my four infamous questions. I tell you up front
2 what I am going to do, then I do it, then I ask if
3 you understand it. This is in the nature of
4 telling you what I am going to do, so you will
5 have an opportunity during this lengthy hearing to
6 consult with one another and come up with answers
7 that are agreeable to all of you if it's possible
8 to do so.

9 And my questions will be: Do any of you
10 wish to have oral closing argument? As you know
11 you have an absolute right to oral opening
12 argument if you choose to make it, you have an
13 absolute right to oral closing argument if you
14 choose to make it.

15 But very often folks want to waive oral
16 closing argument, and so I ask. It is not -- by
17 asking it, it is not my intent in any way to push
18 you one way or the other. It is to give you the
19 opportunity to make your own individual judgment
20 calls.

21 I will then ask if any of you wish to
22 provide a transcript? And perhaps when I finish
23 this little spiel, if you have already made the
24 decision that you want to provide a transcript,
25 you will tell me that, it makes it easier for

1 everybody along the way.

2 But by asking if you wish to provide a
3 transcript, again, I am not trying to lure you
4 into doing that. I'm grateful to have them, but I
5 don't solicit them.

6 Finally, I will ask if any of you wish to do
7 proposed final orders. This may seem like a
8 facetious question in a case of this magnitude
9 that's gone on this long, but it is my duty to ask
10 you that.

11 And then and only then does the fourth
12 question come into play which is: How long do you
13 need to do the proposed final order if you choose
14 to do it? That is probably where you all will
15 want to consult with one another so that you can
16 reach an agreement.

17 If you all can reach an agreement of more
18 than the 10 days provided by law, then provided it
19 is not excessive in my opinion, it is my usual
20 procedure to grant it. You all know your
21 schedules far better than I do.

22 I don't have any rule of thought in that
23 respect. If you want to stipulate to a time less
24 than 10 days, however, and I have had that happen
25 twice in 15 years, much to my astonishment, then I

1 may have some additional questions for you as to
2 why and under what circumstances.

3 But I am guessing perhaps from experience
4 and not from knowledge that in a trial that is
5 going to take the better part of three and
6 probably four days, you aren't going to want to do
7 these in less than 10 days.

8 Very well. Is there anything else that I
9 can offer that will make this easier on any of
10 you?

11 MR. GOGGIN: Your Honor, I have a procedural
12 question.

13 THE COURT: Sure.

14 MR. GOGGIN: Earlier you mentioned that you
15 would not permit double teaming or doubling up on
16 a witness. And you mentioned opening and closing
17 arguments. I guess the assumption of the parties
18 going in is that we were three parties.

19 What I am wondering is whether it is your
20 intention to permit only one of the petitioners to
21 question a witness presented by the staff or
22 whether, in fact, both parties would have an
23 opportunity to question the witness.

24 THE COURT: No, I am not trying to make this
25 unfair. I am trying to make it orderly. Each of

1 you represent individual parties. That's entirely
2 appropriate. But each of you will complete your
3 cross examination before the other one begins.

4 MR. GOGGIN: Okay.

5 MS. CASWELL: I do have one question.

6 THE COURT: Sometimes when I speak it's
7 about as clear as mud, but was there anything that
8 was not understandable about the last or
9 additional question you wanted to ask?

10 MR. GOGGIN: You prefaced that by saying we
11 worked together for sometime. I wanted to make
12 clear we and BellSouth intend to try the case
13 separate from GTE.

14 THE COURT: I don't doubt that, but you all
15 have been very reasonable in discovery schedule
16 and everything. If there is an opportunity to
17 compliment lawyers, I like to do it.

18 MS. CASWELL: I have a question on question
19 number 2, whether we wish to provide a transcript;
20 because of my inexperience if I requested a
21 transcript of the court reporter, is the procedure
22 that we get the transcript and we provide it to
23 you?

24 THE COURT: Well, let me explain what the
25 statute provides, and then you may make certain

1 judgment calls on your own.

2 The statute provides that if you file a
3 transcript with the division for my use in the
4 course of my preparing the final order, you do not
5 have to pay for a transcript for any other party.
6 But the transcript provided to me is filed with
7 the clerk and becomes the official transcript of
8 these proceedings.

9 What you all do about ordering your
10 individual transcripts is a business arrangement
11 you have with the court reporter that I have
12 nothing to do with. Did that answer --

13 MS. CASWELL: I think so.

14 MS. BROWN: Perhaps I can shed some light on
15 it.

16 It's the Commission's practice to provide
17 the transcript to you. We are providing the court
18 reporter. We will provide the transcript for your
19 benefit. If the parties want a copy, they will
20 have to ask the court reporter.

21 MS. CASWELL: Thank you.

22 THE COURT: Let me also indicate when a
23 transcript is provided, it's my habit to enter
24 automatically a post hearing order that tells you
25 when it's been filed. This doesn't make a whole

1 lot of difference to those of you in Tallahassee,
2 but it may make a lot of difference for those of
3 you out of town. It avoids the need to keep
4 calling the clerk of my court or the division to
5 find out when the transcript has been filed so you
6 start counting the first day whenever your
7 proposed final orders are due.

8 The problem, of course, is as the mails have
9 deteriorated, the entry of that order and mailing
10 for five days under Florida law, three days under
11 federal law, doesn't always get it to folks in
12 time so that they have a lot of time to do the
13 proposed final order.

14 But since a transcript will be filed, that
15 post hearing order will automatically be entered,
16 and it's a standard order and there is nothing
17 magic about it. It just cites to the rules for
18 how you go about doing a proposed final order. It
19 will tell you when the transcript has been stamped
20 in filed by the clerk. Is that helpful?

21 Any other -- I hesitate to use this term --
22 housekeeping duty we need to take up?

23 Very well. Are we ready for opening?

24 MS. BROWN: We are, Your Honor.

25 THE COURT: Very well.

1 MS. BROWN: Would you like the Commission
2 to go first? I am prepared to do that.

3 THE COURT: You folks stipulated as to who
4 would go forward. That does not change the burden
5 of proof or the duty of direct evidence. But yes,
6 ma'am, you proceed.

7 MS. BROWN: All right. This is a rule
8 challenge to the Commission's recently proposed
9 Fresh Look rules that have a reasonable long
10 history with the Commission --

11 THE COURT: I don't mean to throw you off,
12 but I just remembered one additional thing I
13 normally do and I would like to ask counsel --

14 MS. BROWN: That's fine.

15 THE COURT: -- if you folks have no
16 objection, if someone has a clean copy of your
17 pretrial stipulation, I would appreciate it if it
18 could be tendered to the court reporter so she
19 will have the spelling of all witnesses' names.
20 That will save you some money in causing to ask
21 spelling of witnesses names, and it will also give
22 her some of the terms that you all are using which
23 are anagrams for things you all understand.

24 Let me also suggest I have no objection to
25 you treating evidence as if you think I am as dumb

1 as a post. You folks have been living with this
2 case for several months. I have not. I am a
3 blank sheet. I am not associated with the
4 Commission. I am not associated with any party.
5 The things that may seem extremely common and
6 normal to you will not seem common and normal to
7 me.

8 So feel free to use real words as well as
9 letters and anything else you feel is necessary to
10 make your best case and best presentation.

11 Ms. Brown, you may continue.

12 MS. BROWN: Thank you, Your Honor.

13 The Commission's proposed Fresh Look rules
14 cite as specific authority section 364.01, Florida
15 Statutes, and section 364.19, Florida Statutes.

16 Section 364.01 entitled the powers of the
17 commission, legislative intent, states at
18 subsection 4 that the Commission shall exercise
19 its exclusive jurisdiction in order to protect
20 public health, safety and welfare, by ensuring
21 that basic local telecommunications services are
22 available to all customers in the state at
23 reasonable prices.

24 Subsection B of that rule encourages direct
25 -- directs the Commission to encourage competition

1 through flexible regulatory treatment among
2 providers of telecommunication services in order
3 to ensure the availability of the widest possible
4 range of consumer choice in the provision of all
5 telecommunication services.

6 That subsection of the rule also directs the
7 Commission to promote competition by encouraging
8 new entrants into telecommunications markets, and
9 by allowing a transitional period in which new
10 entrants are subject to lesser regulatory
11 oversight and local exchange telecommunications
12 companies.

13 Section 364.19, Florida Statutes, states
14 that the Commission may regulate by reasonable
15 rules the terms of telecommunications service
16 contracts between telecommunications companies and
17 their patrons.

18 These rules specifically encourage -- direct
19 and mandate the Commission to oversee the
20 development of a competitive market in the State
21 of Florida.

22 The Commission in these rules has used a
23 regulatory tool entitled Fresh Look in order to
24 help accomplish those processes.

25 The Fresh Look rule protects the public

1 health, safety, and welfare by ensuring basic
2 local telecommunications services are available to
3 all consumers. It encourages competition through
4 developing the widest possible range of customer
5 choice and it encourages new entrants into the
6 markets.

7 That is the legal basis for the proposed
8 rules. At this hearing we will demonstrate
9 through the testimony of our witnesses that the
10 Commission's rules were based on competent,
11 substantial evidence; that they are a valid
12 exercise of legislative authority; that they are
13 not arbitrary and capricious.

14 First, we will set the regulatory stage for
15 the court giving the historical background of the
16 Fresh Look rule as a regulatory tool at the
17 Commission, and at the other federal agencies, to
18 develop competition, to bridge the gap between
19 prior monopoly provision of an essential utility
20 service to a more competitive market.

21 It gives a boost to the process. It
22 furthers the goal of a fully effective competitive
23 market in Florida.

24 Then we will provide testimony from a
25 competitive telecommunications provider, Time

1 Warner Telecom, the original petitioner in rule
2 making before the Commission, to explain why a
3 Fresh Look rule would benefit them.

4 Following that, we will provide the
5 testimony of a small business customer,
6 Mr. Larson, small Internet service provider in
7 Tallahassee, who will explain why this rule will
8 benefit his business.

9 Thereafter we will provide testimony from
10 the Public Service Commission's staff member who
11 worked on the rule and who will provide detailed
12 explanation of the basis for this particular
13 exercise of this Fresh Look rule.

14 And we will conclude with two staff members
15 who developed the two statements of estimated
16 regulatory costs that were provided by the
17 Commission in this rule-making proceeding, an
18 extensive rule-making proceeding that has an
19 extensive record that we will propose be part of
20 this record.

21 We think at the conclusion of our evidence
22 today and at the conclusion of our discussions of
23 the many legal issues that come up, we will be
24 able to convince you that this rule is a valid
25 exercise of delegated legislative authority.

1 Thank you.

2 THE COURT: You folks wish opening at this
3 time?

4 MS. CASWELL: Yes.

5 THE COURT: Okay.

6 MS. CASWELL: The Commission's stated
7 purpose of the Fresh Look rule is to, quote,
8 enable alternative local exchange carriers to
9 compete for existing incumbent local exchange
10 carrier customer contracts covering local
11 telecommunications services offered over the
12 public switched network which were entered into
13 prior to switch-based substitutes for local
14 exchange telecommunications services.

15 The Commission set June 30, 1999, as the
16 date before which there were not switch-based
17 substitutes for the ILECs local contracts
18 services. So the relevant question at least in
19 determining whether the rule is arbitrary or
20 supported by the evidence is whether that is true.

21 Were there no alternatives for these
22 services prior to June 30, 1999?

23 Most of the testimony in this hearing will
24 go to the factual issue. We will demonstrate
25 there were in fact substitutes for the ILECs local

1 services long before June 30, 1999. Applying
2 these facts to the law then compels the conclusion
3 that the Fresh Look rule is arbitrary, capricious,
4 and not supported by competent, substantial
5 evidence.

6 But even though most of the hearing will
7 focus on this point, it's important to keep in
8 mind that this is just one aspect of this
9 challenge. The legal issues will mostly be left
10 to the briefs. But I would like to discuss those
11 issues briefly at this point so we don't lose
12 sight of their critical importance.

13 One of the key legal questions here is
14 whether the Commission even has the authority to
15 adopt a Fresh Look rule. The answer to that
16 question is no.

17 The Commission attempts to rely on the
18 statute that says it can regulate by reasonable
19 rules the terms of telecommunication service
20 contracts between companies and their customers.

21 This reliance is misplaced. The Fresh Look
22 rule isn't a reasonable regulation of contract
23 terms. It's an abrogation of lawful, valid
24 contracts without any regard for the actual
25 contract terms themselves.

1 There is nothing in the statute that gives
2 the Commission this extreme authority. In fact,
3 the legislature in 1995 revised the statute to
4 expand the ILEC's ability to use the kind of term
5 and volume discounts we are talking about here
6 without any need to show any level of competition.

7 The Commission's claimed basis of authority
8 must be particularly closely scrutinized in this
9 case because it's trying to do something
10 unconstitutional. Florida courts tolerate almost
11 no contract impairment, let alone the drastic
12 impairment the Fresh Look rule would work, and it
13 is wrong as a matter of law that contracts and
14 regulated industries are undeserving of
15 constitutional protection.

16 The constitutional problem with the Fresh
17 Look rule is so obvious and so serious that the
18 legislature, through its joint administrative
19 procedures committee, asked the Commission to
20 reconcile the rule with Florida's contract laws,
21 and because the rule also reaches back to affected
22 existing contracts the committee further asked the
23 Commission to explain what statutory authority
24 would justify such a retroactive effect.

25 To our knowledge, the Commission never

1 responded to the committee. Since the Commission
2 gets its authority from the legislature, we
3 believe this is a serious lapse. Although the
4 legality of the rule was intensely debated during
5 the proceeding and although the Commissioners time
6 and again expressed concern about the legality of
7 the rule, the JAPC letter was never even entered
8 into the record. So the parties had no
9 opportunity to comment on it during the
10 rule-making process.

11 We believe the Commission's treatment of the
12 letter was a material failure to follow applicable
13 rule-making procedures which require that all
14 inquiries from standing legislative committees be
15 entered into the rule-making record.

16 In sum, after this hearing it will be clear
17 that there is no evidence to support the
18 Commission's conclusion that there were no
19 substitutes for the ILECs contract services before
20 June 30, 1999. And after considering the legal
21 briefs, it will be that much more apparent that
22 the rule is an invalid exercise of delegated
23 authority. Thank you.

24 THE COURT: Mr. Goggin?

25 MR. GOGGIN: Good morning, I will try not to

1 be overly repetitive.

2 BellSouth agrees with much of what GTE said
3 this morning. As you know, BellSouth contends
4 that the adoption of the Fresh Look rules would be
5 an invalid exercise of delegated legislative
6 authority.

7 The proposed rules will permit certain
8 business customers of BellSouth, GTE, and Sprint
9 the right to unilaterally rescind their term
10 agreements without paying the full termination
11 liability to which they freely agreed.

12 The Commission contends that the rules are
13 justified because the contracts purportedly were
14 signed when customers did not have competing
15 alternatives from which to choose and the
16 contracts purportedly prevent competing providers
17 who are known as alternative local exchange
18 companies, or ALECs, from competing for such
19 business customers.

20 BellSouth contends that the Commission lacks
21 statutory authority to adopt such rules. Indeed
22 the rules would amount to retroactive rule making
23 because they permit the abrogation of existing
24 agreements that were freely bargained for after
25 the parties began to perform.

1 The Commission can point to no statute which
2 would authorize such rule. The Commission relies
3 upon two provisions for its authority to adopt
4 these proposed rules. Section 350.127
5 subparagraph (2) is a general grant of rule-making
6 authority.

7 Section 364.19 states that the Commission
8 may regulate the terms of telecommunications
9 contracts between telecommunications companies and
10 their customers.

11 Granted, this is a grant of rule-making
12 authority to determine the terms of contracts, but
13 does not say that the Commission has the right to
14 authorize the abrogation of those contracts after
15 they have been formed and after the companies have
16 begun to perform under those agreements.

17 The Commission states it is exercising this
18 statutory authority to implement 364.19 which
19 permits the regulation of contract terms and
20 364.01 which confers general powers on the
21 Commission and expresses the intent of the
22 legislature.

23 Ms. Brown, a moment ago, cited a number of
24 statutory provisions under 364.01, specifically
25 subparagraphs (a), (b), and (d), but she failed to

1 mention two other subparagraphs of 364.01 which
2 apparently would be contravened by this rule.
3 Subparagraph (e) states that the Commission should
4 encourage all providers in telecommunication
5 services to introduce new or experimental
6 telecommunications services free of unnecessary
7 regulatory restraints, and subsection (g) requires
8 the Commission to ensure that all providers of
9 telecommunications services are treated fairly by
10 preventing anti-competitive behavior and
11 eliminating unnecessary regulatory restraints.

12 Nothing in the general provisions cited by
13 the Commission authorizes the Commission to adopt
14 rules that permit the abrogation of contracts.
15 When the legislature determined in 1995 to open
16 local telemarkets to competition, it did away with
17 rate-of-return regulation and specifically
18 encouraged the formation of precisely these sort
19 of contracts the Commission seeks to abrogate by
20 these rules.

21 Although BellSouth's rates were capped, the
22 legislature in section 364.051 subparagraph (6)
23 specifically provided that nothing in the new
24 price cap regulations should prevent companies
25 like BellSouth from meeting competition by

1 offering volume or term discounts using individual
2 contracts.

3 That is precisely this sort of contract the
4 Commission is trying to undo through these rules.

5 If the legislature intended to authorize the
6 Commission to pass rules designed to abridge the
7 precise sort of agreements the legislature
8 intended to encourage, it would have done so
9 expressly.

10 The Commission's attempt to stretch the
11 general grants of power and rule-making authority
12 to permit the adoption of these rules is not only
13 contrary to the intent of the legislature as
14 expressed in the price regulations statute, but
15 it's also contrary to section 120.536.

16 In relevant part, that provision states no
17 agency shall have the authority to adopt a rule
18 only because it is reasonably related to the
19 purpose of the enabling legislation, and we'll
20 later show it's not reasonably related to the
21 purpose of the enabling legislation, and is not
22 arbitrary and capricious. Nor shall an agency
23 have the authority to implement statutory
24 provisions setting forth general legislative
25 intent or policy. We submit that section 364.01

1 is such a statute.

2 It's not surprising that the legislature
3 granted no expressed authority to adopt rules that
4 would abridge existing contracts. The contract
5 clause of the United States and Florida
6 Constitutions would prohibit such rules. The
7 rules would clearly impair the obligation of
8 contracts in the language of the contracts laws.

9 No state may take administrative action that
10 substantially impairs a contractual obligation
11 unless the action is justified as a reasonable and
12 necessary means to achieve an important public
13 purpose.

14 The evidence in this case will show that the
15 action here will be neither reasonable nor
16 necessary. It is not reasonable because it
17 applies to contracts that were won in a
18 competitive marketplace when its stated purpose is
19 to permit customers to have access to competitive
20 alternatives. And it is not necessary because the
21 other purpose of the rule is designed to allow
22 competing providers of telecommunications services
23 the opportunity to compete for these customers or
24 to encourage entry from competing providers as
25 will be shown entering into this market has

1 exploded over the past four years.

2 There were six providers of alternative
3 local exchange service in 1996, within less than a
4 year of the time that the federal
5 telecommunications act was passed. By 1998, there
6 were 51 providers of alternative local exchange
7 service in Florida according to the Commission's
8 own competition report. And by mid 1999 that
9 number had risen to over 80. Clearly such a rule
10 is not necessary to encourage the entry of
11 competing providers in telecommunications
12 services.

13 These rules are neither reasonable nor
14 necessary and actually are contrary to the intent
15 of the legislature. For these reasons the
16 proposed rules violate the Commission's grant of
17 rule-making authority and in large modify and
18 contravene the statutes that purportedly it would
19 implement. In addition the rules are arbitrary,
20 capricious, are not supported by substantial
21 competent evidence and imposes substantial costs
22 on BellSouth and other incumbent local exchange
23 companies or ILECs, when a less costly alternative
24 -- no rule -- has already accomplished the
25 purported objectives.

1 BellSouth and GTE produced evidence during
2 the hearing in this matter demonstrating that the
3 contracts that would be abrogated by these rules
4 were the product of competition. In fact, the
5 witnesses from BellSouth and GTE were the only
6 witnesses that appeared at any time during the
7 proceedings who are actually parties to the
8 contracts that will be affected.

9 At the last agenda conference in this matter
10 there was one customer who appeared, but his
11 complaint was not that the customer -- that the
12 contracts he entered into were formed at the time
13 when he had no competing alternatives. His
14 complaint was that he had signed a series of
15 contracts that rolled over, and he felt that he
16 could not switch providers without terminating all
17 of them, which he felt would be too costly for him
18 to do.

19 So it was not the absence of competing
20 alternatives that was frustrating, it was the
21 presence of competing alternatives and his
22 inability to economically terminate the contracts
23 to which he had freely agreed.

24 This rule also can be demonstrated to be
25 arbitrary and capricious because the rule only

1 affects contracts with three telecommunications
2 providers in Florida: GTE, Sprint, and BellSouth.
3

4 Competing providers of telecommunications
5 services also use term contracts that have
6 termination provisions that require customers to
7 pay termination charges if they terminate the
8 contracts early. There is no reason to believe
9 that a new entrant, a new ALEC, would be any less
10 burdened or barred from competing for the business
11 of a customer if that customer happened to have a
12 contract with some other telecommunications
13 company other than these three that have been
14 named, and yet only ILEC contracts would be
15 affected.

16 Second, the rule only affects contracts
17 entered into before June 30, 1999, not because the
18 Commission determined that competition did not
19 exist prior to that date, but because there was no
20 data regarding how many contracts had been entered
21 into after that date.

22 Moreover, as my colleague from GTE has
23 mentioned, the Commission failed to follow proper
24 rule-making procedures. The Administrative
25 Procedures Committee asked for information

1 regarding the constitutionality of the rule and
2 whether it would violate the prohibition against
3 retroactive rule making. To our knowledge, no
4 such information was provided.

5 So in summary, BellSouth believes that the
6 rules clearly should be rejected. There is no
7 statutory authority to adopt them. The rules, if
8 adopted, would be unconstitutional.

9 The rules are not supported by competent
10 substantial evidence.

11 The adoption of the rules was arbitrary and
12 capricious.

13 And the rule imposes regulatory costs on
14 BellSouth, on GTE and on Sprint which could be
15 reduced by the adoption of a less costly
16 alternative, no rule.

17 And finally, the agency has materially
18 failed to follow the applicable rule-making
19 procedures in section 120.52.

20 THE COURT: Very well. We ready for
21 evidence?

22 MS. BROWN: We are, Your Honor. Would this
23 be appropriate time to move to mark our stipulated
24 composite exhibits?

25 THE COURT: Sounds fine to me.

1 MS. HELTON: In the box I put on your table
2 there, there is a stipulated exhibit list that has
3 -- it should be there for everyone -- that has --
4 a separate number has been given to each exhibit.
5 These are --

6 THE COURT: Have they already been marked in
7 the prehearing order?

8 MS. HELTON: That's correct. What this is
9 is the documents that make up the record before
10 the Commission, each one of those has been
11 identified separately. They are stipulated
12 Exhibit Numbers 1 through 65.

13 THE COURT: Very well. And it doesn't
14 really matter except for marking purposes. You
15 are calling them stipulated exhibits. Are they
16 being offered jointly by all the parties? Is that
17 what is going on here?

18 MS. HELTON: Yes.

19 MS. CASWELL: Yes.

20 THE COURT: Very well. Normally the way I
21 do this is to mark in the lower right-hand corner
22 any exhibits that come into evidence. Since these
23 are stipulated, I will be happy to indicate these
24 have been admitted in evidence, if that is your
25 stipulation.

1 MS. HELTON: Yes, Your Honor.

2 MS. CASWELL: Yes, Your Honor.

3 MR. GOGGIN: Yes, Your Honor.

4 THE COURT: Very well.

5 THE COURT: Normally I instruct the court
6 reporter, and I will do so now, for any items that
7 come in or for any items that are marked, if you
8 would please, ma'am, on the table of exhibits at
9 the commencement of the transcript, if you would
10 have the number of the exhibit, however I mark it,
11 the description of what it is, and then a column
12 for the page at which it is marked, followed by a
13 column for the page at which it is admitted.

14 I, for years, thought that was the way all
15 court reporters did it, but I understand that
16 there is now some leeway. I am instructing you I
17 don't allow the leeway.

18 However I will not ask the court reporter go
19 through reproducing this item, which is the list
20 of stipulated exhibits, and I will be happy to
21 call them stipulated exhibits.

22 What I will suggest is at the conclusion of
23 hearing, if you all would remind me, I will tender
24 my copy of this to the court reporter to be
25 inserted in the table of contents for the exhibit

1 -- part of the exhibit list within the transcript.
2 Is that acceptable, Ms. Brown?

3 MS. BROWN: Yes.

4 THE COURT: Ms. Helton. I apologize.

5 MS. HELTON: Yes, Your Honor. She already
6 has a copy in the box. I could also e-mail the
7 list to her.

8 THE COURT: If she has a copy, that's fine.
9 Is that acceptable?

10 MS. CASWELL: Yes.

11 MR. GOGGIN: Yes.

12 MS. CASWELL: I do have one point to raise
13 at this point.

14 I had understood that we all agreed that the
15 Commission's transcript from the agenda
16 conferences would be included as stipulated
17 exhibits. And I don't see them in here. I see
18 the hearing transcripts but I don't see the other
19 four.

20 MS. HELTON: I think you are right, we had
21 agreed to that. They must not have been in the
22 record then. I am not sure --

23 MS. BROWN: They should have been in the
24 record. We will see to that this afternoon.

25 MS. CASWELL: I could read those transcript

1 dates and titles into the hearing, into the record
2 at this time if it's appropriate. If not, we can
3 wait until we get --

4 THE COURT: I am not sure what you are
5 asking me, ma'am. You folks can't just agree to
6 get the exhibits and admit them a few hours down
7 the road?

8 MS. BROWN: We can, yes.

9 MR. GOGGIN: There were a number of hearing
10 transcripts that -- agenda transcripts that did
11 not apparently get in the files of the Commission.

12 THE COURT: In other words, you have other
13 exhibits you stipulated to that aren't here and
14 you want to submit them. Do you need a recess to
15 find them?

16 MS. CASWELL: No, I have them here, we just
17 don't have copies of them apparently.

18 MS. BROWN: We are uncertain of why they are
19 not in there. They should be in there. We'll see
20 --

21 THE COURT: Your agreement is that they can
22 come in?

23 MS. BROWN: Yes.

24 THE COURT: And --

25 MS. BROWN: We want them in.

1 THE COURT: After the next recess, the
2 Commission will find those and make them available
3 to petitioners?

4 MS. BROWN: Yes, Your Honor. We'll try to
5 do that by tomorrow, if that is suitable.

6 THE COURT: Naturally you all have looked at
7 them. Then they will be offered as joint
8 exhibits.

9 MR. GOGGIN: I don't think there is any
10 objection to having them offered as exhibits. It
11 may present a practical problem if, for example,
12 Ms. Caswell wants to cross examine a witness and
13 there is only one copy of the transcript here.
14 That's what we are trying to anticipate.

15 THE COURT: I don't hear anyone asking me
16 for a recess in order to do this now. Perhaps if
17 it becomes a problem, we can take it up then.

18 MS. BROWN: I would appreciate that, Your
19 Honor.

20 THE COURT: This is no different than an
21 agreement to submit exhibits out of order.

22 MS. BROWN: Thank you. If that's convenient
23 for everyone and we will, this morning when we
24 recess, try to get copies.

25 THE COURT: I understand the agency is going

1 to complete its case today?

2 MS. BROWN: We are going to try, Your Honor.

3 THE COURT: Well, what you may want to do is
4 not rest until tomorrow morning after you all have
5 had an opportunity to look at everything, and that
6 logistically will solve everybody's problem, I
7 think, will it not?

8 MS. CASWELL: That's fine with me.

9 THE COURT: Mr. Goggin?

10 MR. GOGGIN: That's fine.

11 THE COURT: Ms. Brown, Ms. Helton?

12 MS. HELTON: Could we break for maybe five
13 minutes to talk to the other parties to determine
14 -- I am not sure that I ever received a copy of
15 the agenda transcript. So I don't know. We might
16 need to borrow theirs to make copies.

17 THE COURT: I think you all need to recess
18 to discuss this. Let's see if you can solve it
19 with runners back to your offices. We'll take a
20 15-minute recess.

21 (Brief recess.)

22 THE COURT: We'll reconvene. I gather you
23 folks have worked out your problems with the other
24 potential joint exhibits, and those will be
25 submitted at some later time in the hearing?

1 MS. BROWN: Yes, Your Honor.

2 MS. CASWELL: Yes.

3 MR. GOGGIN: Yes.

4 THE COURT: Okay. Are we ready to proceed?

5 MS. BROWN: We are, Your Honor, the
6 Commission calls Sally Simmons.

7 THE COURT: Ms. Simmons, my remarks right
8 now are not directed just to you. I am operating
9 on the assumption that there are some other folks
10 in this room who are going to testify.

11 However, for right now you are the one I
12 need to pay attention to.

13 Under Florida law you have an opportunity to
14 either swear or affirm to tell the truth. In
15 either case you are under penalty of perjury if
16 you do not tell the truth in these proceedings.
17 Do you have a religious objection to swearing?

18 THE WITNESS: No, I do not.

19 Thereupon,

20 SALLY SIMMONS

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

23 THE COURT: Could we have your full name.

24 THE WITNEESS: Sally Ann, A-n-n, Simmons,
25 S-i-m-m-o-n-s.

1 THE COURT: You may inquire.

2 DIRECT EXAMINATION

3 BY MS. BROWN:

4 Q State your business address for the record,
5 please.

6 A 2540 Shumard Oak Boulevard, Tallahassee,
7 Florida. Zip is 32399.

8 Q By whom are you employed, Ms. Simmons?

9 A The Florida Public Service Commission.

10 Q In what capacity?

11 A I am one of the two bureau chiefs in the
12 division of telecommunications.

13 Q How long have you been so employed?

14 A I have been employed with the Commission
15 eight or nine years, and I have been in my present
16 capacity since 1995.

17 Q What are generally the duties of a bureau
18 chief in the bureau of telecommunications?

19 A In my area, I am responsible -- I am
20 responsible for the -- basically the policy setting,
21 market analysis, areas such certification and tariffs.
22 It covers a broad range of duties.

23 Q What did you do before you came to work for
24 the Commission?

25 A I worked for 16 plus years with various

1 portions of the Bell system and one of the surviving
2 companies, Bell Atlantic.

3 Q In what capacity there?

4 A I worked in a number of positions: In
5 product line management, and also that involved some
6 financial planning and also rate and tariff type work.

7 Q What is your educational background?

8 A I have Bachelor's and Master's degrees in
9 economics from Virginia Tech.

10 Q Thank you. What is the purpose of your
11 testimony in this proceeding?

12 A The purpose of my testimony in this
13 proceeding is to provide a historical background and
14 also to provide the rationale of the Fresh Look policy.

15 Q How has telecommunications regulation
16 changed over time in the years that you have been
17 involved?

18 A The regulation has changed significantly
19 over time. Originally it was very much a monopoly rate
20 of return regulated environment. Over time,
21 competition has been introduced in various areas,
22 initially covering such areas as long distance and pay
23 telephones.

24 And as there has been more and more areas
25 opened up to competition, there has been more reliance

1 on using price regulation as opposed to rate-of-return
2 regulation as a transitional mechanism.

3 Q You stated just a minute ago that
4 competition has been introduced in phases. What has
5 been the cause of the introduction of competition in
6 phases?

7 A I think it's generally been an
8 acknowledgment because of pressures from certain types
9 of firms that it's possible in some aspects that there
10 is an actual monopoly, and as these conclusions have
11 been reached, more and more areas have been opened up
12 to competition.

13 Q What are the statutory frameworks for the
14 development of competition in telecommunications?

15 A Okay. I guess a couple of the most major
16 changes to take place in 1995 in this state, Florida
17 Statutes were rewritten, specifically Chapter 364, to
18 allow alternative local exchange companies to begin
19 operating effective 1-1-96; and also shortly thereafter
20 in February of 1996, the new federal Telecommunications
21 Act was signed into law that contained similar
22 provisions as in Florida law for opening up the local
23 markets.

24 Q Can you explain for our general
25 understanding here the difference between the terms

1 ALECs and ILECs?

2 A Yes. ALECs is a term used in Florida and it
3 stands for alternative local exchange company. ILEC
4 stands for incumbent local exchange company. And both
5 of those types of companies provide local telephone
6 service over the public switch network.

7 Q Before alternative local exchange companies
8 appeared on the scene, were incumbent local exchange
9 companies subject to competition?

10 A Yes, they were in certain areas.

11 Q Can you describe the nature of that
12 competition?

13 A Yes. I guess first there was competition
14 from long distance companies. Perhaps let me clarify.
15 Let me not say first, but there was competition from
16 long distance companies. They competed for short
17 distance toll service that was also offered by the
18 local exchange company.

19 In addition, there were alternative access
20 vendors who provided alternatives to the LEC's
21 dedicated services, and dedicated services were
22 designed to handle high volume voice and data
23 communications between preestablished points.

24 As an example, a bank might use dedicated
25 services to tie together its various branches.

1 So I have mentioned the alternative access
2 vendors, the long distance companies.

3 The third area where there was competition
4 is that customer premises equipment vendors provide a
5 partial alternative to a service that the LECs provide
6 frequently referred to as CENTREX. It had different
7 names depending on the company, but that's pretty much
8 a generic name.

9 And the customer premises equipment vendors
10 provided many of the same functions through something
11 called a PBX. PBX stands for private branch exchange.
12 And through a PBX, a customer could, for instance, have
13 communication between stations on their own premises,
14 they also had a number of calling features, all within
15 this piece of customer premises equipment but was still
16 a monopoly, however, and was something that only the
17 local exchange companies could provide was the
18 connection to the outside world.

19 So the PBXs were a partial substitute for
20 the LECs CENTREX.

21 Q Did they provide dial tone?

22 A That's correct, the local exchange company
23 did provide the dial tone, in either case, whether it
24 be CENTREX or PBX. So if you wanted to communicate
25 with the outside world, it was necessary to have dial

1 tone from the local exchange company.

2 Q What options did the incumbent local
3 exchange companies have to compete with these
4 alternative providers?

5 A The Commission allowed the local exchange
6 company to compete in a few ways. Subject to the
7 Commission's approval, the local exchange company could
8 lower their regular month-to-month rates; they could
9 offer something called tariff term plans, or they could
10 offer something called contract service arrangements.

11 I also need to add that if a customer wanted
12 a nonstandard type of offering, the local exchange
13 company could provide that through something called a
14 special assembly.

15 Q What is the tariff term plan?

16 A A tariff term plan calls for the rate to
17 depend on the period of time to which the customer
18 commits to providing -- not providing -- taking service
19 from the local exchange company. And the longer the
20 service commitment, the lower the monthly rate.

21 Q Why don't you take a minute to describe or
22 define the word tariff so that we can understand the
23 term plan in that connection?

24 A Yes. A tariff in the context of
25 telecommunications is maybe a little bit different from

1 how a layman thinks about a tariff.

2 A tariff, I like to think of it as simply a
3 large catalog of the company's various offerings,
4 rates, terms, conditions. And it is to a large extent
5 fairly legal in nature, I mean in terms of the wording,
6 it's not a layman friendly document.

7 Q What is the significance of the tariff in
8 telecommunications regulation?

9 A The tariff is significant because basically
10 it is the contract between the customer and the
11 company.

12 Q What influence does the Florida Public
13 Service Commission have over tariffs?

14 A Let me take you back in time because the
15 situation has changed a little bit.

16 Prior to the rewrite of Chapter 364, in
17 1995, the Commission approved all of the tariff filings
18 before they went into effect.

19 Now --

20 Q Let me stop you there for a minute. If the
21 Commission had not approved a tariff, what would be the
22 effect of that for the company?

23 A They were not allowed to offer the item to
24 the customer.

25 Q Thank you.

1 A At that time. Now, with the rewrite to
2 Chapter 364, during 1995, local exchange companies were
3 allowed to elect a new form of regulation called price
4 regulation effective 1-1-96.

5 Under this new scheme -- and all the major
6 local exchange companies did elect very quickly, they
7 had all elected -- GTE, BellSouth, and Sprint had all
8 elected by January 3, 1996; and by doing that, some new
9 provisions in the statute then became applicable. And
10 that is it was no longer necessary for the companies,
11 specifically local exchange companies, to have prior
12 approval from the Commission. The filings were made,
13 they were presumed valid, and they went into effect
14 really on fairly short notice periods.

15 Q Okay.

16 A Now the thing about it, though, is the
17 Commission still retained jurisdiction to ensure that
18 the local exchange company did not engage in any
19 anti-competitive act or unreasonably discriminate among
20 customers, similarly situated customers that is.

21 And there have been a few instances where
22 the Commission's staff has taken tariffs that are
23 presumptively valid and they have brought them before
24 the Commission over a concern that perhaps the filing
25 perhaps did violate one of those principles I just

1 mentioned.

2 Q Under the current form of price cap
3 regulation, can price cap regulated telecommunications
4 companies provide services that are not tariffed, that
5 are not filed with the Commission?

6 A There are certain offerings that are not
7 regulated by the Commission. Certain nonregulated type
8 of offerings, can be things like customer premises
9 equipment, voice mail, Internet, those type of things.

10 So there are certain items not regulated by
11 the Commission, but to the extent the particular item
12 is regulated by the Commission in any form, it needs to
13 be in the tariff.

14 Q What about basic local exchange
15 telecommunications services?

16 A Those particular offerings and prices are
17 contained in the tariff.

18 Q And they must be filed with the Commission?

19 A Yes. Yes.

20 Q Now that you have explained a little bit
21 about tariffs and the regulatory importance of them,
22 why don't you go back and explain again what a tariff
23 --

24 A A tariff term plan? It's simply a plan
25 where the rate the customer pays depends on the length

1 of the service commitment. And the longer the service
2 commitment that the customer makes with the company,
3 then the lower the monthly rate will be.

4 Q Okay.

5 A And these are in the tariff as the word
6 suggests.

7 Q Why would an ILEC offer a tariff term plan?

8 A An ILEC might offer a tariff term plan to
9 respond to competition or they may do it to reduce
10 financial risk.

11 Q All right. Will you explain for us what a
12 contract service arrangement is?

13 A Yes, a contract service arrangement was
14 originally only offered subject to the Commission's
15 authorization for those services which were susceptible
16 to uneconomic bypass.

17 Now, uneconomic bypass refers to a situation
18 where a competitor can offer service at a price below
19 the local exchange company's tariffed rate but above
20 the local exchange company's cost.

21 So there was concern if there was not some
22 flexibility to offer contract service arrangement,
23 there was concern that captive customers might have to
24 basically make up for this loss.

25 Q Why would an ILEC, an incumbent local

1 exchange company, offer a contract service arrangement?

2 A They would do so in response to competitive
3 pressure. Typically that would be the typical reason.
4 And going back to what I said earlier, competitive
5 pressures have changed over time.

6 Initially we saw areas becoming vulnerable
7 such as long distance, particularly the LECs short
8 distance toll, pay phones, dedicated type services. So
9 it has changed over time. And in response to those new
10 competitive pressures, the local exchange company has
11 had an increasing interest in offering contract service
12 arrangements.

13 Another thing I should mention about
14 contract service arrangements is that when the statute
15 was rewritten in 1995, that is the Florida Statute,
16 Chapter 364, it was written into the statute that the
17 local exchange company had the opportunity to respond
18 to competition through offering contracts, I think
19 Mr. Goggin mentioned that earlier.

20 I think the important point, though, to keep
21 in mind is that the Commission retained jurisdiction to
22 ensure that the local exchange company did not engage
23 in any anti-competitive act or unreasonably
24 discriminate among similarly situated customers.

25 Q What sort of requirements does the

1 Commission have for information regarding contract
2 service arrangements?

3 A The Commission does require that the
4 companies provide reports on a periodic basis, I
5 believe it's quarterly, indicating what contract
6 service arrangements have been provided, basically what
7 a customer would have paid under the tariff rate, what
8 they paid under the contract, that type of information,
9 the duration of the contract.

10 Q Now, let me -- these two types of contracts
11 that you have been discussing, the tariff term plan and
12 the contract service arrangements, are these two types
13 of contracts covered by the Commission's proposed Fresh
14 Look rules?

15 A Yes. Yes, they are.

16 Q Would you agree that ALECs can offer
17 alternatives to LECs service offerings which were not
18 previously possible?

19 A Yes. Yes, I would agree with that.

20 Q What are the new competing alternatives that
21 LECs, ALECs can offer now?

22 A ALECs can offer basically switched local
23 service that they could never before offer in
24 competition with the local exchange company. And by
25 switched local service what I am referring to is the

1 basic dial tone that allows a customer to communicate
2 with anyone else who has a telephone.

3 Q Is that different than the services that
4 alternative access vendors offer?

5 A Very much so. The alternative access
6 vendors previously, and it was actually back to the
7 first of 1992, had authority to offer local dedicated
8 services. However, that involved communication between
9 preestablished points.

10 What we are talking about now is being able
11 to pick up the phone, get a dial tone and being able to
12 call anyone with another phone. Previously you could
13 only get that dial tone from a local exchange company.
14 Now additional alternatives have emerged because of
15 alternative local exchange companies.

16 Q What else does the local switch service that
17 ALECs offer include?

18 A In addition to the dial tone, being able to
19 communicate with anyone basically that has a telephone,
20 there are also certain calling features that are
21 available through the local exchange company's central
22 office such as things like call waiting, call
23 forwarding, speed dialing, toll restriction. So there
24 are certain features available through the local
25 exchange company's central office that also fall under

1 the term local switched service.

2 Q In a general, broad sense, what is the
3 purpose of a Fresh Look policy?

4 A Generally, the purpose of a Fresh Look
5 policy would be to afford customers an opportunity to
6 terminate a contract without significant financial
7 consequences in order to consider alternatives that
8 have emerged or have arisen due to a new form of
9 competition.

10 Q And what is the new form of competition
11 today that this Fresh Look policy would cover?

12 A In the current context, we are dealing with
13 now alternative local exchange companies being able to
14 offer options in terms of the LECs local switched
15 services.

16 So there is now another class of companies
17 that you could get this basic local service from as
18 well as these calling features that I talked about that
19 heretofore you could not obtain from anyone but the
20 local exchange company.

21 Q Has the Commission ever instituted a Fresh
22 Look policy in the past?

23 A Yes. In 1994, the Commission did adopt a
24 Fresh Look policy in the context of expanded
25 interconnection.

1 Expanded interconnection allowed alternative
2 access vendors to place transmission equipment in the
3 local exchange company's central offices. And it made
4 it easier for alternative access vendors to offer their
5 services that -- made it easier than it had previously
6 been.

7 Q And how did that Fresh Look policy make --
8 affect the authorized -- the expanded interconnection
9 regulation?

10 A You are talking about what was the effect of
11 the Fresh Look policy?

12 Q Yes.

13 A All right. The effect was to allow
14 customers who had contracts for dedicated services with
15 the local exchange company, it gave them a window
16 during which they could opt out of the contract and pay
17 a reduced termination liability. That termination
18 liability was calculated based on repricing the
19 contract to reflect a term that was actually used.

20 This is something that was sanctioned both
21 by the Florida Public Service Commission, was also
22 sanctioned by the Federal Communications Commission.

23 So there is precedent for a Fresh Look. As
24 I say, it goes back to 1994, authorized by both Florida
25 Commission and the FCC.

1 Q And what was the general rationale that the
2 Commission and the Federal -- the FCC used to permit a
3 Fresh Look policy for AAVs?

4 A The rationale really was we have a new class
5 of competitors, alternative access vendors, had been
6 difficult without the expanded interconnection for them
7 to offer service. This was a way of providing a boost
8 to allow them to offer service, and in their case was
9 dedicated service more readily than they could have
10 done previously.

11 Q In the current case, is the rationale for
12 having a Fresh Look policy comparable to the rationale
13 that the Commission used in instituting a Fresh Look
14 policy for expanded interconnection?

15 A Yes, and I would say the rationale is
16 similar and perhaps even more compelling in this
17 situation because in the case of the alternative access
18 vendors and the expanded interconnection, Fresh Look
19 was provided because the companies, the AAVs, now had
20 an easier way of providing service.

21 In the current context, prior to ALECs being
22 authorized, there was no other class of company that
23 could even provide local switched service.

24 So I think the rationale is even perhaps
25 more compelling in this situation.

1 Q Would you say that -- I think -- would you
2 say that this rule is directed -- is this rule directed
3 more toward consumers than it is toward the companies
4 themselves?

5 A I would agree with that. Really, the bottom
6 line is what's best for the customers. And this is an
7 opportunity to give customers an opportunity to avail
8 themselves of new alternatives that were not
9 necessarily there previously.

10 MS. BROWN: Thank you. Your Honor, that
11 concludes my testimony. I tender the witness for
12 cross examination.

13 THE COURT: GTE?

14 CROSS EXAMINATION

15 BY MS. CASWELL:

16 Q Good morning, Ms. Simmons.

17 You have been in the telecommunications
18 industry for quite a while; correct?

19 A Yes.

20 Q Did you help formulate the staff
21 recommendation on Time Warner's petition when it was
22 first filed in February of 1998?

23 A Yes, I did.

24 Q And based on your long experience, is it
25 true that you as well as the other staff saw no

1 compelling need to institute a Fresh Look proceeding?

2 MS. BROWN: Your Honor, I would like to make
3 an objection that these questions appear to be
4 outside the scope of Ms. Simmons' testimony.

5 MS. CASWELL: They are going to the
6 rationale for the Fresh Look policy which I think

7 --

8 THE COURT: Overruled. You may answer.

9 A Could you repeat the question?

10 BY MS. CASWELL:

11 Q Based on your experience, you, as well as
12 the other staff, didn't see a compelling need to
13 institute a Fresh Look proceeding; is that right?

14 A I did recommend denying the request. I did
15 indicate -- I did indicate in that recommendation that
16 I felt that there was some instances where a Fresh Look
17 would be warranted.

18 Q Did you also indicate in your recommendation
19 of March '99 -- March 1998 -- that staff believed it
20 was reasonable to expect that telecommunications
21 managers would have considered the possibility of
22 future alternatives for local switch service and would
23 have considered this factor when agreeing to the term
24 of the contract?

25 A I did say that, yes.

1 Q And did staff also question the basic
2 premise that CSAs are a barrier to competition?

3 A I did state that. Let me mention, however,
4 in response all these questions that reasonable minds
5 may differ on that point, but I did say that. Yes.

6 Q Thank you. And again, at the March 10th,
7 1998, agenda, did you tell the Commission that it was
8 important to keep in mind that it was large business
9 and government customers who would be signing the
10 contracts at issue?

11 A I did say that. I would like to add that
12 there are customers besides the type you just mentioned
13 that could be affected. For instance, with the tariff
14 term plans, that would not necessarily be exclusively
15 those large business and government customers.

16 Q But the rule doesn't make any distinction as
17 between large and small customers for purposes of
18 exercising the Fresh Look opportunity; does it?

19 A I will be honest, I hesitate answering that
20 because I really was not involved with this once the
21 matter went to hearing.

22 MS. BROWN: Your Honor, if I might
23 interrupt. I wasn't -- I did not understand we
24 would have quite so many cross examination
25 questions for impeachment purposes on the

1 documents that were questioned, and I don't have a
2 copy of them.

3 MS. CASWELL: I don't really think they are
4 impeachment questions.

5 THE COURT: There hasn't been any
6 impeachment. She asked questions that the witness
7 has answered directly.

8 MS. BROWN: All right. But if we are going
9 to get there, I really would like a copy of the
10 transcript.

11 THE COURT: Get where, ma'am?

12 MS. BROWN: To impeachment questions.

13 THE COURT: In the event the witness denies
14 something and it's necessary for impeachment, then
15 we will follow the normal impeachment proceeding
16 and you may look over her shoulder at the
17 deposition, if that's what we are going from.

18 MS. BROWN: Thank you.

19 BY MS. CASWELL:

20 Q Is Walter D'Haeseleer your supervisor?

21 A He is not my immediate boss.

22 Q What is his position?

23 A He is director of the division of
24 telecommunications.

25 Q Do you recall that he reminded the

1 Commission at the March 10 agenda that the customers at
2 issue were big commercial users, sophisticated users,
3 and not mom-and-pop operations.

4 MS. BROWN: Your Honor, I object to that. I
5 think that's hearsay.

6 THE COURT: Sustained.

7 BY MS. CASWELL:

8 Q Going back to your February 1998 regulation,
9 staff recommendation, didn't staff express the view
10 that the already existing contract resale requirement
11 gave the ALECs another entry strategy which staff
12 believed further mitigated the need for Fresh Look?

13 A Yes, I did indicate that would be a
14 mitigating factor. However, that might not necessarily
15 be a controlling factor.

16 Q Can you describe the Commission's resale
17 requirement that staff referred to in that?

18 A I can in general terms. I don't recall
19 exactly when it was authorized.

20 Q Okay.

21 A But in general terms, resale simply is an
22 obligation to resell an item. It doesn't matter what
23 it is, it's an obligation to resell it to an ALEC and
24 provide a wholesale discount. That's in general what
25 resale is.

1 Q To your knowledge, would that resale
2 requirement include the contract service arrangements,
3 ICBS, and tariff term plans we are talking about here
4 today?

5 A I believe that's consistent with the
6 Commission's decisions.

7 Q Is that resale requirement still in effect?

8 A Yes.

9 Q As a result of the Commission's denying
10 staff's recommendation not to go to rule making, staff
11 was obliged to draft a proposed Fresh Look rule; is
12 that correct?

13 A Yes.

14 Q And the first version of that rule said that
15 contracts entered prior to January 1, 1997, would be
16 available for Fresh Look. Is that also true?

17 A I guess I am pausing because you are going
18 to the specifics of the Fresh Look provision which
19 really isn't -- is not the scope of my testimony today.

20 Q Actually it's the specifics of the staff
21 recommendation that I think you had some role in. You
22 can correct me if I am wrong, but I am referring to the
23 recommendation. I think it's November 19, 1998, and
24 your name is on the recommendation.

25 And that's the recommendation where staff

1 recommended that contracts entered into prior to
2 January 1, 1997, would be eligible for Fresh Look.

3 And I can show you a copy of the
4 recommendation if your counsel doesn't have it.

5 A Okay. I agree that there was an 1-1-97 date
6 listed.

7 Q And that recommendation, which staff
8 proposed that January '97 date, stated that the purpose
9 of the Fresh Look was to enable ALECs to compete for
10 existing LEC customer contracts covering local
11 telecommunications services offered which were entered
12 into prior to -- and it goes on.

13 That purpose didn't change throughout the
14 course of the proceeding; did it?

15 A I can't speak to that. I was not involved
16 in this matter once the Commission set it for hearing.

17 MS. BROWN: I would like to make two
18 objections.

19 One, I do believe it is outside the scope of
20 Ms. Simmons' testimony.

21 Two, I am not sure where that -- the
22 questions regarding the initial rule in this
23 matter are relevant to whether the rule that the
24 Commission has proposed is a valid exercise of
25 delegated legislative authority.

1 THE COURT: Well, ma'am, I think we have
2 gone outside the scope. I can require petitioners
3 to bring this witness back in their case in chief.
4 And if your objection on that basis is made timely
5 next time, that would probably be my ruling.

6 However, the questions have been asked and
7 answered. If we are going down the trail of a
8 prior rule draft other than the one that is at
9 issue, ma'am, I think that's irrelevant. You have
10 more questions for this witness?

11 MS. CASWELL: Yes.

12 BY MS. CASWELL:

13 Q When staff chose the date for Fresh Look
14 availability, did it believe that consideration more
15 relevant than the level of competition in the market
16 was awareness of customers, customer's awareness of
17 competition, impending competition; is that right?

18 MS. BROWN: I raise my same objection. I
19 think we are still talking about a previous rule
20 draft.

21 MS. CASWELL: No, I am not. But as we -- I
22 can tell you where in the transcript Commissioner
23 --

24 THE COURT: Ma'am, I can't tell from your
25 question. I am going to sustain the objection.

1 Please make it smaller than a bread box so the
2 witness knows what you are talking about.

3 MS. CASWELL: Okay.

4 THE COURT: So I do, too.

5 BY MS. CASWELL:

6 Q Do you recall when the Commission adopted
7 the Fresh Look rule, the current version, the existing
8 version, did you recall that Commissioner Clark offered
9 that awareness of competition was one of the rationales
10 behind the rule, behind the choice of the June 30 date?

11 A I really don't recall.

12 MS. BROWN: I hate to object again. It's
13 hearsay. It's outside the scope of Ms. Simmons.
14 She can't answer. She doesn't recall.

15 THE COURT: Sustained.

16 A I don't know.

17 BY MS. CASWELL:

18 Q I think you just testified that the rule was
19 intended to benefit customers; is that right?

20 A Yes, maybe with a qualifier. It's got to be
21 something that is reasonable. The idea, once again,
22 behind a Fresh Look in any context is to afford
23 customers an opportunity to consider new alternatives
24 that have come about due to a new form of competition.

25 Q Did any customers testify at the

1 rule-making hearing?

2 A I repeat, I was not present at the
3 rule-making hearing. I was not involved once this
4 matter was set for hearing.

5 Q Do you know what economic criteria, if any,
6 the Commission considered when choosing the June 30,
7 1999, date?

8 A It was, once again, done after my
9 involvement with this rule.

10 MS. CASWELL: I am sorry, Martha, will Anne
11 Marsh be offered to answer these sorts of
12 questions?

13 MS. BROWN: Your Honor, yes, we have a
14 witness, as I think I said in my opening
15 statement, who can provide testimony on the
16 specific procedures the Commission used in
17 adopting or proposing the present rule.

18 MS. CASWELL: Will she also testify to
19 rationale because --

20 MS. BROWN: Yes.

21 MS. CASWELL: Okay.

22 BY MS. CASWELL:

23 Q I believe you discussed in your testimony
24 that the long distance market was open to competition
25 some time ago. Were you referring to both the

1 intraLATA and interLATA long distance markets?

2 A I was speaking generally. Of course, it
3 occurred first in the interLATA and progressed to
4 intraLATA.

5 Q The interLATA would generally be the
6 interstate market, if we could call it that for
7 purposes of the hearing, just to --

8 A I am not sure I would agree to that. I
9 don't know that it's critical.

10 Q I don't think it's critical either. What I
11 was going to ask you is: Is it your understanding that
12 that interLATA market has been competitive for some
13 time?

14 A I am not sure how to answer that question.
15 There are a number of providers, there may be a
16 question as to the competitiveness of it, but there are
17 a number of providers.

18 Q Do you know what AT&T's market share is in
19 that market today?

20 MS. BROWN: Your Honor, I am object to that
21 on relevance grounds.

22 MS. CASWELL: The Commission has with its
23 rule indicated that the market for local switch
24 services was not competitive prior to June 30,
25 1999. I am trying to understand the indicators,

1 competitive indicators they used and compare it to
2 other markets which are deemed competitive by
3 federal regulators and most state regulators is
4 probative of the question whether the market we
5 are looking at is competitive or not.

6 THE COURT: I understand this witness did
7 not participate in any of the public hearings or
8 in the final draft of the rule.

9 How does what she knows about one
10 competitor's market share have anything at all to
11 do with the promulgation of the proposed rule?

12 MS. CASWELL: I will withdraw the question.
13 I think it may be appropriate for Ms. Marsh.

14 THE COURT: Sustained.

15 BY MS. CASWELL:

16 Q I think, Ms. Simmons, that you discussed
17 competition between PBX system vendors and CENTREX
18 which would be an ILEC's service; is that correct?

19 A Yes, I did.

20 Q And I think you also mentioned that PBXs
21 were a partial substitute for the ILEC's CENTREX
22 services; is that right?

23 A Yes, I did.

24 Q Didn't the Commission in 1994 decide that
25 CENTREX systems were in direct competition with PBX

1 systems for medium and large-sized customers?

2 A That wouldn't surprise me, but I could not
3 absolutely confirm that.

4 Once again, I reiterate that the CENTREX was
5 -- I am sorry, the PBX was only a partial substitute
6 because the dial tone or the link with the outside
7 world, you still had to get that from the local
8 exchange company if you had a PBX.

9 Q I believe you also testified that while the
10 1995 legislative revisions gave the ILECs the
11 opportunity to offer contracts included volume and term
12 discounts, the Commission still retained its
13 jurisdiction to determine whether the ILECs' actions
14 were anti-competitive; is that right?

15 A Yes, I did say that.

16 Q Did the Commission at any time review any of
17 the ILECs' contracts at issue here to determine if they
18 were anti-competitive?

19 A I can only recall that coming up on one
20 occasion, and actually it was -- I am not certain of
21 the timing, whether it was pre or post the change in
22 the state law.

23 But normally, we would investigate upon a
24 complaint the matter of -- of whether or not a contract
25 was unduly discriminatory or anti-competitive.

1 Q And the Commission has been generally aware
2 that the ILECs were using termination liability
3 provisions in their tariffs and their contracts; is
4 that right?

5 A Yes.

6 Q And at no time did the Commission prohibit
7 such provisions; is that correct?

8 A That's correct. But bear in mind that the
9 whole environment does change over time.

10 Q Is it your opinion that termination
11 liability provisions are anti-competitive in themselves
12 so that all these contracts with these provisions are
13 anti-competitive?

14 A I can't answer that.

15 MS. BROWN: I object. I think it's beyond
16 the scope of Ms. Simmons' testimony.

17 THE COURT: Overruled. You may answer.

18 A Please repeat the question.

19 THE COURT: Was there another objection,
20 ma'am?

21 MS. BROWN: No, Your Honor.

22 BY MS. CASWELL:

23 Q Is it your view that all of the contracts
24 containing termination liability provisions are
25 anti-competitive?

1 A I wouldn't believe so, but once again, I
2 have to reiterate, circumstances can change. As a
3 general rule, I would say they are not. But
4 circumstances can change.

5 Q You discussed in 1994 a decision, I believe
6 it was '94, in which the Florida Commission adopted a
7 Fresh Look rule and expanded interconnection which was
8 borrowed from the FCC's similar rule; is that correct?

9 A Yes, it was going on about the same time as
10 I recall both here in Florida and at the FCC.

11 Q Do you recall under the FCC decision and the
12 subsequent FPSC decision what triggered the
13 availability of the Fresh Look opportunity?

14 A The specific trigger?

15 Q Well, let me put it this way. Wasn't it
16 triggered by the availability of expanded
17 interconnection arrangements that the state and federal
18 commission had just ordered?

19 A Yeah, I think I stated that previously.

20 Q Do you recall was the Fresh Look window 180
21 days long?

22 A I haven't studied it in any detail and don't
23 recall.

24 Q I think you also pointed out that the FCC as
25 well as the FPSC required contract repricing in those

1 instances, did you not?

2 A Yes, I did mention that.

3 Q The Fresh Look rule before us today doesn't
4 require repricing for all contracts; does it?

5 A That is really beyond the scope of my
6 testimony. I think Ms. Marsh can answer that.

7 MS. CASWELL: Thank you. That's all I
8 have, Ms. Simmons.

9 THE COURT: Mr. Goggin.

10 CROSS EXAMINATION

11 BY MR. GOGGIN:

12 Q Ms. Simmons, you mentioned that you have
13 both a Bachelor's and Master's degree from Virginia
14 Tech; is that right?

15 A Yes.

16 Q I am a fellow Virginian. I share what might
17 have been your disappointment on New Year's.

18 You described earlier in your testimony how
19 competition evolved in long distance, speaking
20 specifically of intrastate toll services, pay telephone
21 services, and later certain substitutes for certain
22 services offered by local exchange companies; is that
23 correct?

24 A Generally speaking. I did mention
25 alternative access vendors offering dedicated services,

1 in addition to what you just mentioned.

2 Q These areas of competition began to emerge
3 at a time when BellSouth and GTE and others were
4 subject to monopoly rate of return regulation; is that
5 correct?

6 A Yes and no. I say -- the answer pretty much
7 is yes. However, there was also a -- BellSouth was
8 under a sharing plan such as when their earnings
9 exceeded a certain amount, they were shared in some
10 proportion, I don't remember how, between the company
11 and their customers.

12 Q That would be --

13 A There was a form of incentive regulation
14 that went beyond the traditional rate-of-return
15 regulation that applied to BellSouth.

16 Q But the term uneconomic bypass is a term
17 that arises in the context of rate of return
18 regulations; is it not?

19 A I would say that's where it was first used.
20 I don't know that I would say that's the exclusive use
21 of it, but that's where it was first used.

22 Q In a competitive market, we might call
23 uneconomic bypass competition; is that correct?

24 A Economic bypass?

25 Q Uneconomic bypass.

1 A No, I don't think I would agree with that.

2 Q What is it about bypassing BellSouth's
3 network that would be uneconomic?

4 MS. BROWN: Your Honor, I object to that
5 question. It's outside the scope of Ms. Simmons'
6 testimony.

7 MR. GOGGIN: I believe Ms. Simmons testified
8 earlier that economic bypass had something to do
9 with the fact that there would be revenues that
10 would not be realized by the monopoly provider of
11 service, and that the revenue shortfall would be
12 borne by the customers of the monopoly service
13 provider.

14 What I am trying to get at is her definition
15 of uneconomic bypass. She began to define --

16 THE COURT: I will permit that question.

17 A The question is -- could you repeat? I am
18 sorry. I want to make sure I understand what you are
19 asking.

20 BY MR. GOGGIN:

21 Q What is it about bypassing monopolies'
22 facilities that is uneconomic?

23 A The term uneconomic bypass is defined simply
24 as a situation where a competitor can offer service at
25 a price lower than the LEC's tariffed rate which

1 presumably was set by a regulator, we are talking in a
2 monopoly regulatory environment. So a competitor could
3 offer service at a price that is lower than the
4 tariffed rate but above the local exchange company's
5 cost. That's what is considered uneconomic bypass.

6 Q In a competitive market, this would be
7 considered efficient; would it not?

8 MS. BROWN: Objection. Outside the scope.

9 THE COURT: Overruled.

10 A Could you say that again?

11 BY MR. GOGGIN:

12 Q In a competitive market, an offer by a
13 competitor to provide service that is a substitute or
14 even a partial substitute at a price lower than the
15 price currently being paid would be considered
16 efficient; would it not?

17 A I am still struggling with your question --

18 Q As a --

19 A -- to understand.

20 Q As a matter of economics, would that be
21 considered price competition, what you just defined, a
22 competitor offering same service for a lower price than
23 the tariffed price?

24 A Let me try to answer it this way.

25 What I just described was uneconomic bypass,

1 in a more competitive situation, if the rate that is
2 charged, the tariffed rate, if the tariffed rate is not
3 subject to approval of the regulatory body, then I
4 would agree with you, it's economic bypass.

5 Q You testified before that this uneconomic
6 bypass was the reason that contract service
7 arrangements were permitted; is that correct?

8 A That was the original reason, yes.

9 Q Are there other reasons that have occurred?

10 A Well --

11 Q Or arisen since then?

12 A I would say that one obvious one is that
13 it's permitted under Chapter 364, Florida Statutes, for
14 local exchange companies under price regulation to meet
15 competition via offering contracts. So that is
16 specifically mentioned in the statute.

17 Q It was your testimony also, was it not, that
18 a tariff is tantamount to a contract between a carrier
19 and its customer; is that correct?

20 A Yes. Yes, I did say that.

21 Q It would be similar to a form contract
22 offered to all potential customers; correct?

23 A Yes, I believe so.

24 Q Containing terms and conditions including
25 price?

1 A I believe so, yes.

2 Q And I think you described a tariff term
3 contract as a contract under which a customer may pay a
4 lower rate than the ordinary tariffed rate in exchange
5 for an agreement to a longer term; is that correct?

6 A I can't agree to that because the term plans
7 are, in fact, in the tariff. And it's merely a matter
8 if you agreed to a longer term, you get a lower rate
9 than the normal month-to-month rate which is also in
10 the tariff.

11 All these rates are in the tariff when you
12 are talking about a term plan, a tariffed term plan.

13 Q So a business customer, for example, who
14 wanted to buy a multiple line offering, might be able
15 to purchase that service at a month-to-month rate under
16 BellSouth's tariff?

17 A They are often month-to-month rates as well
18 as rates that vary depending on whether you are
19 committing to taking service for say two or three,
20 maybe even five years, for a variety of different
21 rates.

22 Q Would you disagree with the statement that
23 the tariff term plans are an alternative to other
24 offers, other price plans BellSouth offers under its
25 tariff?

1 A I would agree with that.

2 Q And the choice as to whether to accept the
3 tariff term plan or to purchase from the month-to-month
4 tariff, for example, would be made by the customer;
5 would it not?

6 A It's the customer's choice, yes.

7 Q And this tariff term plan would be a term
8 discount as the Florida Statute chooses that term?

9 A I am sorry, could you repeat that?

10 Q Let me rephrase it.

11 You mentioned before Chapter 364 permits the
12 offering of contract service arrangements.

13 That same subsection I believe you are
14 referring to states that -- and this is 364.051
15 subparagraph (6) -- "that nothing contained in this
16 section shall prevent the local exchange
17 telecommunications company from meeting offerings by
18 any competitive provider, the same or functional
19 equivalent nonbasic services, in a specific geographic
20 market or to a specific customer by deaveraging the
21 price of any nonbasic service, packaging nonbasic
22 services together, or with basic services, using volume
23 discounts and term discounts and offering individual
24 contracts."

25 Would a tariff term plan qualify as a term

1 discount for purposes of the statute?

2 A Yes, I would say so. If I remember
3 correctly, there is more following the portion you just
4 read.

5 Q I will read the remainder. "However, the
6 local exchange telecommunications company shall not
7 engage in any anti-competitive act or practice nor
8 unreasonably discriminate among similarly situated
9 customers."

10 A Yes, that's how I remembered it.

11 Q A tariff, to the extent that it's offered to
12 all similarly situated customers, would not be
13 discriminatory; would it?

14 A I guess on the surface it appears the answer
15 is yes. However, we have had situations where we have
16 had filings that while they might appear as to treat
17 all customers in the same way, we have had at least an
18 instance or two where we have felt that wholesale
19 customers would have been disadvantaged.

20 So by virtue of having the offering in the
21 tariff does not necessarily mean it's
22 nondiscriminatory.

23 And I mean, it often means that, but I am
24 just saying there are isolated cases where we have seen
25 an offering that might be okay at the retail level, but

1 when you look at the consequences of the item being
2 resold and how effectively an ALEC can use the resold
3 offering, we have on occasion come to the conclusion
4 that the offering is discriminatory or
5 anti-competitive. So it is possible.

6 Q So does the Commission review tariff term
7 plans to determine whether they are nondiscriminatory
8 at the time they are filed?

9 A Not presently. As I mentioned, when the
10 statute was rewritten in 1995, and once a local
11 exchange company elected price regulation which became
12 available as of 1-1-96, the Commission no longer really
13 approves these plans. They are presumed valid, they go
14 into effect. To the extent the Commission has any
15 concerns about them, they are dealt with after they go
16 into effect typically.

17 Q But the Commission retains jurisdiction to
18 challenge such a tariff if it believed it were
19 discriminatory, for example?

20 A Yes, on occasion we have.

21 Q And also if it were anti-competitive?

22 A That's correct.

23 Q To your knowledge, are any of the tariff
24 term arrangements that would be subject to these rules
25 the product of tariff term -- excuse me, tariff term

1 plans that have been deemed anti-competitive or
2 discriminatory?

3 A I really can't answer that. That's beyond
4 the level of my understanding.

5 Q Getting back to contract service
6 arrangements, you testified that the purpose of these
7 was to permit incumbent companies to meet competitive
8 offerings; is that correct?

9 A You said tariff term plans?

10 Q No, contract service arrangements.

11 A Contract service arrangements?

12 Q Going back to contract service arrangements.

13 A Yes, I did say it was -- they were offered
14 originally to help address situations of uneconomic
15 bypass, where there was a competitor, the competitor
16 could offer service at a price lower than the tariff
17 rate but above the LEC's cost, and that was the
18 original reason for contract service arrangements.

19 Q Would it be safe to assume then for a
20 contract service arrangement entered into prior to the
21 1995 act, that it was offered to meet a competing
22 alternative?

23 A Competing alternative of some sort, right.
24 As I discussed, competition emerged in phases.

25 Q I think you said that CENTREX substitutes

1 through PBX services were not a complete substitute for
2 local exchange services; is that correct?

3 A Yes, I did say a PBX was not a complete
4 substitute because it did not afford the link or
5 provide the link with the outside world; that still had
6 to come from the local exchange company.

7 Q But a customer might reasonably view
8 PBX-based services as a substitute for a great many
9 services offered by a local exchange company, correct?

10 MS. BROWN: Objection. It calls for
11 speculation.

12 THE COURT: Sustained.

13 BY MR. GOGGIN:

14 Q As an economist, how does one or one with a
15 background in economics, how do you analyze whether
16 something is a substitute?

17 A You look at to what extent the item performs
18 similar functions. I mean, that's -- that would be one
19 of the things I would look at; functionality, and also
20 I would probably look to some extent at the pricing as
21 well.

22 Q Is there a difference between the demand
23 side substitutability and supply side substitutability?

24 A I have been outside the realm of academia
25 for some time, and I wouldn't attempt to answer that.

1 Q You mentioned that the Commission's orders
2 permit the resale of contract service arrangements as
3 well as tariff term plans; isn't that correct?

4 A Yes.

5 Q I apologize for the disjointed nature of
6 this, but much of the ground was already covered.

7 You spoke of new alternatives that, if you
8 will allow me, were a more perfect substitute for the
9 local exchange service that arose subsequent to 1995.

10 A Were a perfect substitute?

11 Q Switched local exchange service, as opposed
12 to a partial substitute which is how you described
13 PBX-based services, this was a more perfect substitute,
14 complete substitute, if you will?

15 A I would say certainly the alternative local
16 exchange company can offer the link with the outside
17 world which could not be done previously. As I
18 mentioned before, it used to be that the local exchange
19 company was the only one that could provide the dial
20 tone that would allow you to call anyone with a
21 telephone.

22 Q Okay.

23 A So it's true that piece of it is now
24 something that can be provided through an alternative
25 local exchange company.

1 Q Can we go back just for a minute to the
2 PBX-based services. Apart from the dial tone and the
3 interconnection with the rest of the switch network,
4 what services can be provided by PBX-based services?

5 A I do not have in-depth knowledge of PBX.
6 It's my understanding that most of the central office
7 features that are available through the LEC would be
8 available through a PBX, but I cannot give you any
9 specifics.

10 Q Okay. We'll get to that through a different
11 person.

12 Wouldn't it be safe to assume that if a CSA
13 existed that had been entered into prior to 1995, that
14 had been entered into in response to a competitive
15 alternative?

16 A That's true, but keep in mind the
17 competitive alternatives keep changing.

18 And no one in that time frame you are
19 talking about, no one else besides the LEC could offer
20 dial tone.

21 Q In the period after the 1995 act was passed,
22 competitors began to emerge that could offer dial tone;
23 isn't that correct?

24 A ALECs were able to offer dial tone. I can't
25 comment about anything more than that in terms of the

1 timing, but they were allowed to provide it.

2 Q You mentioned the Fresh Look rule that was
3 adopted in 1994 regarding alternative access vendors.
4 In 1994, local exchange companies were subject to rate
5 return regulation as monopolies; isn't that correct?

6 A That's correct, with the caveat that I am
7 not sure how to characterize the incentive plan
8 BellSouth was operating under. It was rate of return,
9 but there was a provision whereby if the company earned
10 in excess of certain levels, the earnings above a
11 certain point were shared between the company and the
12 customers.

13 And I believe at some point, earnings above
14 certain -- some level had to be returned completely to
15 customers -- is my recollection.

16 So I am just not sure how to characterize
17 that regulatory plan BellSouth was operating under.

18 Q I understand from what you have said that
19 you are not an attorney; correct?

20 A That's correct.

21 Q Do you have an understanding of whether
22 under Chapter 364 as it existed in 1994, BellSouth was
23 subject to rate-of-return regulation?

24 MS. BROWN: Objection. Outside the scope.

25 She said she is not an attorney.

1 THE COURT: Overruled.

2 A I honestly don't recall how the statute was
3 written at that time.

4 BY MR. GOGGIN:

5 Q Okay.

6 A I can't say with certainty.

7 Q In talking about the previous Fresh Look
8 rule, I believe you stated that a comparable rationale
9 would apply here, but it would be more compelling
10 because in that context, the rule was designed to take
11 advantage of improved alternative access, wherein in
12 this context no switch service had been offered before;
13 is that correct?

14 A Yes.

15 Q When you say no switch services had existed
16 before, before when?

17 A It's very difficult for me to talk in terms
18 of specific dates. I would say the law has changed at
19 certain points. This is an evolutionary kind of
20 process.

21 There is a definite lag in terms of people
22 becoming aware that the world has changed as far as
23 telecommunications.

24 It definitely takes a while for companies to
25 get established, so it's very hard for me to give you

1 hard, fast dates.

2 Q You also said that you didn't have any role
3 in the development or adoption of the rule past the
4 original recommendation of the rule making, is that
5 correct? Let allow me to amend -- the original
6 recommendation against the rule making; is that
7 correct?

8 A I had involvement until such time as the
9 Commission set the matter for hearing, and then I was
10 not involved thereafter.

11 Q Okay. In the time that you had involvement,
12 did the Commission interview or take statements from
13 any of the parties to the contracts that would be
14 affected by the rule?

15 A I honestly don't recall who appeared at the
16 agenda conferences.

17 I think it's fair to say that any
18 conversations -- well, I think it's fair to say there
19 were no conversations other than the ones that took
20 place at the agenda conferences, and I don't remember
21 who was there.

22 Q So there were no investigations performed
23 prior to the hearing, for example, to determine whether
24 or not customers who were parties to these contracts
25 had switched base alternatives from which to choose at

1 the time the contracts were entered into?

2 A There were no discussions with customers
3 while I was involved. We did do some inventory work on
4 the contract service arrangement reports. I recall
5 that going on, but there were no discussions with
6 customers.

7 Q Similarly, there were no discussions with
8 customers who had entered into agreements prior to 1995
9 as to whether the services that they were offered by
10 competing providers were viewed by them as substitutes
11 for BellSouth services?

12 A I think I said we didn't have any
13 conversations with customers while I was involved. So
14 I can't really answer, nothing to relay.

15 Q Getting back to the question of reselling
16 CSAs and tariff term plans, do you have an
17 understanding of the orders that permit such resale?

18 A I have a general understanding.

19 Q Would it be accurate to say that ALEC has
20 the right to resell an existing CSA or tariff term
21 plan, in other words, to step into the shoes of the
22 carrier that is currently providing service under the
23 contract?

24 A That's true, and there would need to be a
25 wholesale discount provided as well for the costs

1 avoided by selling wholesale rather than retail.

2 Q When you say a wholesale discount, what you
3 are referring to is the price charged by BellSouth or
4 GTE to the company that is reselling the service;
5 right?

6 A Yes.

7 Q Is the reseller, the ALEC, permitted to pass
8 all or part of that wholesale discount along to the
9 customer?

10 A They obviously price it however they think
11 best, to try to take advantage of what market
12 opportunity they see. And obviously they try to cover
13 their costs. Other than that, it's their call.

14 Q Under a resale arrangement, would the
15 reseller also be permitted to provide its own customer
16 service?

17 A Yes.

18 Q So a customer who is currently a party to a
19 CSA or tariff term plan, theoretically, at least, could
20 receive service from a different carrier for precisely
21 the same services at a lower price with potentially
22 better customer service; isn't that correct?

23 A I can't --

24 MS. BROWN: Objection. Calls for
25 speculation.

1 A -- comment.

2 THE COURT: Asked and answered, she can't
3 answer.

4 BY MR. GOGGIN:

5 Q Do you have any knowledge of any regulatory
6 or economic barriers that would prevent an ALEC from
7 competing for new business from a business customer in
8 Florida?

9 A I wouldn't want to attempt to answer that.
10 I mean, there are so many factors that would go into
11 that. I really couldn't answer that.

12 Q Fair enough. When you described the
13 rationale of the rule earlier, I believe you said that
14 the rule was designed to do two things. One was to
15 permit customers to have a choice of alternatives that
16 had not previously existed, but also to give ALECs a
17 chance to compete for the business of existing
18 customers; is that correct?

19 A I think I described it slightly differently
20 than what you just did.

21 Q Please describe it in your own words.

22 A Okay. I would describe the purpose of a
23 Fresh Look policy is to allow a customer to consider
24 new alternatives that have arisen due to a new form of
25 competition.

1 Q If a customer had an ALEC offering
2 switch-based services as an alternative at the time it
3 entered into the contract, would the justification that
4 you just stated suggest that Fresh Look would be
5 appropriate to the extent that additional ALECs have
6 now entered the market and are offering switch-based
7 services?

8 A That goes beyond what I can answer. We are
9 getting into judgment calls and Ms. Marsh, I think, is
10 the appropriate witness to address why the Commission
11 chose to handle it the way it did.

12 Q Okay. Do you know of any reason why an ALEC
13 could not, at the time the rule was proposed, compete
14 for additional business from existing BellSouth
15 customers, additional business meaning additional
16 lines, other services to the customer might want?

17 A I am not absolutely certain how to answer
18 that question. There may -- I have been led to believe
19 that there may be some dependencies in that you may
20 need to have all your lines from one company.

21 For instance, if a customer has hunting
22 arrangements where basically a hunting arrangement is a
23 situation where a customer or an end user dials a
24 particular number and it routes between numbers. There
25 may be a whole series of numbers.

1 I am not sure if such an arrangement is
2 operative, if you have some of your lines provided by
3 one company and some of the lines provided by another
4 company.

5 Q Do you know whether PBX can replicate that
6 hunting feature you just described?

7 A It wouldn't surprise me, but I do not -- I
8 really -- my understanding of PBX is very cursory. I
9 have never been involved in regulating them and
10 consequently, my knowledge of them is very superficial.

11 Q Would it be safe to say that a customer
12 could take advantage of a new competitive alternative
13 by waiting for the term of its current contract to
14 elapse, and then signing a contract with a competing
15 provider?

16 A That could be done. The question I think
17 from the standpoint of regulatory policy, is that
18 appropriate or not? But yes, that could be done.

19 Q Couldn't a customer also simply switch
20 carriers and pay the termination rates that it agreed
21 to?

22 A Conceivably. But once again, to what extent
23 does the termination liability represent a barrier? I
24 am not sure how to answer your question. I mean, yes,
25 they could pay. Is that a feasible option? I think

1 it's hard to say.

2 Q One would need to speak with the customer to
3 determine whether that was so; isn't that correct?

4 A Right, I just don't know. It would depend
5 on circumstances.

6 MR. GOGGIN: I have no further questions.

7 THE COURT: Redirect?

8 MS. BROWN: No redirect, Your Honor.

9 THE COURT: Ma'am, you may return to your
10 seat.

11 (Witness excused.)

12 THE COURT: It seems a reasonable time to
13 take lunch. Do you have witnesses available?

14 MS. BROWN: We do, but it's my understanding
15 they are available at a later date.

16 THE COURT: We'll take lunch. It may be
17 that you folks have a misapprehension as to how
18 much evidence is necessary in a rules case or how
19 diverse the evidence may be in a rules case.

20 In looking at your prehearing stipulation,
21 it appears to me that challenge 1 may simply be
22 addressed by comparing the statutes and the rules
23 with legal argument.

24 And I am not sure where the petitioners are
25 going with regard to challenge item number 6, if

1 the only material failure by the Commission to
2 follow applicable rule-making procedures that is
3 going to be presented refers to the JAPC letter,
4 you may be able to stipulate that the JAPC letter
5 was not submitted or published, and that may be
6 all you need.

7 MS. BROWN: May I address that?

8 THE COURT: Not quite yet, ma'am.

9 If there is more that you wish to cover
10 under that, petitioners certainly have that right,
11 as does the agency. But it appears to me that by
12 reversing the normal order of proof, you folks may
13 think you have to go into things that, in fact,
14 you really do not need to in order to get where
15 you want to go.

16 I am just throwing these out as items that
17 you may want to consider in planning your
18 respective strategy because all the evidence that
19 you are used to presenting to the Public Service
20 Commission is probably not relevant in a rule
21 challenge. It is the rule only that we are
22 concerned with.

23 Now, Ms. Brown, is there something other
24 than -- can I help you with?

25 MS. BROWN: Your Honor, I will work with the

1 parties to stipulate to the issues regarding the
2 JAPC letter.

3 THE COURT: I don't need to know what you
4 plan to do. You folks have an hour recess. If
5 you need more than an hour recess, just send
6 somebody in to let me know and we'll be at ease.
7 If you folks can work something out, fine. If
8 not, we'll proceed as is.

9 MR. GOGGIN: Your Honor, we had a bit of
10 confusion when you describing before the items for
11 which evidence needs to be presented. Were you
12 discussing the disputed issues of fact?

13 THE COURT: Yes, sir.

14 MR. GOGGIN: Thank you.

15 THE COURT: On page 2, you have essentially
16 reiterated the items raised by both petitioners in
17 their petitions. Item 1 is whether or not the
18 proposed rules would exceed the powers, functions,
19 and duties delegated to the Commission by the
20 legislature, and would, indeed, violate the
21 Florida and United States constitutions.

22 That is normally purely a legal argument
23 with very little evidence involved, if any.

24 And the other item I was referring to, and
25 perhaps I have misapprehended where you were both

1 going with the respective -- the three of you
2 going with your respective openings, but if, in
3 fact, Roman Numeral VI there, refers only to the
4 JAPC letter, it seems to me that you all can
5 stipulate whether who saw it, who didn't see it,
6 where it comes in or doesn't come in, and may be
7 able to avoid having to put on a great deal of
8 evidence.

9 If that involves something additional that
10 was not done, that is not covered somewhere else
11 with regard to some of these other items, then
12 obviously you have a lot to go through. But some
13 of these things I think you are making hard on
14 yourselves.

15 It's up to you all to decide. I am not
16 trying to tell you how to run your cases, but you
17 all may want to talk about this with regard to
18 your respective strategies over lunch, is all I am
19 suggesting.

20 (Luncheon recess.)
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CERTIFICATE OF REPORTER


STATE OF FLORIDA:

COUNTY OF LEON:

I, SANDRA L. DiBENEDETTO-NARGIZ, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages numbered 1 through 112 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 30th DAY OF APRIL, 2000.


SANDRA L. DiBENEDETTO-NARGIZ
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850) 878-2221