

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :
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Petition of Competitive :
Carriers for Commission :
Action to support local :
competition in BellSouth :
Telecommunications, Inc.'s :
service territory. :

DOCKET NO. 981834-TP

Petition of ACI Corp. d/b/a :
Accelerated Connections, Inc. :
for generic investigation to :
ensure the BellSouth :
Telecommunications, Inc., :
Sprint-Florida Incorporated :
and GTE Florida Incorporated :
comply with obligation to :
provide alternative local :
exchange carriers with :
flexible, timely, and :
cost-efficient physical :
collocation. :

DOCKET NO. 990321-TP



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PROCEEDINGS: HEARING

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER E. LEON JACOBS, JR.

DATE: Monday, September 25, 2000

TIME: Commenced at 2:45 p.m.
Concluded at 4:50 p.m.

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

REPORTED BY: KORETTA E. STANFORD, RPR
Official Commission Reporter
Division of Records & Reporting

1 APPEARANCES:

2 NANCY B. WHITE, BellSouth
3 Telecommunications, Inc., c/o Nancy Sims, 150 South
4 Monroe Street, Suite 400, Tallahassee, Florida
5 32301, appearing on behalf of BellSouth
6 Telecommunications, Inc.

7 KIMBERLY CASWELL, Post Office Box 110,
8 FLTC0007, Tampa, Florida 33601-0110, appearing on
9 behalf of GTE Florida, Incorporated.

10 SUSAN S. MASTERTON and CHARLES REHWINKEL,
11 Post Office Box 2214, Tallahassee, Florida 32316,
12 appearing on behalf of Sprint-Florida Incorporated
13 and Sprint Communications Company Limited
14 Partnership.

15 JEREMY D. MARCUS, Blumenfeld & Cohen,
16 Suite 300, 1625 Massachusetts Avenue, NW, Washington
17 D.C. 20036, appearing on behalf of Rhythms Links.

18 VICKI GORDON KAUFMAN, McWhirter, Reeves,
19 McGlothlin, Davidson, Dekker, Kaufman, Arnold &
20 Steen, 117 South Gadsden Street, Tallahassee,
21 Florida 32301, appearing on behalf of the Florida
22 Competitive Carriers Association.

23 MICHAEL A. GROSS, Florida Cable
24 Telecommunications Association, Inc., 310 North
25 Monroe Street, Tallahassee, Florida 32301, appearing

1 on behalf of Florida Cable Telecommunications
2 Association.

3 BETH KEATING, Florida Public Service
4 Commission, Division of Legal Services, 2540 Shumard
5 Oak Boulevard, Tallahassee, Florida 32399-0870,
6 appearing on behalf of the Commission Staff.

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P R O C E E D I N G S

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CHAIRMAN DEASON: Call the oral argument to order.

Can I have the notice read, please?

MS. KEATING: By notice issued September 11th, 2000, this time and place have been set for a motion hearing in dockets numbers 981834 and 990321. The purpose is as set forth in the notice.

CHAIRMAN DEASON: Okay. Take appearances.

MS. WHITE: Nancy White for BellSouth Telecommunications.

MS. MASTERTON: Susan Masterton for Sprint, and also Charles Rehwinkel for Sprint.

MS. KAUFMAN: Vicki Gordon Kaufman of the McWhirter, Reeves law firm on behalf of the Florida Competitive Carriers Association.

MR. MARCUS: Jeremy Marcus with the law firm of Blumenfeld & Cohen on behalf of Rhythms Links, Inc.

MR. GROSS: Michael Gross on behalf of the FCTA.

MS. KEATING: And Beth Keating appearing for Commission Staff.

CHAIRMAN DEASON: Okay. Ms. Keating, you have a suggested procedure we follow?

MS. KEATING: I just suggest that we begin with the movants in this case. There were only three issues that were indicated for discussion. Those were the

1 conversion of virtual to physical collocation, cross
2 connects between collocators and equipment. And I would
3 suggest, perhaps, that Ms. White start us off.

4 CHAIRMAN DEASON: Very good. Ms. White?

5 MS. WHITE: Since I'm the only movant here.
6 BellSouth moved for reconsideration on only two of those
7 three issues, the conversion of virtual to physical
8 collocation and the issue of cross connects. We did not
9 move for reconsideration on the issue of what equipment
10 can be collocated and, therefore, I will not discuss that
11 issue.

12 I think, we need to start out with what the
13 statute says. Section 251 C 6 of the Telecommunications
14 Act requires incumbent local exchange companies to provide
15 physical collocation of equipment necessary for
16 interconnection or access to unbundled network elements at
17 the premissis of the ILEC on rates, terms and conditions
18 that are just, reasonable and nondiscriminatory.

19 In the first report and order of the FCC, order
20 number 96-325 issued in 1997, the FCC specifically stated
21 that national rules should be adopted to implement the
22 collocation requirements of the Telecommunications Act.
23 Congress, specifically, delegated to the FCC authority to
24 issue regulations implementing the collocation section of
25 the Act.

1 The FCC has said there are two exceptions to
2 federal preemption of collocation. One is that states can
3 adopt additional collocation requirements, only if they
4 are consistent with the 1996 Act and consistent with the
5 FCC's implementing regulations.

6 The second exception to federal preemption on
7 collocation that the FCC has addressed is in their newest
8 order, the order on reconsideration and second and fifth
9 notice of proposed rulemaking that was released on August
10 10th, 2000, in order number 00-297.

11 In that order they stated that if the states
12 have already set provisioning intervals or standards prior
13 to October 10th, 2000, which is the effective date of that
14 order, then those standards will govern. If not, then,
15 the FCC sets forth national standards for collocation
16 provisioning. So, those are the two situations in which a
17 state has authority to act in accordance with what the FCC
18 has done.

19 Now, in this case, the dockets that we're
20 concerned with here today and the order that the
21 Commission issued on those dockets on May 11th 2000, order
22 number PSC-00-0941, on these two issues, the Commission
23 based its decision on the FCC advanced services order that
24 was rendered in March of 1999, that's order 99-48.

25 With regard to conversion of virtual to

1 physical, they said that the ALEC's equipment may remain
2 in place, even if it is in the ILEC's equipment line-up
3 when the conversion occurs; and that the ILEC cannot
4 require an ALEC's equipment -- excuse me, a collocation
5 arrangement to be put in a segregated area.

6 They said that to require relocation would be
7 unduly burdensome and costly. That is the same exact
8 rationale that the FCC used in their advanced services
9 order decision where they said, essentially, the same
10 thing.

11 With regard to cross connects, this Commission
12 found that the FCC, in the advanced services order, had
13 provided sufficient guidance in its rules and orders
14 concerning cross connects. This Commission decided that
15 the ILEC must follow those recommendations.

16 The problem is in the GTE versus the FCC case,
17 205 F3rd 416 issued on March 7th, 2000, the Court held
18 that the FCC's -- that these FCC -- strike that. Let me
19 start again.

20 In that order, the Court held that these two
21 issues that have been decided by the FCC in the advanced
22 services order were not based on what the statute said --
23 on what the Telecommunications Act said.

24 They said that the FCC's definition of necessary
25 was too broad, that neither one of these requirements had

1 a basis in the statute; therefore, they vacated these two
2 regulations of the FCC and remanded the issues back to the
3 FCC in order to look at it again. In other words, they
4 sent the FCC back to the drawing board on these two
5 issues.

6 And since then, the FCC has come out with a
7 second notice of proposed rulemaking. It's effective
8 October 10th. It came out on October -- I'm mean, sorry,
9 August 10th in order number 00-297. And the FCC is
10 seeking comment on the very issues involved in this
11 docket.

12 They're seeking comment about the process by
13 which space is assigned, on where the space is to be
14 located, on how a collocator accesses that space, on the
15 criteria an ILEC should employ in selecting the space, on
16 whether the statute, the Telecommunications Act,
17 encompasses cross connects between collocators. The very
18 issues that we're concerned with in this Florida docket
19 are being looked at again by the FCC on order of the
20 District Court -- the D.C. Circuit.

21 The bottom line here is that the federal court
22 -- excuse me, that this Commission has adopted FCC -- what
23 the FCC said about these two issues on the same basis that
24 the FCC did. The federal court has said these bases are
25 insufficient, are overly broad, and do not conform with

1 the Telecommunications Act. This Commission cannot
2 implement a rule that has been vacated by a federal court,
3 a rule based on the same reasoning that the Court decided
4 was insufficient.

5 The FCC has not appealed the D.C. Circuit's
6 order. Instead, they have said they have gone back to the
7 drawing board and are accepting further comments on the
8 issue. Once again, this Commission can only adopt
9 regulations that are consistent with the Act. That is not
10 here.

11 The District D.C. Circuit Court of Appeals has
12 already said that these regulations that this Commission
13 adopted are not consistent with the Act. The only other
14 way that they can adopt regulations is if they're
15 consistent with the FCC's implementing regulations.

16 Here, they're identical. And the D.C. Circuit
17 Court of Appeals has already said those implementing
18 regulations do not have sufficient basis in fact or on the
19 statute in order to let them go forward.

20 Therefore, I would say that the Commission does
21 not have the jurisdiction on which to promulgate these
22 particular regulations and that they should just keep
23 status quo until we see where the FCC goes in their second
24 notice of proposed rulemaking.

25 Thank you.

1 CHAIRMAN DEASON: And what is the status quo?

2 MS. WHITE: The status quo -- well, I can tell
3 you what the status quo is for BellSouth. BellSouth has
4 written the FCC after the D.C. Circuit Court of Appeals
5 order came out and, essentially, said we are not going to
6 go back and renegotiate agreements because of what the
7 D.C. Circuit Court of Appeals has done. We will let the
8 agreements that are in place right now, what they say
9 about these issues, go forward until we see what happens
10 in the FCC's arena.

11 CHAIRMAN DEASON: So, what about the decision in
12 the docket that we're here on, what is the status quo for
13 it?

14 MS. WHITE: Well, the status quo for it -- I can
15 tell you that in all practical purposes, BellSouth is not
16 going into these. When somebody comes in and says I want
17 to convert from virtual to physical, it is not BellSouth's
18 practice to go in and say well, you're getting out of this
19 spot, you have to go into that spot. It is definitely
20 looked at on a case-by-case basis. And usually, the only
21 time anything is requested to be moved or we say
22 relocating is necessary is if we're talking about opposite
23 a space exhaustion situation, and there's no other
24 opportunity.

25 COMMISSIONER JACOBS: You argue that we hold no

1 jurisdiction to implement these collocation provisions,
2 correct?

3 MS. WHITE: Just these two, the ones on cross
4 connects and the ones on conversion of virtual to
5 physical, because your decision was based on the same
6 rationale that the FCC used, and the Court has said that
7 rationale is not sufficient.

8 COMMISSIONER JACOBS: Now, what does our
9 authority to act on this issue, what is it derived from,
10 in your opinion?

11 MS. WHITE: Your authority to act on this issue
12 is derived from the FCC.

13 COMMISSIONER JACOBS: So, you don't think
14 Section 252 of the Act has any relevance here, prevalence?

15 MS. WHITE: No, I think, it does. What the FCC
16 has said is the Telecommunications Act on collocation, the
17 FCC has said we have complete jurisdiction over
18 collocation, except in two instances: One is that you can
19 do additional regulations, if they're consistent with the
20 Act and consistent with the implementing regulations of
21 the FCC.

22 COMMISSIONER JACOBS: That's an interesting
23 point. It's particularly interesting since the Court is
24 questioning the FCC's interpretation of that section on
25 the whole. But as a matter of how the FCC envisions

1 implementation of that Act, if I'm not mistaken, the Act
2 says specifically the state Commissions are to approve
3 these provisions; is that correct?

4 MS. WHITE: I'm not aware. I mean, the state
5 Commission has to approve collocation agreements that
6 comport with the Act and with the FCC's rules and this
7 Commission's rules. I think that what we're talking about
8 here are two issues that are specifically under
9 consideration by the FCC. We're not talking about an
10 issue where the FCC hasn't spoken, where the FCC has said,
11 okay, we're not going to worry ourselves with this issue.
12 That's an issue for the states.

13 COMMISSIONER JACOBS: Understood. Where I'm
14 hoping to focus the discussion is where Congress has
15 spoken. And then, of course, the FCC has come in and
16 interpreted what Congress said, I agree. But if Congress
17 said in the statute that the state Commission should
18 approve these provisions and true enough, the FCC comes in
19 and says we now specify how states' Commissions should
20 view collocation requirements and now we have the Court
21 saying that what the FCC said isn't proper, for whatever
22 reason --

23 MS. WHITE: Right.

24 COMMISSIONER JACOBS: -- what should we do with
25 regard to our obligations under the statute?

1 MS. WHITE: Well, I think, if you want to go
2 back and look and say we think these are still good
3 regulations, you definitely cannot -- well, I'm not even
4 sure you could do that, because the D.C. Circuit has gone
5 beyond saying that the FCC just didn't have enough
6 reasoning behind their decision.

7 COMMISSIONER JACOBS: If you take that reading
8 in the statute, hasn't the D.C. Circuit really overturned
9 the statute? Because it says we can't act now. It says
10 state Commissions can't act anymore to approve these
11 provisions.

12 MS. WHITE: No, I disagree with that. All I'm
13 saying is if you're talking about a provision where the
14 FCC hasn't acted, yes, you've got authority to do that.
15 If you're talking about an additional requirement that's
16 consistent with the Act or consistent with the FCC, yes,
17 you can do that. What I'm saying is these two particular
18 provisions are not consistent with the Act or with what
19 the FCC has done.

20 COMMISSIONER JACOBS: So, you would hold to the
21 view that our obligations on the Act did not convey any
22 authority for state Commissions to interpret the Act.
23 That is the sole purview of the FCC.

24 MS. WHITE: As far as collocation is concerned,
25 yes, because that's what the FCC has said is that we

1 preempt, we have control over this, but here are the
2 specific incidents, the specific scenarios, in which a
3 state Commission can act.

4 The problem is you're asking a very broad
5 question when, I guess, I'm looking at it from a very
6 narrow focus of these particular two issues. So, it's
7 hard -- the broad answer may not be the same as the answer
8 for these particular two issues.

9 COMMISSIONER JACOBS: I agree.

10 MS. WHITE: That's the problem.

11 COMMISSIONER JACOBS: I've been honing in on
12 this point and feeling as if I've been hitting my head
13 against the wall. And I saw this case the other day. And
14 it's not on point, I'll say that up front. This is
15 talking about reciprocal comp. But what interests me is
16 this is the Eighth Circuit speaking in it, and it's in the
17 Southwestern Bell, and it has to do with reciprocal comp
18 decision. I think, I have the Lexis cite, 200 US APP
19 Lexis 22931.

20 And what the Court says is we have the
21 jurisdiction to go and review a state Commission's
22 decision on these provisions, okay? Now, it could be that
23 our authority over reciprocal comp approval -- approval of
24 reciprocal comp provisions could be different than our
25 authority to review collocation.

1 MS. WHITE: And I would say that part of that is
2 correct, because the FCC has -- I mean, they've spoken
3 halfway on the reciprocal comp, but not the other way.

4 COMMISSIONER JACOBS: And here's my point. By
5 the Court indicating -- and I want your view on this. By
6 the Court indicating that it wants to assert jurisdiction
7 to review a state Commission's ruling on this, how, then,
8 could it be that we have to wait for the FCC to act, if
9 the Court -- because the Court would then, I would think,
10 say if the FCC hadn't acted, you don't even get into the
11 courthouse door.

12 MS. WHITE: And two, I would say for two
13 reasons: One is that under the Act, state decisions --
14 state Commission decisions that are based on the
15 Telecommunications Act are reviewable by federal court.

16 COMMISSIONER JACOBS: Understood. But I'm
17 speaking to jurisdiction now.

18 MS. WHITE: Right. And the second reason I
19 would say for why that court has jurisdiction to review
20 your case is because of the specific issue involved. As I
21 said, reciprocal comp is -- I mean, that's up in the air
22 big time.

23 COMMISSIONER JACOBS: I understand, but you
24 would agree with me that the FCC clearly has not stated --
25 in other words, they've spoken, but they haven't spoken

1 clearly on reciprocal comp.

2 MS. WHITE: Well, it would depend on the case
3 I'm in. If I'm in a reciprocal comp case, I'm going to
4 argue that they've said this traffic is interstate, but
5 they haven't said it very clear, I will agree to that.

6 COMMISSIONER JACOBS: We're not operating off
7 clear law from what you see as the reciprocal comp.

8 MS. WHITE: Right.

9 COMMISSIONER JACOBS: And if I follow your
10 rationale as it pertains to collocation, state Commissions
11 have no real ability to act on reciprocal comp, because
12 the FCC hasn't really given a clear indication.

13 Now, as soon as I say that, I recognize that
14 they did a caveat in their order, and I understand that.
15 So, if -- you can buy off on that. But this is a matter
16 of jurisdiction, and the FCC can't grant jurisdiction by
17 their own rule. Do you understand my point?

18 MS. WHITE: I do. I do. But what, I guess,
19 I'm saying is that with regard to collocation, if we were
20 talking about an issue that hasn't been thought up by
21 anybody, looked at by anybody, okay, let's look at this.

22 If somebody was complaining that BellSouth or
23 GTE or an ILEC was assigning them space, only because it
24 was going to cost them more money to be put in that space,
25 and it would take longer to be put in that space, then I

1 would say there's no regulation that I'm aware of from the
2 FCC.

3 And it would seem to me that this Commission
4 could come in and say, BellSouth, GTE, you cannot assign
5 space on the basis just to make it more expensive and just
6 to make it take longer and just to make them go through
7 more hoops. The problem is what we're dealing with here
8 today is two very, very specific issues.

9 One is whether the statute that says that an
10 ILEC has to provide collocation at its premises for an
11 ALEC, whether that encompasses the issue of the ILEC has
12 to allow collocators to cross connect between each other.
13 And as the Court said, the statute is more concerned with
14 getting new entrants connected to the ILEC's network. And
15 that's what their problem was. It doesn't talk about new
16 entrants connecting between each other. So, that's a
17 very, very specific issue.

18 The other specific issue they're talking about
19 is when you've come in and you've decided you want virtual
20 collocation, and you've had that for some time, and then
21 you decide you want to go to physical. The whole issue on
22 that is who controls the central office space?

23 Can an ALEC come in and say, well, I don't like
24 where you put me. I just don't like the looks of it, you
25 know. If it has nothing to do with the amount of money it

1 costs or the amount of time it takes to have collocation,
2 if they can come into the ILEC's building, which the ILEC
3 owns and says, no, I've decided I want my collocation
4 arrangement in the middle of the building where it's
5 totally inconvenient for everybody. So, the issue is who
6 controls the space in that building.

7 That's a very, very specific issue. And those
8 two specific issues are the ones that the FCC has put out
9 regulations on and, I think, where this Commission is more
10 limited in what they can do than if we were talking about
11 something else.

12 COMMISSIONER JACOBS: Thank you.

13 CHAIRMAN DEASON: My question is are we
14 preempted because we simply adopted an FCC position and
15 that FCC rule was overturned or are we just preempted
16 because the Court has -- on anything dealing with this
17 subject matter, regardless of whether we've had an
18 evidentiary hearing or not, we're preempted.

19 MS. WHITE: Well, I would say that you're more
20 preempted, because you did what the FCC and you based it
21 on what the FCC based it on. If this Commission --

22 CHAIRMAN DEASON: Let me ask you this question.
23 Is your opinion that for purposes of this hearing and the
24 record that we develop for these two issues that we didn't
25 develop any record, the only thing we said was if it's

1 good enough for the FCC, it's good enough for us?

2 MS. WHITE: Yes. I have gone back, and I have
3 looked at the record. And every line of reasoning, every
4 argument that I can see from the transcript where people
5 argued about these two issues were the same rationale, the
6 same reasoning, the same basis on which the FCC made their
7 decision and which the circuit court vacated and remanded
8 and said that reasoning, that rationale is not good
9 enough. So, the answer to your question would be yes.

10 CHAIRMAN DEASON: So, for the purpose of these
11 two issues it's really, in your opinion, it's moot as to
12 whether we develop any rationale beyond the FCC's
13 rationale, because we didn't do it.

14 MS. WHITE: Because you didn't do it. If you
15 had, I think, I might -- I'm not sure what my answer would
16 have been.

17 CHAIRMAN DEASON: So, if we had developed more
18 rationale and we had identified another reason the FCC had
19 never even considered and we had a record basis that said
20 this is an important reason and for this reason you should
21 adopt this policy, then, it would be another question as
22 to whether we're preempted?

23 MS. WHITE: I think so. I think, it would be a
24 different issue.

25 CHAIRMAN DEASON: Okay.

1 MS. WHITE: GTE may disagree with me, but --

2 CHAIRMAN DEASON: Ms. Caswell, you may want to
3 make an appearance.

4 MS. CASWELL: I'm sorry, for being late. I'm
5 Kim Caswell with Verizon Florida, Inc.

6 Commissioners, the starting point for the legal
7 analysis you've requested is a basic understanding of the
8 effect of the Telecommunications Act of 1996. In
9 litigation after that Act was passed, there was much
10 debate about how the Act had changed the federal state
11 regulatory dynamic. In general, up until that point, the
12 FCC made rules affecting the interstate jurisdiction and
13 the states retained jurisdiction over intrastate
14 telecommunications matters.

15 The state Commissions and the ILECs, including
16 Verizon, argued that the Act had not changed the
17 fundamental scheme and that the states had primary
18 authority to implement the local competition provisions of
19 the Act. The FCC, on the other side, argued that it had
20 jurisdiction to implement those provisions.

21 Unfortunately, the FCC won that battle. In the
22 Iowa Utilities Board decision in January of 1999, the U.S.
23 Supreme Court concluded that there was no real issue as to
24 whether the Act had limited state control over local
25 regulation.

1 It said, quote, "The question in this case is
2 not whether the federal government has taken the
3 regulation of local telecommunications competition away
4 from the states. With regard to the matters addressed by
5 the 1996 Act, it unquestionably has," end quote.

6 The state's participation in the new regime is
7 thus guided by the federal agency rules implementing the
8 Act. As for collocation, specifically, Verizon and other
9 ILECs have already --

10 CHAIRMAN DEASON: Excuse me. First of all, you
11 need to slow down.

12 MS. CASWELL: Sorry.

13 CHAIRMAN DEASON: Then, I have a question.

14 MS. CASWELL: Okay.

15 CHAIRMAN DEASON: So, you're saying that
16 according to the United States Supreme Court, the state's
17 invitation to participate in telecommunications regulation
18 is limited to what the FCC says?

19 MS. CASWELL: For matters under the Act, such as
20 collocation. The FCC has --

21 CHAIRMAN DEASON: Well, for matters under the
22 Act. Well, that's everything, right? I mean, what does
23 the Act --

24 MS. CASWELL: As Ms. White said, you need to
25 make rules consistent with the Act. That's right in the

1 Act itself. And if the FCC implements the Act in a
2 certain manner, then, unfortunately, you've got to follow
3 the FCC. And we have argued, you know, long and hard that
4 you don't need to, but we've lost.

5 CHAIRMAN DEASON: So, if the FCC adopts a rule
6 on anything pertaining to the Act, we're obligated to
7 follow that rule.

8 MS. CASWELL: I believe that's true.

9 CHAIRMAN DEASON: Okay.

10 MS. CASWELL: I believe that's true.

11 COMMISSIONER JACOBS: So, in areas where the FCC
12 has not spoken, you would agree we can interpret the Act,
13 can't we?

14 MS. CASWELL: I'm sorry, you said you can
15 interpret the Act?

16 COMMISSIONER JACOBS: Right.

17 MS. CASWELL: Yes. I think, all your rules have
18 to be consistent with the Act, as well as the FCC's
19 provisions.

20 CHAIRMAN DEASON: Now, if the FCC adopts a rule,
21 are we -- as a state regulatory body, can we go beyond
22 what the FCC has adopted?

23 MS. CASWELL: Yes, you can adopt additional
24 rules, as long as they're consistent with the FCC's.

25 CHAIRMAN DEASON: Okay. I'm sorry. You may

1 continue.

2 MS. CASWELL: Thank you.

3 As for collocation specifically, as I said,
4 Verizon and other ILECs have argued that national rules
5 are unnecessary and impractical, but the FCC has mostly
6 rejected these arguments. And as the federal courts have
7 confirmed, there is no debate about the FCC's ability to
8 adopt national collocation standards.

9 To be sure the states do retain a good degree of
10 authority over collocation and other local matters, but
11 the critical constraint on that authority is that it must
12 be exercised in a way that's consistent with the Act.

13 That's clearly stated in Section 251 D 3 of the
14 Act, and it's something the FCC has repeatedly recognized
15 in its own orders. Indeed, the parties' testimony in this
16 case was framed in terms of what the FCC and the Act
17 require, and that's the framework you've used for some
18 time.

19 The question, then, for this case, is whether
20 the particular collocation rulings at issue are consistent
21 with the Act. To answer that question, we need to look at
22 the D.C. Circuit's rulings on each of these issues. We
23 can't look to the FCC's implementing regulations, of
24 course, because those regulations have been invalidated.
25 The first issue is equipment placement.

1 Is it the ILECs or the ALECs that have the right
2 to determine where the ALEC's equipment will be located on
3 the ILEC's premises? As I believe, Ms. White went over,
4 your decision, and the FCC's decision gives that right to
5 the ALECs in the sense that an ILEC can't require
6 segregation of the ALEC's collocation arrangements. But
7 the D.C. Circuit indicated that the ILECs can, in fact,
8 require such segregation areas for physical collocation.

9 In particular, the Court rejected rationale that
10 both the FCC and this Commission used that allowing
11 equipment segregation may raise the ALEC's cost. The
12 Court stated that delay and higher costs for new entrants
13 cannot be used to overcome the statutory terms of the Act.
14 Because the Court has found that allowing ALECs to
15 determine equipment placement contravenes the Act, your
16 ruling to the contrary, must follow just as the FCC's did.

17 CHAIRMAN DEASON: Excuse me. So, you're saying
18 that the fact that it may cost more, it may delay the
19 actual implementation of the collocation arrangement, that
20 this still is not sufficient; we don't have the authority
21 to require it, because the FCC rules have been overturned,
22 and that was the basis for the FCC rule?

23 MS. CASWELL: Under the Eighth Circuit's ruling,
24 the Eighth Circuit said that those were not sufficient
25 reasons to implement that sort of policy, that that's not

1 what the Act says, so it's tied to the statutory terms of
2 the Act. And if your decision has to be consistent with
3 the Act and their decision -- their same decision was not,
4 then your decision has to be reversed as well, I believe.

5 CHAIRMAN DEASON: Okay. Well, let me ask you
6 this. And just for the sake of argument, I'm not really
7 sure what the record of evidence is. And we may hear that
8 from some of the other parties, but just for the sake of
9 argument, say we took no evidence whatsoever in our docket
10 other than to say this is the FCC rule, this is what it
11 requires, we agree, we're going to adopt this.

12 MS. CASWELL: Right.

13 CHAIRMAN DEASON: All right. You're saying
14 under that scenario it's very clear that, according to the
15 Court's decision, we have to change our decision.

16 MS. CASWELL: Yes.

17 CHAIRMAN DEASON: Correct?

18 MS. CASWELL: I believe so.

19 CHAIRMAN DEASON: Now, what if, in this record,
20 we had taken evidence and there was another reason beyond
21 cost or delay and someone expressed an opinion for some
22 other reason that this was the correct policy, then, we
23 have no choice but to reverse our decision because of the
24 Court's decision or do we have record evidence which
25 supports a different outcome?

1 MS. CASWELL: I think that's a slightly more
2 difficult question, because first of all, I don't think
3 there is such evidence in the record.

4 CHAIRMAN DEASON: I'm just -- for the sake of
5 just assuming.

6 MS. CASWELL: Right, for the sake of argument.
7 If there were another reason that didn't fall within the
8 criticisms that the Eighth Circuit had made, you could
9 perhaps adopt that in the interim. But if the FCC, again,
10 comes back and says, no, the ILECs have the right to
11 choose, you've got to reverse your decision again. You've
12 got to change your decision again.

13 And I'm not even sure about that opinion as to
14 whether you could even do it. But for the sake of
15 argument, assuming you could, you need to change your
16 decision again once the FCC has spoken to the extent that
17 that decision is inconsistent with yours.

18 CHAIRMAN DEASON: So, you're saying that if we
19 do have evidence, that at least for interim we could do
20 something, but then once the FCC adopts the final rule,
21 we've got to conform to whatever the FCC says.

22 MS. CASWELL: Yes. And I would have to do some
23 more thinking about the first part, about the interim
24 part. Frankly, I haven't considered it, because I didn't
25 see any evidence, other than evidence going to the

1 rationale that the Eighth Circuit had used.

2 CHAIRMAN DEASON: Okay. I'm going to ask you
3 another question, and it's just hypothetical, because --
4 well, just hypothetically, let's say that there was some
5 other reason that we had record evidence on, and we said,
6 well, with all due respect to the Court, the Court didn't
7 hear the evidence that we heard, and they're not familiar
8 with the facts as they exist in Florida. And since we do
9 have a record which supports our position, we're just --
10 we're not going to reconsider this vote, and we're just
11 going to let it stand. Now, what happens? Does the
12 federal court come down here and issue some injunction
13 against us or what happens?

14 MS. CASWELL: No. I think, someone would have
15 to challenge that. Perhaps --

16 CHAIRMAN DEASON: So, you would go to the
17 federal court?

18 MS. CASWELL: I'm not saying I would do it or my
19 company would do it. I'm not going to make that
20 commitment now, but I'm saying that's very possible. To
21 the extent that you do something that's considered
22 inconsistent with the Act, either under the FCC's rules or
23 under the federal court ruling, until the FCC has valid
24 rules, I think, you're very vulnerable to challenge there
25 under the principles that the U.S. Supreme Court laid out

1 in the Iowa Utilities Board decision, no matter what your
2 record says and no matter what your state statutes say.

3 CHAIRMAN DEASON: Why do we go to the trouble of
4 taking record evidence in these proceedings? It takes
5 your time, it takes my time --

6 MS. CASWELL: Right, and I agree. And we went
7 with you to support that view before the Supreme Court,
8 and we lost.

9 CHAIRMAN DEASON: Oh, I know that, we've lost.
10 So, why, from now on, do we take record evidence in each
11 of these proceedings?

12 MS. CASWELL: Well, I think, in each case,
13 you've got to make an assessment of perhaps where the FCC
14 is on these matters, whether it's spoken to these matters,
15 what's going on, on appeal. And, I think, you've got to
16 make a decision about timing, like we're doing now in the
17 reciprocal compensation case, like we've done in the cost
18 study case. I mean, I think, unavoidably, that's going to
19 be the drill for the future, and it's regrettable. It
20 wastes all of our time, but I think that's the situation
21 you're in.

22 CHAIRMAN DEASON: So, what you're saying is
23 while we may be slow, we move faster than the federal
24 government, so we can make some interim decisions until
25 they decide ultimately what the rules are going to be.

1 MS. CASWELL: Often, you do move faster than the
2 federal government. At times, you know, I'd say you'd be
3 better --

4 CHAIRMAN DEASON: Because we could just tell you
5 we're closing down business, just take to it the FCC and
6 get your answers once and for all and don't bother us, but
7 I don't think that's the right thing to do. That's really
8 going to slow things down.

9 MS. CASWELL: Right. And yeah, and I would say
10 in particular cases, no, you certainly can't do that. But
11 in others, you'd want to make --

12 CHAIRMAN DEASON: I'll go to the federal court
13 and get a declaratory decision or whatever. I mean, if
14 they're going -- I mean, these are kind of absurd things
15 I'm saying, but I think you kind of can tell the amount of
16 frustration that we have here.

17 MS. CASWELL: Sure. Because we feel the same
18 frustration. I mean, we've gone through and submitted
19 testimony and cost studies and everything and, you know,
20 only to be, you know, sort of frustrated by the federal
21 courts. And it's happening in the reciprocal comp cases.

22 CHAIRMAN DEASON: Because, see, it seems to me
23 that, you know, I've always believed that hearings and
24 taking evidence is paramount and that's what's important
25 and that's what should drive good decisionmaking. But it

1 seems it's just the reverse of this situation. You've got
2 policymakers in Washington and federal courts, they're
3 saying, well, we're looking at it at a national level, and
4 we think the policy should be X, Y, or Z. Now states, you
5 conform, and we don't care if you took record evidence or
6 not.

7 MS. CASWELL: And that's true. I mean, that's
8 the fundamental paradigm shift. The U.S. Congress has
9 enacted regulations that govern local competition. And
10 it's given the FCC the authority to implement those
11 regulations. So, for better or for worse, the FCC has
12 much more jurisdiction over the local sector than it ever
13 had before.

14 And, you know, everytime one of these issues
15 comes up I go back and read that 1999 case, the Supreme
16 Court case, Iowa Utilities Board. And I would advise, you
17 know, everyone involved in this issue to go back and do
18 the same thing, because I think that was the first case
19 that really set out, from a federal court perspective,
20 what the Act did and what the new regime was.

21 CHAIRMAN DEASON: Okay. Let me ask you another
22 question. Does the FCC take record evidence? Do they
23 have evidentiary hearings?

24 MS. CASWELL: They, typically, have a paper
25 record in these rulemaking proceedings.

1 CHAIRMAN DEASON: And how is that different from
2 ours? They don't swear in witnesses?

3 MS. CASWELL: They don't have any oral
4 testimony. They submit comments and reply comments.

5 CHAIRMAN DEASON: So, they kind of sit in a
6 sterile environment and just listen to everything and make
7 these broad determinations on what the policy's going to
8 be.

9 MS. CASWELL: Yes.

10 CHAIRMAN DEASON: And all the states are
11 supposed to comply. And it doesn't matter what states do,
12 what evidence they take, we just have to comply.

13 MS. CASWELL: That seems to be the case. In
14 some circumstances, now, where the FCC does make rules,
15 and in other cases, the FCC might say, for instance, okay,
16 states, where you've acted we're going to leave your rules
17 in place. But, like, now in the further notice of
18 proposed rulemaking, implementation intervals, for
19 instance, you are one of, you know, a handful of states
20 who have spoken about implementation intervals.

21 The FCC earlier said, look, we're not going to
22 touch that. We're going to leave that to the states. We
23 don't think we need national rules on that. It's now
24 reversed itself and said, well, maybe now we do need
25 national rules on that. But to the extent that states

1 have acted and you've got an order or you're enforcing a
2 tariff, we're going to leave that in place. But it could
3 have just as easily said we're going to overrule
4 everybody, and we're going to implement our new rules.

5 I mean, that's the sort of environment you work
6 in. The FCC does something or doesn't do something and
7 then changes its mind as to whether something needs to be
8 done on a national level or not and then, you know, you
9 sort of get dragged along with it.

10 I think, it's trying to be sensitive to state
11 actions and, I think, it does consider the states to be
12 helping them further the goals of the Act in cases like
13 implementation intervals. But, in some cases, I mean, the
14 results are just unpredictable, you know, as in this case
15 where they've become overturned. And, I think, they try
16 in the recip comp case, which is very confusing, to
17 respect the state's decisions as well, but it only ended
18 up making a mess in that situation.

19 COMMISSIONER JACOBS: I have a question, a
20 hypothetical. What if we had before us an interconnection
21 agreement that had been approved and what we now have is a
22 dispute as to whether or not these provisions that are now
23 in question have been appropriately executed under that
24 agreement, okay, what do we do?

25 MS. CASWELL: Well, does the interconnection

1 agreement under that hypothetical, does it include -- I
2 mean, does it include these terms that you've -- like --

3 COMMISSIONER JACOBS: Yes. It would include
4 terms that are based on the provisions that you say we
5 don't have the jurisdiction to entertain now.

6 MS. CASWELL: Well, if you decide to implement
7 your rules or your rulings and everybody's got to
8 incorporate them into interconnection agreements and then
9 somehow that goes to arbitration or whatever -- you know,
10 I don't think it would get that far, to tell you the
11 truth.

12 COMMISSIONER JACOBS: What I'm focused on is do
13 we have enforcement authority?

14 MS. CASWELL: I don't think you can enforce
15 these provisions. I don't think you can enforce these
16 rulings that are contrary to the Act. I don't think you
17 can enforce any provisions that are contrary to the Act.

18 COMMISSIONER JACOBS: But if it were consistent
19 with the Act, then you --

20 MS. CASWELL: If it were consistent, yes, you
21 could. If you decide --

22 COMMISSIONER JACOBS: And you base that on --

23 MS. CASWELL: I base it, in this instance, on
24 what the Court has said, what the D.C. Circuit has said is
25 inconsistent or consistent with the Act. And in this

1 case, these particular provisions are inconsistent with
2 the Act as the Eighth Circuit sees them.

3 COMMISSIONER JACOBS: Okay. If I can walk you
4 through that, so I can understand it, where the FCC has
5 spoken -- has given its guidance in rule, and our order
6 follows the FCC's rule, then, we have authority to enforce
7 our order.

8 MS. CASWELL: Yes. Yes.

9 COMMISSIONER JACOBS: That sounds rather obtuse
10 to me that we don't have authority to enforce our order,
11 unless and until -- and understand now, what we have here
12 is a provision that is now questionable, legally.

13 So, now what we have before us is a dispute that
14 we don't know whether or not we have the jurisdiction to
15 enforce. So, what do we do, vacate our order now? That
16 would be our only recourse?

17 MS. CASWELL: Well, I mean, I think so. I
18 think, you have to hold off implementing that order.

19 See, the problem is that the rules have been
20 invalidated. If the rules had stayed where they were and
21 if they'd been validated, there would be no problem here.
22 You could enforce those rules, because they'd be lawful.

23 But right now, we're sort of in limbo where the
24 Court has said look, those rules are no good, we think
25 they're inconsistent with the Act. So, instead of

1 guidance from the FCC, what you've got is guidance from a
2 court decision and then the FCC's rules need to implement
3 that decision, and you don't know what they're going to
4 look like.

5 COMMISSIONER JACOBS: And under your views,
6 there are no ramifications under federal law, because when
7 I see the federal statute says that by my order, by this
8 Commission's order, we are to implement those provisions.
9 And then, when I see a dispute come that bring those
10 provisions before us in dispute and I can't -- because of
11 the tendency of what the rules say, I can't resolve the
12 issue that is in this order, then it sounds to me like I
13 can't effectuate actions under these federal provisions.
14 It sounds to me like the federal law now becomes moot,
15 because these FCC rules are in dispute.

16 MS. CASWELL: No, I don't think the federal law
17 has become moot.

18 COMMISSIONER JACOBS: I can't enforce those
19 provisions.

20 MS. CASWELL: Well, say, if I company had agreed
21 to do cross connects, for instance, had agreed to let, you
22 know, some CLEC cross connect with another CLEC and that
23 was somehow an interconnect agreement, yeah, I think, you
24 probably could enforce that, because it's voluntarily
25 entered, and it's your job to enforce that agreement. But

1 if the provisions are in the interconnection agreement
2 only because of your ruling here and that ruling is
3 inconsistent with federal law, then, you can't enforce
4 them.

5 If I'm forced to do it -- because these
6 interconnection agreements, I mean, if they're arbitrated,
7 often they're not really voluntarily. And if I'm forced
8 to put that provision in, then I don't think you can
9 enforce it.

10 CHAIRMAN DEASON: Let me ask this question,
11 perhaps, in a little bit different terminology. Let's
12 take cross connects for example. The FCC had a rule which
13 required cross connects; is that correct?

14 MS. CASWELL: Yes.

15 CHAIRMAN DEASON: That provision was struck down
16 by the Court, correct? Okay. Now, in striking that down,
17 did they say that -- the Court, did it say that cross
18 connects violate federal law period or did they say FCC,
19 your rule did not substantiate to our satisfaction that
20 cross connects should be required under the Act. Go back
21 and redo it and see if you can convince us the next time
22 around.

23 MS. CASWELL: What the Court said is that the
24 cross connect requirement had no basis in the statute and
25 that the Act was focused solely on connecting new

1 competitors to the LEC's network, not connecting CLECs to
2 CLECs.

3 CHAIRMAN DEASON: So, the Court said FCC, and
4 states, too, under no conceivable way can you, as
5 regulatory entities, regardless of whether you're state or
6 federal, require cross connects because it violates
7 federal law; is that what the Court says?

8 MS. CASWELL: I think, there may be a fine
9 distinction there. What it says is it has no basis in the
10 statute. Now, if the FCC somehow it gets this point on
11 remand. I guess, it's possible that they could somehow
12 justify it to the satisfaction of the federal courts
13 and --

14 CHAIRMAN DEASON: All right. Now, let me
15 interrupt. If the FCC can do that, why can't we? Because
16 we can read federal law just as easily as they can.

17 MS. CASWELL: Okay. If you implement this now,
18 if you say -- well, one, I think, the Eighth Circuit does
19 forbid a cross connect requirement right now, because
20 there's no basis for it in the Act. But even if you
21 disagree with that and implement something, you have the
22 practical consideration of having to potentially change it
23 later and having to have these cross connects come out or
24 not be modified. So, there's a legal consideration,
25 there's also a practical consideration. Eventually,

1 you're going to have to follow what the FCC does. It may
2 or may not be consistent with what you're doing.

3 CHAIRMAN DEASON: So, why don't we just tell you
4 all go, get it worked out at the FCC, and then come see
5 us. We don't do anything here that has any meaning --
6 perhaps we can do something in the interim, but then as
7 soon as the FCC either changes what they did that we
8 followed or else they decide what we did was wrong, well,
9 then, it goes away.

10 MS. CASWELL: In areas where the FCC has done
11 implementing rules. There are several areas in the
12 collocation, your collocation orders, that no one has
13 challenged and that aren't inconsistent with the FCC
14 rules, and those will remain. But it's always kind of a
15 crapshoot guessing what the FCC's going to do and where
16 it's going to act next.

17 CHAIRMAN DEASON: Oh, tell me about it.

18 MS. CASWELL: So, you know, again, we understand
19 the frustration. But, you know, that's the environment we
20 operate in now. But there are -- many of your provisions
21 are still there, you know, like the implementation
22 intervals.

23 CHAIRMAN DEASON: Well, as I said earlier today,
24 tell us what our jurisdiction is and if it's clear and
25 it's our job, we'll do it. The problem is, is when nobody

1 knows what a jurisdiction is and when we try to do our
2 job, we've got people telling us we're doing it wrong and
3 what you did has to be changed. It is extremely
4 frustrating.

5 MS. CASWELL: I think, Ms. White's probably gone
6 over cross connects, and that's the same sort of issue
7 here, that there's no basis for it in the statute.

8 I don't think she's probably addressed
9 equipment, because that was in our filing alone. And,
10 again, your decision mirrors the FCC's existing rule that
11 we need to put in equipment consistent with the FCC's
12 rule. In fact, your order recognized the parties had --

13 CHAIRMAN DEASON: You're talking about the issue
14 about what type equipment?

15 MS. CASWELL: Yeah, what type equipment needs to
16 be collocated.

17 CHAIRMAN DEASON: And whether it's necessary --

18 MS. CASWELL: Or used and useful or simply used
19 and useful. And, I think, there may not really be a
20 debate on this point as to what you should do. I think,
21 the Staff has suggested you clarify your order to indicate
22 that to the extent that it relies on provisions that were
23 just vacated, then, it doesn't apply.

24 But you can go back to preexisting FCC rules,
25 which were okay, and make determinations, perhaps on a

1 case-by-case basis, as to whether something is necessary
2 or indispensable, which is the current standard. It's not
3 used and useful. And I think that probably AT&T and FCCA
4 agree that the Commission can resolve these disputes on a
5 case-by-case basis.

6 CHAIRMAN DEASON: So, what do you want us to do?

7 MS. CASWELL: I think, we just need a
8 clarification that to the extent your decision relies upon
9 the vacated rules, then it's no longer good. You can say
10 it relies -- you can say to the extent that your decision
11 relies on the FCC's rules that were preexisting that,
12 then, it's okay.

13 CHAIRMAN DEASON: And the preexisting rules, it
14 was a necessary standard?

15 MS. CASWELL: Yeah, necessary, rather than the
16 used or useful standard they used.

17 CHAIRMAN DEASON: Okay.

18 MS. CASWELL: And Sprint has also suggested that
19 you should draw up a list that can be collocated. They've
20 presented this as sort of another option, but I think that
21 presents a problem in terms of the record here. And as
22 the Staff pointed out, there's little basis in the record
23 to identify specific equipment since parties, basically,
24 relied on the FCC's orders. So, in terms of state
25 administrative law, that approach would not be acceptable

1 nor would it be feasible or practical, as the Staff also
2 pointed out.

3 And, I think, I mentioned earlier that it's
4 possible the FCC, on remand, may issue the same rules that
5 it did before and that these may be upheld. And while
6 anything's possible, given the Court's strong language,
7 it's probably unlikely that the rules will survive in the
8 same form.

9 So, to the extent the ALECs urge you to keep
10 rules in place because we don't know what the FCC will do,
11 I think that's a bad decision from both a legal and a
12 practical perspective. The legal perspective, as I've
13 said, the Commission can't lawfully leave in place rules
14 that are deemed inconsistent with the Act, which is the
15 case here.

16 And second, if the Commission implements its new
17 rulings now, it will only have to change them later when
18 the FCC adopts its new rules. And that means possible
19 disruption or removal of equipment in collocation
20 arrangements. And this is a wasteful and inefficient
21 result, which will surely lead to disputes about who will
22 pick up the costs of changing the arrangements that are
23 already in place.

24 And I really don't think that any party here
25 would seriously claim that you don't have to conform your

1 rules to the FCC's once they're issued, but what Sprint
2 says, for example, is that it's premature for you to
3 change your decision. Aside from the legal problems with
4 that view, I would say it's premature to implement your
5 decision, because it's easier and less disruptive to move
6 from the status quo to the eventual FCC rules than to move
7 from the status quo to invalid FCC rules to the valid FCC
8 rules.

9 And once again, Verizon understands the
10 Commission's frustration at conducting a hearing and
11 making a decision on the record only to have that decision
12 overturned by the FCC or the federal courts. Verizon is
13 in a somewhat awkward position here, because it supported
14 the state's rights in collocations in other areas under
15 the Act.

16 But in terms under a strict legal analysis, I'm
17 afraid that the federal courts have left you little
18 choice, but to revise your collocation rulings to conform
19 to the Act as the D.C. Circuit has interpreted it. So, in
20 that regard, we urge you to accept your Staff's
21 recommendations on these items.

22 CHAIRMAN DEASON: Okay, thank you.

23 Ms. Masterton.

24 MS. MASTERTON: Susan Masterton representing
25 Sprint.

1 As I understand the scope of oral argument
2 today, we're to address specifically the Commission's
3 authority to prescribe guidelines for collocation on the
4 state level when certain federal communications rules are
5 in limbo due to a D.C. circuit court decision vacating
6 them --

7 CHAIRMAN DEASON: You need to slow down.

8 MS. MASTERTON: Okay -- vacating them and
9 remanding them to the FCC for additional action.

10 First of all, Sprint disagrees with BellSouth
11 and GTE's interpretation of the impact of the D.C. Circuit
12 decision. While, it questions the FCC's authority based
13 on principles of administrative law to adopt certain rules
14 pursuant to the federal act, it does not address the state
15 Commission's ability to independently adopt collocation
16 requirements as long as they are consistent with the
17 federal act and FCC regulations. Section 2--

18 CHAIRMAN DEASON: Now, how do we do that if FCC
19 regulations have been struck down and what we've ordered
20 is consistent with FCC regulation?

21 MS. MASTERTON: Well, I think that the
22 Commission has independent state authority to adopt
23 collocation guidelines. And I'm going to go into what I
24 think the statutory basis for that is.

25 And I do believe 251 D 3 of the federal act

1 recognizes that the states can take actions that are in
2 addition to what's allowed in the federal act, as long as
3 they are consistent with the federal act and with FCC
4 rules.

5 CHAIRMAN DEASON: Okay. How can it be
6 consistent with the federal act, if you've got a federal
7 court that says it's not?

8 MS. MASTERTON: Well, now, what I think the
9 Court said is the FCC did not have the authority under the
10 Act to adopt those rules. That doesn't mean that the
11 state Commission might not have the authority under its
12 own laws to adopt similar rules, as long as they're
13 consistent with the Act. You see what I'm saying? In
14 administrative law, the agencies are limited by the
15 statutory authority. And what they've said is you've gone
16 beyond the statute, FCC, but if the state -- if you as a
17 state --

18 CHAIRMAN DEASON: Now, the statute for the FCC
19 is the federal act.

20 MS. MASTERTON: Exactly.

21 CHAIRMAN DEASON: And that's what we're
22 implementing, the federal act, correct?

23 MS. MASTERTON: I think that you have the
24 ability to implement collocation guidelines pursuant to
25 provisions in the state law as well that would not

1 necessarily contain --

2 CHAIRMAN DEASON: Is that what you argued during
3 the hearing? I don't remember anyone in that hearing ever
4 bringing up Chapter 364.

5 MS. MASTERTON: No, it's true. That was not
6 raised during the hearing, but I had thought that you had
7 wanted to hear those arguments today.

8 CHAIRMAN DEASON: I do. I want to hear that.
9 But, you know, it seems to me that if, for purposes, we're
10 going to make decisions relying upon Chapter 364, it
11 shouldn't be now we're going to talk about it, because a
12 Commissioner asked a question about it.

13 If you sincerely believe that Chapter 364 gives
14 us the authority, you should lay that out as an issue at
15 the very beginning and say, Commission, pursuant to
16 Chapter 364, Section blah, blah, blah, this is what you
17 need to do, but you didn't do it.

18 MS. MASTERTON: That's true. And I agree, that
19 was an oversight. But for the purposes of today, I do
20 believe the state has independent authority under state
21 law to enact the collocation guidelines.

22 I think that if you look at Sections 364.16,
23 161, and 162 of the Florida statutes, they provide the
24 Commission the authority to establish the terms and
25 conditions for interconnection and access to unbundled

1 network elements by competitive carriers and that this
2 includes collocation requirements.

3 In addition, Section 364.01 directs the
4 Commission to exercise this authority in a manner that
5 encourages local competition and prevents anticompetitive
6 behavior. And I think that that's what the guidelines
7 that the Commission adopted do. I believe, these sections
8 of the Florida law are sufficient to provide the
9 Commission authority notwithstanding the fact --

10 CHAIRMAN DEASON: Ms. Masterton, just slow down.
11 You're not under a clock.

12 MS. MASTERTON: Oh, I thought I was under a
13 10-minute clock.

14 CHAIRMAN DEASON: Well, I'm running this. And
15 when I say slow down, I'll give you the time to complete,
16 okay? My ears are tired.

17 MS. MASTERTON: I think, these statutory
18 sections are sufficient authority, notwithstanding the
19 status of the FCC rules or the D.C. Circuit decision. In
20 addition, Commission precedence supports the Commission's
21 authority to adopt generic collocation principles.

22 In the expanded interconnection docket, the
23 Commission examined its statutory authority to adopt
24 collocation requirements in that environment and found its
25 authority, generally, expressed in Sections 364.01 and

1 364.16 of the Florida statute.

2 CHAIRMAN DEASON: When did we do that?

3 MS. MASTERTON: That was in '95.

4 CHAIRMAN DEASON: Before the federal act was
5 adopted?

6 MS. MASTERTON: That was before the federal act.
7 And that was pursuant to those sections as they then
8 existed. And they were subsequently amended, those
9 sections, and Section 364.161 and 162 were added to the
10 statutes. But I believe that those amendments sustained
11 the Commission's authority to adopt collocation policies
12 to further local competition.

13 And I don't think the adoption of the federal
14 act -- in other words, I don't think that acting under
15 those statutes are inconsistent with the federal act or
16 the FCC rules. It may go beyond that authority, but it's
17 not inconsistent with it. And I really believe that's the
18 situation that 251 D 3 was contemplating.

19 CHAIRMAN DEASON: You're saying 364 is not
20 inconsistent with the federal act.

21 MS. MASTERTON: Right. Well, in this regard,
22 I'm saying the authority that the Commission has to act
23 under 364 may allow it to go beyond what the D.C. Circuit
24 said that the FCC could do under the federal act and that
25 that would not be inconsistent with the federal act.

1 CHAIRMAN DEASON: Question?

2 COMMISSIONER JACOBS: No, she actually answered.

3 MS. MASTERTON: In addition, 251 C 6 of the
4 federal act authorized -- gives state Commissions
5 independent jurisdiction to determine the practicality of
6 various collocation arrangements. And I think that that
7 gives some independent authority to interpret the Act
8 different from the FCC and go, perhaps, beyond the FCC's
9 regulations.

10 The idea that the Commission does have the
11 authority to adopt these collocation guidelines or
12 collocation guidelines that aren't necessarily identical
13 to the FCC regulation, which I think is what BellSouth and
14 GTE are saying, what the Commission must do is act only --
15 in order to be consistent, it has to be identical. And I
16 think that is not a correct reading of the status of the
17 law.

18 Sprint thinks that it's appropriate to address
19 now how the Commission should act under its authority. We
20 support the actions that were taken by the Commission in
21 its original May 11th order. And unlike GTE and
22 BellSouth, Sprint feels that there's adequate evidence in
23 the record, outside the FCC rules, to support and provide
24 a factual basis for the Commission to readopt those
25 recommendations pursuant to its authority under state law

1 and its independent authority under federal law.

2 The ALECs presented evidence as to the
3 anticompetitive and costly burdens --

4 CHAIRMAN DEASON: Let me ask you a question.
5 Just ignore, for the moment, Chapter 364, and let's just
6 assume that we're acting strictly under the federal act.
7 You're saying that if there is sufficient record evidence
8 in our proceeding that we can make a decision, for
9 example, to require cross connects, given the language in
10 the D.C. decision?

11 MS. MASTERTON: I think that -- yes, I think, a
12 record could be developed, yes. That the D.C. Circuit's
13 opinion was based a lot on the FCC not really doing a very
14 in-depth analysis of the rationale behind what they were
15 recommending and how that was supported in the Act.

16 CHAIRMAN DEASON: So, you're saying the D.C.
17 Circuit opinion was that FCC -- you did not substantiate
18 your policy statement or your rule which says cross
19 connects should be required. That's your saying. That's
20 was the Court said. The Court did not say that cross
21 connects are inconsistent with federal law. Is that the
22 standard, Ms. Caswell? You used more terminology than she
23 used.

24 MS. CASWELL: Well, I can find it in the order
25 so we don't have to interpret it.

1 CHAIRMAN DEASON: I'll ask you that question in
2 a moment. I'm sorry, Ms. Masterton.

3 MS. MASTERTON: Well, no, I can't deny that the
4 language of the decision says that the problem with the
5 rule is that it imposes an obligation that has no apparent
6 basis in the statute. But they go on to say the
7 Commission does not even attempt to show the cross
8 connects are, in any sense, necessary for interconnection
9 or access to unbundled network elements.

10 Rather, the Commission is almost cavalier in
11 suggesting the cross connects are efficient and,
12 therefore, justified under 25-- which implies that had the
13 Commission taken more time and consideration in explaining
14 how cross connects were necessary, that perhaps the D.C.
15 Circuit Court would not have come to the same conclusion.

16 CHAIRMAN DEASON: Okay. Well, what meaning,
17 then, do you give to the terminology -- this is what I was
18 looking for -- no basis in law?

19 MS. MASTERTON: No apparent basis in the
20 statute. I mean, you know, you can interpret it as they
21 are, which means that there's no way to show that they are
22 necessary or you could just say that you need to do a
23 little bit more detailed analysis of how they are
24 necessary for interconnection and access to unbundled
25 network elements.

1 CHAIRMAN DEASON: So, no apparent basis in law
2 means you've got to work it a little harder, if you want
3 to convince us.

4 MS. MASTERTON: That's what I believe the Court
5 was saying and how the FCC may respond to that. And, I
6 believe, there is evidence in the record that was
7 developed here that would support the Commission's
8 recommendations outside of the reliance on the FCC's
9 rules.

10 Although it is true that there was an extensive
11 discussion of the FCC rules in the testimony, such
12 evidence may be found -- and I can give you citations of
13 the testimony. I don't know if you want me to do that or
14 just generally there was testimony on --

15 CHAIRMAN DEASON: You can give it to me, if
16 you'll slow down.

17 MS. MASTERTON: Okay. Well, I didn't know how
18 far in-depth, but for the virtual conversion of virtual to
19 physical collocation there was evidence to support the
20 Commission's recommendation, specifically, in witness
21 Williams' testimony on pages 780 to 784 and witness
22 Gillan's testimony on pages 1,041 to 1,048.

23 CHAIRMAN DEASON: And what do they say? Do you
24 know?

25 MS. MASTERTON: They explained the

1 anticompetitive effects of requiring relocation for
2 conversions from virtual to cageless collocation and the
3 unnecessary -- the unnecessariness of it, that it would
4 not necessarily be a benefit to the ILEC, but a detriment
5 to the ALEC and would be costly and require disruptions in
6 service to ALEC customers in an anticompetitive manner.

7 CHAIRMAN DEASON: So, you're saying the fact
8 that they declared it anticompetitive and that it could
9 cause disruptions in service to customers, that that goes
10 beyond just the arguments about delaying cost and that
11 that is a record of evidence to do something different?

12 MS. MASTERTON: Well, I think, it goes beyond
13 just arbitrary reference to delaying cost. It gives
14 actual explanations of the impact on ALECs. I mean, it
15 didn't have numbers or dollars associated with it, but it
16 was more than just, well, it's going to be costly and
17 cause delays. It was an explanation of --

18 CHAIRMAN DEASON: I guess, that's my question.
19 Is anticompetitive and disruptions in service just
20 synonyms for costly and delay. I mean, it seems to me, if
21 you're going to have a record basis that you maybe need to
22 come in and say, well, if this happens, we anticipate that
23 we're going to have this number of disruptions, which will
24 affect this number of customers or whatever. And that may
25 be fairly subjective, but at least it provides the record

1 basis that the FCC's certainly not going to take the time
2 to do.

3 COMMISSIONER JACOBS: And then, we have to
4 balance that against the intrusion and to the assent seal?

5 MS. MASTERTON: But I don't think that was the
6 point of the ALEC testimony, that there was no evidence of
7 the detrimental effect on the ILECs when you had virtual
8 collocation arrangements and the space requirements would
9 be the same, yet it would have a detrimental effect on the
10 ALECs. And I did want to say that the rejection of the
11 costly and delay standard was for the regulations based on
12 the FCC -- on the federal act and not on actions that you
13 might take under your authority in the state act.

14 There was testimony on equipment by witness Levy
15 on pages 913 and 932, witness Jackson, for witness Strow
16 on page 1,115 and by witness Nilson on page 985; and that
17 testimony goes to the nature of the continuing change in
18 the types of equipment that are available and the need to
19 have a flexible standard to facilitate the deployment of
20 equipment by ALECs.

21 CHAIRMAN DEASON: So, how does that differ from
22 what the FCC considers that the Court said was not good
23 enough?

24 MS. MASTERTON: Well, it isn't directly
25 different. It would say that, because the Court did make

1 the differentiation between necessary and used and useful.
2 And I wouldn't say that this testimony went directly to
3 that issue, but it does support the types of equipment
4 that the Commission recommended.

5 And I wanted to clarify. What Sprint had really
6 been recommending is the way the order came out. It just
7 said we, basically, adopt the FCC rules and Sprint was
8 recommending that rather than do that, the Commission
9 should use the verbiage of the FCC rules and adopt it as
10 its own. And I believe that that testimony supports doing
11 that.

12 CHAIRMAN DEASON: What's the difference between
13 adopting a rule and adopting the verbiage of a rule?

14 MS. MASTERTON: Well, it's sort of incorporating
15 it by reference. And if it doesn't exist, then there's
16 nothing there. But if you adopt the verbiage, then it's
17 not dependent on the existence of the rule, it's your
18 language, even though it came from the FCC rule. And
19 therefore, the vacation of the FCC rule would not
20 invalidate it.

21 CHAIRMAN DEASON: But the basis for why it was
22 invalidated would still exist. So, You're hanging your
23 hat, again, on Chapter 364 as opposed to the federal act?

24 MS. MASTERTON: Well, Chapter 364, and also the
25 ability for the state Commission to do a better job than

1 the FCC did of explaining why it adopted the standards
2 that it did under the federal act.

3 COMMISSIONER JACOBS: If we follow the logic
4 that our ability to act under 252 has to be guided by the
5 FCC's rule, what, then, is the status why that rule is in
6 limbo? What do we do while the rule is in limbo?

7 And I understand that you don't follow that
8 view. But for a moment, if we feel that that was an
9 attempt to preempt state interpretation of the Act and
10 that preemption now is in limbo, what do we do?

11 MS. MASTERTON: Well -- and assuming that you
12 don't have independent authority under the state law to
13 act, that your only authority to --

14 COMMISSIONER JACOBS: Let's set that aside for a
15 moment.

16 MS. MASTERTON: If you're saying that you can
17 only act when there is an FCC rule in place that is valid
18 or hasn't been?

19 COMMISSIONER JACOBS: Well, I'm wondering how
20 you would guide us through the law. What I'm
21 understanding the rationale to be is that we were
22 preempted by the FCC's statement and its rule, but
23 whatever the context of that preemption is, is now in
24 limbo.

25 So, if we -- well, let me stand back for a

1 moment. You said independent state authority, right? If
2 I understood your argument earlier, we also have
3 independent authority to act under 252; is that correct?
4 Was that your argument?

5 MS. MASTERTON: And 251, right.

6 COMMISSIONER JACOBS: Okay. So, given that
7 authority but without a blueprint to guide us as to how to
8 interpret the statute because the FCC's rule is no longer
9 there, how would you guide us through the law, then?

10 MS. MASTERTON: Well, if the FCC rule doesn't
11 exist, then we don't have to worry about being consistent
12 or inconsistent with it. We only need to worry about
13 being consistent with the federal act.

14 And I do think that the FCC has, in many
15 occasions, both in the first report and order and in the
16 advanced services order, independent of the portions that
17 were vacated, recognized states authority to go beyond
18 their rules and adopt additional collocation requirements
19 and does not perceive the additional requirements as being
20 inconsistent with their requirements, if they don't go as
21 far.

22 COMMISSIONER JACOBS: Thank you.

23 MS. MASTERTON: In conclusion, Sprint believes
24 that the Commission -- that the policies in the
25 Commission's original order are appropriate to ensure that

1 ALECs make collocated ILEC premissis in a manner that will
2 facilitate competition. And Sprint believes that the
3 Commission has sufficient independent authority to take
4 these actions, as well as an ample evidentiary record,
5 regardless of the status of the FCC rules.

6 CHAIRMAN DEASON: Ms. Kaufman.

7 MS. KAUFMAN: Thank you, Chairman Deason. My
8 name is Vicki Gordon Kaufman. I'm of the McWhirter,
9 Reeves law firm, and I'm here on behalf of the Florida
10 Competitive Carriers Association.

11 And as I understand the issue that you all would
12 like addressed today, it's the authority of this
13 Commission to set standards for collocation in light of
14 the federal district court for the D.C. Circuit's vacation
15 of certain specific collocation rules.

16 Just to give you a heads-up here, it's the
17 FCCA's position here that you have authority to take the
18 action that you took in your May order and that the order
19 need not be reconsidered.

20 As a preliminary matter, and Ms. Masterton
21 already discussed this with you a bit, we think that you
22 do have independent state authority to act. And to maybe
23 preempt Chairman Deason's question, I will say it's also
24 true that that was not the focus of the hearing.

25 However, I think that it might be helpful to

1 step back and look at how we got to this hearing in the
2 first place. And the way we got to it was the collocation
3 proceeding we're in now actually began at the end of 1998
4 when the FCCA and other parties asked this Commission to
5 take a number of actions to support local competition.
6 Then, there were various dockets that sort of spun off;
7 one of them was the UNE pricing docket, one of them was
8 this docket on collocation.

9 If you go back to the petition that began this
10 docket, you'll see that our request was made pursuant to
11 Florida law, was not made pursuant to federal law; and
12 specifically, was made pursuant to Chapter 364.01 paren 4,
13 I know that you're both familiar with that, sending out
14 the legislature's intent that local markets in Florida be
15 open to competition. So, that's how we got to the hearing
16 phase.

17 I know you also will remember that we had a
18 three-day hearing in this docket, that you took sworn
19 testimony under the Florida APA from some 13 witnesses who
20 were subject to cross examination, briefs were filed and
21 then, eventually, your May order was issued that we're
22 here to talk about today.

23 And then, in that same time frame, the district
24 court looked at some of the FCC rules related to
25 collocation and they vacated some of those rules. And

1 we've heard a lot of discussion already this afternoon
2 about that court opinion. And, I think, it's important to
3 look at what that opinion did, even more importantly what
4 it did not do.

5 What that opinion did was remand certain of the
6 FCC's rules back to the FCC for further consideration,
7 further explanation, if you will, have the FCC flesh them
8 out further. That opinion does not say, FCC, you cannot
9 enact these rules; FCC, you don't have authority to enact
10 these rules.

11 I think, Chairman Deason may have mentioned this
12 earlier. What it says is that as to some of these rules,
13 we don't think you did, perhaps, the best job you could in
14 explaining to us what your rationale might have been and
15 how those rules are related to the statute that you're
16 trying to implement. That's sort of the same question
17 that you're struggling with overlaid with your state law
18 and the process that went on here in January with the
19 record evidence.

20 Now, the three issues, the cross connect, the
21 conversion, and the equipment issue, were all addressed in
22 the hearing. And, I think, what's important to remember
23 is as I said, you have state law authority under 364.01,
24 364.161 as well as the provisions of Chapter 364 that
25 require you to prohibit, if you will, anticompetitive

1 behavior.

2 And as to each of these issues, you took
3 evidence and sworn testimony, and you heard from the
4 witnesses. Ms. Masterton has somewhat taken the wind out
5 of some of my argument because I, too, had gone back to
6 the record and reviewed the witnesses' testimony. And
7 there is testimony on all of these issues. Yes, some of
8 it relates to what the FCC did or didn't do, but that is
9 by no means the bulk of the evidence in the record here.

10 For example, on the conversion issue, there were
11 a lot of witnesses who testified in regard to that issue.
12 And as Ms. Masterton said, one of them was the FCCA's
13 witness, Mr. Gillan. And I just want to quote from your
14 order, and this is towards the end of your analysis of the
15 conversion issue; and you say in the order, quote,
16 "Furthermore, regarding relocation of equipment, the
17 record supports that the ALEC's equipment may remain in
18 place, even if it is in the ILEC's equipment line-up when
19 converting from virtual to cageless physical collocation.
20 It appears that to require the relocation of equipment,
21 under these circumstances, would be unduly burdensome and
22 costly to the ALEC without any benefit," closed quote.

23 That's what you said in your order based on the
24 evidence that you heard. And even your Staff told you, in
25 their recommendation on reconsideration on that issue,

1 quote, "There's a significant amount of testimony in the
2 record that supports the Commission's decision." That
3 being the case, I'd say to you there is nothing in the
4 Court's order that would require you to vacate that
5 decision and sit, I guess, and wait for the FCC which, I
6 think, is what's being suggested to you by the ILECs.

7 Similarly, on the cross connect issue, there is
8 testimony. This is not testimony where the witness has
9 simply said the FCC rule says A, B, C. And also, on the
10 equipment issue that was discussed earlier and which is of
11 critical importance to opening local markets to
12 competition, of necessity, you've got to look at that
13 issue on a fact-specific case-by-case basis. And the ALEC
14 witnesses presented you with evidence in that regard.

15 So, I think, you have all of the record evidence
16 in the hearing that was held before you, and you have all
17 the legal authority that you need in both the state and
18 federal law to sustain your decision. Now --

19 CHAIRMAN DEASON: Let me ask you, if we make
20 that determination, and we say there is sufficient record
21 evidence and someone disagrees then what, they appeal our
22 decision to where?

23 MS. KAUFMAN: I believe, they would appeal it to
24 the federal district court.

25 CHAIRMAN DEASON: Okay. And then, the federal

1 district court would make the determination as to whether
2 we'll just flat out preempt it or whether we have the
3 ability to take our own record evidence, and if we do,
4 whether that's sufficient to adopt the policy that we
5 adopted?

6 MS. KAUFMAN: Yes. I mean, I certainly think in
7 any case you hear or any party who feels aggrieved has the
8 right to take an appeal and attempt to make their case.
9 The burden is on the appellant in that regard. But yes, I
10 think those would be some issues the Court would look at,
11 if your decision was appealed.

12 CHAIRMAN DEASON: Which court would it go to?

13 MS. KAUFMAN: I think, it would go to the
14 federal district court here in the northern district of
15 Tallahassee.

16 COMMISSIONER JACOBS: And the first thing
17 they're going to do is raise the decision in the Eighth
18 Circuit. What do we have to do to distinguish that the
19 Eighth Circuit's ruling -- well, I guess you just argued
20 it though, didn't you? Your argument was that the Eighth
21 Circuit didn't take away our ability to interpret the
22 statute. In fact, it didn't even take away the ability of
23 the FCC to interpret the statute. It simply said the FCC
24 didn't do a good enough job of substantiating this
25 interpretation.

1 MS. KAUFMAN: Yes, I think, that's right. And I
2 think, you know, if you just look at some of the language
3 that's in the opinion, for example -- let's see, this is
4 on the equipment issue, and they talk about the fact that
5 they would require a better explanation from the FCC in
6 regard to that rule; and, of course, this is the point of
7 a remand. As I said, they're sending it back to the FCC.
8 They're not -- if these rules were illegal, and the FCC
9 could not enact them, I think that the opinion would have
10 so stated.

11 And, I think, it's also important to note, and I
12 believe Chairman Deason brought this up as well, the FCC
13 makes its determinations based on a paper record. They
14 don't hear live testimony. The witnesses or the
15 submitters or commenters are not subject to cross
16 examination. And, I think, those are important
17 distinctions between what you do in Florida and the way
18 the FCC conducts their business.

19 CHAIRMAN DEASON: Let me ask you another
20 question. If we do not reconsider our decision on these
21 issues and then that matter is appealed, will the federal
22 court consider our authority under Chapter 364 or that is
23 not something the federal court would consider at all
24 since it's a state statute?

25 MS. KAUFMAN: Well, I mean, I kind of hesitate

1 to predict what a federal court is going to do, but
2 certainly I think that the parties would argue the
3 applicability of your state authority, as well as the
4 federal authority and be hopeful that the Court would take
5 that into consideration. I don't think they're precluded
6 from looking at it, if that's what you're suggesting.

7 CHAIRMAN DEASON: Well, I guess, that's my
8 question; not predicting what they would do, but it is
9 permissible to argue state authority in a federal court?

10 MS. KAUFMAN: Yes, I think, it is.

11 CHAIRMAN DEASON: Okay.

12 MS. KAUFMAN: What I was about to say was that
13 after you look at the evidentiary record and you look at
14 the state law and then you look at the court decision, I
15 don't think that you come to the sweeping conclusion that
16 the ILECs want to attribute to it and that you can take
17 the actions that you have taken.

18 And as I've already discussed, basically, the
19 FCC needs to flesh out the requirements that it set forth.
20 And the Court found that there was a -- if you will,
21 almost a lack of an evidentiary basis for some of the
22 actions that the FCC was trying to take. The FCC has not
23 preempted you, the district court opinion has not
24 preempted you on the issues that are before you today.

25 And so, I would suggest to you that you

1 shouldn't sit back and you shouldn't wait for the FCC. I
2 do agree with one thing, at least, I believe, that
3 Ms. Caswell and Ms. White said, and that is that you can't
4 view anything that is inconsistent or in contravention of
5 the federal law, but I don't think that that is the
6 situation that you find yourself in today.

7 What you find is that there are some FCC rules
8 that, basically, are not on the books anymore. They're
9 sent back to the FCC for a further look. And here we are
10 in Florida trying to open the local markets to
11 competition. So, what should you do? Should you sit and,
12 you know, wait and see what the FCC does?

13 No. I think that you have an obligation under
14 state law, and you have an obligation under the
15 Telecommunications Act as well to make the best decision
16 that you can based on the record you have, based on the
17 state of the law, the point and time where we find
18 ourselves.

19 As long as you don't do anything that is in
20 contravention of the federal law, I think, you have all
21 the authority that you need to move forward. And, I
22 think, you have all the authority and the factual evidence
23 in this case to sustain your order. And we would suggest
24 that reconsideration should be denied.

25 Thank you.

1 CHAIRMAN DEASON: Mr. Marcus.

2 MR. MARCUS: Thank you, Chairman. My name is
3 Jeremy Marcus. I'm with Blumenfeld & Cohen representing
4 Rhythms Links here.

5 As I understand it, the main purpose of this
6 proceeding today is to discuss the authority of this
7 Commission in light of the D.C. Circuit's decision, and
8 I'd like to address that in three areas; first, the D.C.
9 Circuit's decision's impact itself; second, the
10 independent authority of this Commission under both
11 federal and state law; and third, whether the Commission
12 has a sufficient record to sustain its order on these
13 three issues.

14 First, with regard to the D.C. Circuit
15 decision's impact, nothing in that decision requires this
16 Commission to reverse itself. The D.C. Circuit simply
17 rejected the FCC rules as not sufficiently justified for
18 virtual to physical and for the carrier-to-carrier cross
19 connect. And for the rule interprets of the equipment
20 types that ALECs can place, the D.C. Circuit rejected the
21 FCC's rule as not based on the proper legal standard.

22 It's important to note that the D.C. Circuit did
23 not state that the FCC rules violated the '96 Act.
24 Rather, it remanded these three issues to the FCC for
25 further reconsideration, and comments are currently being

1 taken. Had the D.C. Circuit intended to out and out say
2 that the FCC was just flat wrong as a matter of law, we
3 believe that the D.C. Circuit would have done so and that
4 these matters would not be the subject of comment
5 currently at the FCC.

6 In relying on the D.C. Circuit decision,
7 BellSouth and GTE are either claiming that the Commission
8 must reverse itself here because the FCC will subsequently
9 reverse itself, and there is no evidence to support that
10 conclusion at this time; or they must be claiming that the
11 vacation and remand of these rules will lead to an
12 automatic reversal of the now vacated rules, at least
13 until the FCC speaks otherwise. This, also, is not the
14 case; rather, federal regulations are simply silent
15 currently. Silence does not mean that ILECs have any
16 unilateral right to interpret what the law is until the
17 FCC speaks.

18 Second point is the independent authority of
19 this Commission. Rhythms believes that this Commission
20 has independent authority, both under Florida state law,
21 Section 364.01 as some other parties have talked about
22 already and in a section of the federal act that I don't
23 believe anybody has spoken to yet today and that is
24 Section 261 C.

25 That section states, and I quote, nothing in

1 this part precludes a state from imposing requirements on
2 a telecommunications carrier for intrastate services that
3 are necessary to further competition in the provision of
4 telephone exchange or exchange access as long as the
5 state's requirements are not inconsistent with this part
6 or the Commission's implementation of this part," end
7 quote.

8 Thus, Congress, in enacting Section 261, clearly
9 contemplated that states would establish their own
10 regulations, so long as those regulations did not conflict
11 with any minimum federal standard established by the FCC.
12 And, I think, it's important to look at FCC regulations in
13 their right context. When the FCC establishes national
14 rules, those rules are minimum standards. States are free
15 to promulgate rules and regulations that go beyond the
16 FCC's rules.

17 In addition, other states have looked at
18 collocation matters and have implemented their own rules
19 and regulations relying, in part, upon federal rules and,
20 in part, upon their own state authority. For example, in
21 September of 1998, Washington state promulgated some of
22 its own collocation rules, and those were based both under
23 the Telecom Act, FCC rules at the time, and the
24 Commission's own rules.

25 There's nothing that prevents this Commission

1 from doing the same thing from adopting collocation rules
2 based, in part, under the federal act and, in part, on its
3 own rules to further competition within the state of
4 Florida.

5 Final point I'd like to discuss is whether the
6 Commission has a sufficient record to sustain its order in
7 this proceeding. There are three issues, and I'd like to
8 go through them in order, beginning with virtual to
9 physical conversion.

10 We believe that there is sufficient testimony in
11 the record. I believe, Ms. Masterton has cited you all to
12 certain specific locations, several witnesses have
13 testified as to the increased costs that would be incurred
14 and the service outages that would incur if an ILEC could
15 require the relocation of equipment in moving from a
16 virtual to a physical environment, particularly, when the
17 equipment may be the same. The only difference would be
18 the location in the central office.

19 This Commission recognized that there was a
20 sufficient order in its own order when it said, quote,
21 "Regarding relocation of equipment, the record supports
22 that ALECs' equipment may remain in place, even if it is
23 in the ILECs' equipment line-up when converting from
24 virtual to cageless physical collocation. It appears that
25 to require relocation of equipment under these

1 circumstances would be unduly burdensome and costly to the
2 ALEC without any benefit.

3 I don't think any party disputes that there is a
4 record in this case on this matter. Indeed, the Staff, in
5 its recommendation on reconsideration, did state that,
6 quote, "There is a significant amount of testimony in the
7 record that supports the Commission's decision." Thus, we
8 believe there is sufficient evidence here to support this
9 Commission's decision determination requiring virtual to
10 physical collocation conversion in place.

11 Second issue, carrier-to-carrier cross connects.
12 As pointed out by other parties here. The D.C. Circuit
13 chastised the FCC because it did, quote, "not even attempt
14 to show that cross connects are, in any extent, necessary
15 for interconnection." Thus, the FCC simply did not make a
16 sufficient showing to justify its own rule. The issue is
17 back before the FCC, and will presumably act on this issue
18 and, hopefully, with more justification.

19 However, this Commission conducted its own
20 evaluation on this issue, and this Commission's evaluation
21 went beyond what the FCC was evaluating to the point of
22 even evaluating the FCC's own rule itself. The FCC's rule
23 carved out an exception, quote, subject only to reasonable
24 safety limitations.

25 This Commission, in reviewing that rule, found

1 that exception, quote, "somewhat vague and little specific
2 guidance on this matter," end quote; therefore, this
3 Commission went on to provide additional guidance. This
4 is exactly the type of authority this Commission has to
5 provide, additional guidance above and beyond what the FCC
6 has done. And in this case, there was silence at the
7 federal level, so there's plenty of room for this
8 Commission to act.

9 Further, I'd like to point out that parties in
10 this case, and in particular, BellSouth, has been
11 permitting carrier-to-carrier cross connections since
12 before the FCC's advanced services order was ever
13 promulgated and before the FCC's rule that was vacated by
14 the D.C. Circuit was ever promulgated.

15 This is evidenced by interconnection agreements
16 that have been approved by this Commission, and clearly
17 being that between my client, Rhythms, and BellSouth.
18 There is no reason provided by any party here today as to
19 why the Commission should reverse this longstanding
20 policy.

21 Finally, with regard to equipment types, I would
22 concede that the record is not nearly as robust, in terms
23 of equipment types that can be placed in a collocation
24 arrangement as it is on the other two issues before this
25 Commission. I would suggest, however, that should this

1 Commission decide there is an insufficient record, this
2 matter can be decided as a matter of law and that this
3 Commission can decide that multifunctional equipment can
4 be placed as a matter of law in a collocation arrangement.

5 ILECs are permitted to place this type of
6 equipment in their own central offices. To allow ILECs to
7 use this type of equipment without allowing ALECs to use
8 this type of multifunctional equipment would be
9 anticompetitive and would give a distinct advantage to
10 incumbents over ALECs.

11 However, even if the Commission were to not
12 accept this line of reasoning, the Commission should, at
13 the very least, maintain the status quo awaiting further
14 FCC action. By this, I mean that ALECs must be allowed to
15 continue to place the types of equipment they have been
16 placing to date in ILEC central offices and that ILECs
17 must not be permitted to refuse to permit types of
18 equipment without first receiving Commission approval, for
19 this refusal in such a manner neither ILECs nor ALECs
20 would be disadvantaged until the FCC provides further
21 guidance.

22 Thus, in sum, Rhythms believes that this
23 Commission has sufficient independent authority to support
24 its decision and that the D.C. Circuit does not mandate
25 reconsideration on any of these three issues.

1 Thank you.

2 CHAIRMAN DEASON: Let me ask you a question on
3 that last point.

4 You say the status quo would be to allow ALECs
5 to continue to locate this type equipment; is that
6 correct?

7 MR. MARCUS: I believe so, yes. In particular,
8 there are terms in existing interconnection agreements
9 that govern this. And, I believe, this Commission has
10 spoken to the types of equipment in prior arbitration
11 decisions. There's no reason that any of that should be
12 undermined while awaiting potential future action from the
13 FCC.

14 CHAIRMAN DEASON: Now, you say that you should
15 be allowed to continue to locate this equipment if it is
16 according to an existing agreement?

17 MR. MARCUS: Yes. Basically, equipment that the
18 incumbents have been allowing, even if the Commission were
19 to go back and vacate this portion of its order, this
20 Commission must not allow the ILECs, then, to have a
21 unilateral right to make determinations as to what type of
22 equipment can be placed in collocation arrangements.

23 Clients such as Rhythms, collocation is a key
24 part of our business plan. We obtain unbundled loops and
25 cross connects and to equipment in our central offices.

1 If all of a sudden the type of equipment that we could
2 place in our central office, if what that equipment is
3 thrown into significant doubt or an ILEC in Florida were
4 to come along and say, you're not allowed to have what
5 we've previously been allowing, that would have a
6 significant and detrimental effect on our business and our
7 ability to serve Florida consumers.

8 CHAIRMAN DEASON: Well, is there any impact on
9 equipment you have already located? Do you have to take
10 it out?

11 MR. MARCUS: Let me back up a second. We're not
12 aware of any equipment that should be effected by the D.C.
13 Circuit's decision either way, but what we would say is
14 that -- or what we would request is that this Commission
15 not permit an incumbent to require an ALEC to remove
16 equipment that is currently in place without this
17 Commission first okaying the action of the ILEC.

18 CHAIRMAN DEASON: Okay. On a going-forward
19 basis, if the Commission decides not to reconsider this
20 issue, and you continue to locate this type equipment, are
21 you placing yourself in jeopardy in that if the FCC does
22 not prevail, and their rule, the final rule that comes out
23 does not allow this, are you then required to go back and
24 remove this equipment that was placed in the interim
25 period?

1 I think, there was an allegation that this would
2 be disruptive. If I'm not mistaken, the incumbents
3 indicated that that may be required and that it would be
4 disruptive. Let me ask. Ms. Caswell, didn't you indicate
5 that would be the case?

6 MS. CASWELL: Yes, I did. I mean, if you have a
7 regulation now that says, okay, you can do cross connects
8 and okay, ALECs, you can choose where you go in the
9 central office, and then you come back with a federal rule
10 that says, no, you don't do those things, ILECs, you have
11 the right to determine where they go, and you don't need
12 to permit cross connects, then we're in a situation where
13 we need to remove equipment, we need to disconnect things.
14 And I can assure you we're going to have arguments about
15 who picks up the cost for those, you know, as well as
16 probably some other arguments.

17 So, I mean, I think, it's -- again, the
18 practical issue, is it more difficult to move -- to stay
19 with the status quo which, I think, you know, I agree with
20 Mr. Marcus that we're okay with the status quo right now.
21 I don't think we're going to go removing CLECs equipment.

22 You know, is it better to go from that to the
23 eventual rules or is it better to go from that to an
24 intermediary step you don't know whether it will last and
25 then to go to the ultimate FCC rules? So, then, again,

1 you've got to think about what would cause you least
2 frustration.

3 CHAIRMAN DEASON: Do you think you're subject to
4 having equipment removed, regardless of what the final
5 outcome is at the federal level, if we do not reconsider
6 our decision?

7 MR. MARCUS: If you do not reconsider your
8 decision, the only way that I could envision us being
9 subject to having equipment removed would be if the FCC
10 came back and came out with their rule that limited the
11 equipment we could put in, and it turned out that that FCC
12 rule was so limiting that it did not permit us to place
13 equipment that we are now placing.

14 And then in conjunction with that, an incumbent
15 were to come back and say we don't have to allow you to
16 put that equipment, and we're not going to anymore, so
17 take it out. I suppose, in that situation, the FCC would
18 be telling us we can't do it, and our beef, then, would be
19 with the FCC.

20 CHAIRMAN DEASON: So, you're saying that there
21 would have to be a decision as to whether you actually
22 would have to remove it and that you may or may not have
23 to remove it. I guess, that would be a fight for another
24 day?

25 MR. MARCUS: I think that would be a fight for

1 another day, yes. It's not necessarily a fight we
2 envision needing to have. Rhythms has not had, that I'm
3 aware of, situations where incumbents question the
4 equipment we were putting in, our collocation
5 arrangements. I don't claim to be aware of every
6 situation, but I'm not aware of one.

7 I just think we need to err on the side of
8 caution and make sure that whatever is being -- whatever
9 types of equipment are being placed in collocation
10 arrangements can continue to be placed in them, unless and
11 until somebody else comes up with a requirement to the
12 contrary.

13 CHAIRMAN DEASON: I'm sorry, are you finished?

14 MR. MARCUS: Yes.

15 CHAIRMAN DEASON: Mr. Gross?

16 MR. MARCUS: Thank you.

17 CHAIRMAN DEASON: No? Okay. Is there anyone
18 else wishing to make an argument? Staff? You can make an
19 argument, too, if you'd like.

20 MS. KEATING: Well, I don't really have much of
21 an additional argument to make, because I don't want to
22 rehash what the parties have already said, but it sounds
23 to me like really the main question is whether or not you
24 can adopt these requirements, even though the FCC's rules
25 have been vacated. And honestly, Commissioners, I really

1 don't think that you can, either using state law or a
2 different rationale or interpretation of the Act.

3 I think, you are preempted with regard to these
4 three areas, because the FCC's demonstrated a desire to
5 act with regard to these points. And, I think, I disagree
6 with Mr. Marcus. I think, a federal court has said that
7 the Act doesn't allow what the FCC proposed to require.
8 As such --

9 CHAIRMAN DEASON: Hold it. The federal court
10 said that the federal act does not allow it to do what
11 they've propose. Does that automatically mean then that
12 the Florida Public Service Commission cannot do what it's
13 proposed to do based upon a record of evidence?

14 MS. KEATING: I believe, it does, because you're
15 acting under the Act. I mean, you are implementing the
16 Telecommunications Act. And a federal court has said the
17 Act doesn't contemplate this. And therefore, you can't --

18 CHAIRMAN DEASON: Is that what the Court's
19 saying? Or does the Court say, FCC, you did not do a good
20 enough job justifying the rules under the Act?

21 MS. KEATING: My reading of it is a little bit
22 stronger of it than, I think, Mr. Marcus' reading. I
23 mean, the Court says this is -- well, let's see. One of
24 the comments that they make is, "A court will not uphold
25 an interpretation that diverges from any realistic meaning

1 of the statute." I mean, they include quotes like that in
2 there. I think, they've got a little bit --

3 CHAIRMAN DEASON: Say that again, now, they said
4 what?

5 MS. KEATING: One of the quotes that the Court
6 uses in rendering its decision is a quote from a -- I
7 believe, this is a Massachusetts versus Department of
8 Transportation case out of the same circuit. And they
9 said, "A court will not uphold an interpretation that
10 diverges from any realistic meaning of the statute."

11 And to me, that entails that they really did not
12 believe that what the FCC had proposed in these rules is
13 really a realistic interpretation of the statute. But
14 that being said --

15 COMMISSIONER JACOBS: The passage that was
16 quoted contrasts that, the other passage, which says that
17 the FCC should have done a better job justifying what it
18 was interpreting. How do you contrast -- how do you
19 distinguish that?

20 MS. KEATING: Actually, what they say is, let's
21 see. They say that it is apparently contrary to the Act.
22 Now, they do use the word "apparently" in there, but
23 within the context of the full discussion in the order, it
24 sounds more to me like they're not really saying
25 apparently, they're saying go back and come up with

1 something else.

2 COMMISSIONER JACOBS: Let me ask you a question
3 about the preemption. So, your view is that Section 252
4 does not convey any authority on state Commissions to
5 interpret the Act outside of some guiding or enabling
6 regulation from the FCC.

7 MS. KEATING: You can interpret the Act, but you
8 cannot interpret it contrary to stated federal law or
9 contrary to any FCC rules that are currently in place.
10 Right now there is a federal court decision that says, at
11 least in my mind, that what the FCC proposed in these
12 rules is contrary to the Act. Therefore, I don't believe
13 that you can promulgate guidelines that are contrary to
14 what the federal court has said.

15 Under the Act in the utilities board case that
16 Ms. Caswell referred to, you can't do anything that's
17 contrary to the Act or FCC rules with regards to matters
18 that are covered by the Act. And collocation is covered
19 by the Act.

20 If you require the cross connects or conversion
21 in place or equipment that's under the used and useful
22 standard, you'll be acting in a manner that a federal
23 court's determined is contrary to the Act. There are
24 provisions in your state statute that --

25 CHAIRMAN DEASON: I think, what it boils down to

1 is our reading of what the federal court meant when they
2 remanded the rule, whether that meant that what was
3 proposed is contrary to the Act or whether the Court was
4 saying, FCC, you did not justify your rules consistent
5 with the Act, go back and try again. And in the meantime,
6 what our responsibility is if whether we can independently
7 interpret the federal act when there are no FCC rules in
8 effect.

9 MS. KEATING: My reading of the decision is that
10 what they said is that it is contrary to the Act.

11 CHAIRMAN DEASON: Why do they remand it, then?
12 Why did they remand it to the FCC? Why didn't they just
13 say, FCC, these rules are no good, we strike them down;
14 said, done, finished.

15 MS. KEATING: Well, the FCC could come up with
16 variations on the rules that perhaps the Court doesn't
17 think are contrary to the Act.

18 CHAIRMAN DEASON: Well, can't we come up with
19 interpretations of the Act which we think can be supported
20 by a record of evidence?

21 MS. KEATING: And they didn't, specifically, say
22 when they were remanded to the FCC. They didn't say go
23 back and try again with regard to cross connects or go
24 back and try again with regard to maintaining equipment
25 wherever the ALEC wants the equipment to be.

1 I mean, there are things in here, like
2 equipment, like the specific kinds of equipment, that are
3 addressed within the order. I mean, they didn't give
4 specifics as to what they thought the FCC could come up
5 with that was in compliance with the Act.

6 I mean, it could be that whatever they come back
7 with, with regard to cross connects or particularly
8 locating equipment within a central office. I mean, I
9 think that if they come back with rules that address
10 those, I think, you're going to end up with the same
11 result.

12 CHAIRMAN DEASON: All right. When the FCC
13 finally adopts a rule, I guess -- I think, everybody
14 agrees that we're bound by those rules. Do you agree with
15 that?

16 MS. KEATING: I'm afraid so.

17 CHAIRMAN DEASON: All right. What happens in
18 the meantime? There are no rules out there. Does the
19 Court decision, does that mean then that if they strike
20 down a rule that we have to do the opposite of what the
21 rule said before it was struck down? It just means there
22 are no rules out there.

23 MS. KEATING: Well, essentially, you're correct.
24 But remember, there are a number of rules out there that
25 are governing collocation. You're only looking at three

1 points. You're just looking at cross connects requiring
2 conversion in place is appropriate and whether the FCC's
3 rules, with regard to equipment, are applicable. So, I
4 mean, it's not that everything with regard to collocation
5 is going away.

6 CHAIRMAN DEASON: The fact of the matter is that
7 collocation has to continue in the meantime.

8 MS. KEATING: That's correct. And I don't
9 believe that reconsideration on these three points is
10 going to impair collocation or interconnection in any way.

11 CHAIRMAN DEASON: Well, why did we make the
12 decisions we did to start with?

13 MS. KEATING: These were issues that were
14 presented for decision in this proceeding. And the
15 Commission can make decisions -- can make requirements --

16 CHAIRMAN DEASON: If it was good policy that
17 this is the best way to promote competition, why do we no
18 longer believe that?

19 MS. KEATING: I don't know that we necessarily
20 believe that --

21 CHAIRMAN DEASON: Is that changing your mind as
22 to what is good policy?

23 MS. KEATING: No, sir. I don't think that's
24 what it comes down to.

25 CHAIRMAN DEASON: Okay.

1 MS. KEATING: It's not an issue of whether the
2 state Commission thinks it's good policy or not. I think,
3 you're in a position that it really, frankly, doesn't
4 matter.

5 CHAIRMAN DEASON: What we think. It doesn't
6 matter what we think. Say it. It doesn't matter what the
7 Florida Public Service Commission thinks.

8 MS. KEATING: I was getting there, but trying to
9 be a little more delicate.

10 CHAIRMAN DEASON: I mean, be blunt.

11 MS. KEATING: But, essentially, I think, that's
12 what it is. I think, with regard to these three points,
13 we're out of it.

14 CHAIRMAN DEASON: You know, and it doesn't
15 bother me. If we had known in the beginning going in,
16 Florida Public Service Commission, it doesn't matter what
17 you think, I'd have been happy, and I'd have been able to
18 go home and would not have sat through these hearings and
19 wasted my time.

20 MS. KEATING: Well, but let me point out, it
21 doesn't matter what you think about these three things,
22 because what you propose to do looks like it's contrary to
23 the Act, but you could have gone further than what the FCC
24 required. If those FCC rules had stayed in place, if you
25 wanted to put some additional requirements in place that

1 were not contrary to what the FCC was doing, you could
2 have done that. So that's --

3 COMMISSIONER JACOBS: The whole point is what
4 the FCC thought it was doing, it didn't do. We thought we
5 were being consistent. And now that we understand that
6 that is in limbo, we have to retract everything we did,
7 because we followed them off the cliff.

8 MS. KEATING: Well, I don't know that you're
9 really retracting everything that you did. I mean, bear
10 in mind, at that hearing there were a whole lot of other
11 points that were addressed that aren't up on
12 reconsideration that are going to go into effect.

13 COMMISSIONER JACOBS: Let me ask you this.
14 Given the Court's ruling, okay, which casts doubt on the
15 sufficiency of the FCC's proof here, but what I understand
16 you to say did not categorically overturn the idea that
17 -- let's narrow in on the conversions -- did not
18 categorically overturn the idea that there can be an
19 option for conversion from physical -- from virtual to
20 physical collocation, okay?

21 As I understand your interpretation of the
22 Court's ruling, while they said that what the FCC
23 attempted to do was out there, they didn't categorically
24 overturn the idea that some version of conversion from
25 virtual to physical collocation would be adequate, okay?

1 MS. KEATING: Well, let me just be clear. We're
2 not talking about whether or not conversion from virtual
3 to physical collocation is allowed. What Staff addressed
4 in its recommendation was whether or not the ILEC could
5 require the ALEC to move its equipment when it was
6 converting to physical collocation. And what the --

7 CHAIRMAN DEASON: And we made the finding that
8 there's no benefit in having the incumbent LEC require
9 that that equipment be moved. We made that finding; did
10 we not? Isn't that the language in the order?

11 MS. KEATING: That's correct.

12 CHAIRMAN DEASON: No benefit. And now, we're
13 saying, well, we've got to change our mind because of a
14 D.C. Circuit Court decision, right? Now, we're saying
15 there is a benefit?

16 MS. KEATING: No, we're not saying anything.
17 We're simply --

18 COMMISSIONER JACOBS: And the logic is --

19 MS. KEATING: What I'm suggesting is that you
20 don't do anything on these points.

21 COMMISSIONER JACOBS: The logic escapes me. If
22 we were saying that it is now illegal or irrational to
23 allow conversion from virtual to physical because that is
24 outside of the scope of federal law, I would be a lot more
25 at ease with the conclusion you suggest, because then it

1 says this conduct is outside of the scope of this statute.

2 But what I'm understanding you to say is that to
3 allow it to be done in this way, which was suggested by
4 the agency with particular expertise, but to allow it to
5 be done this way is outside of the scope of the federal
6 statute. Now, that's the Court's bailiwick. It gets to
7 make that call.

8 But it said we were the ones to approve these
9 agreements which define these methods and these matters.
10 And if that is the case, if the idea is that this federal
11 agency has to prescribe the exact manner, then has to go
12 before a federal court and it has to prescribe -- it has
13 the stamp, a seal of approval, we have absolutely no
14 business approving these agreements until that process has
15 run its course.

16 I can't understand why we would be engaged in
17 approving these -- in attempting to enforce these
18 agreements until that process has absolutely run its
19 course, because all we have is a shifting landscape. The
20 FCC would do a rule, it will go to a federal court, they
21 get bounced back, they'll make a decision, and we're
22 sitting here in an effort to carry out the law.

23 It would be absolutely illogical for us to be
24 attempting to approve and, most certainly, enforce any of
25 these interconnections -- well, let's step back. Let's

1 not be that radical -- at least agreements which deal with
2 collocation. How could we?

3 MS. KEATING: Well, I think, maybe you're going
4 a step too far.

5 COMMISSIONER JACOBS: I'm overstating it a bit,
6 but --

7 MS. KEATING: Because bear in mind, these are
8 areas that the FCC has already indicated it's going to act
9 and that the Act has made, you know -- specifically,
10 discusses collocation. So I mean, I don't know that you
11 have to make the additional leap to say that, well,
12 because collocation is currently in dispute, then we
13 shouldn't do anything with any of these agreements.

14 COMMISSIONER JACOBS: See, that's the basis of
15 your argument is that because the FCC statement -- I take
16 that back. Let me be clear. Unless there is an FCC
17 statement as to this, then, we have no real basis upon
18 which to move our authority under this statute. Is that
19 what you're saying?

20 MS. KEATING: I'm saying that unless -- if there
21 is a statement, a federal law, saying that these
22 provisions are contrary, then you can't adopt guidelines.

23 COMMISSIONER JACOBS: There was and, I think, we
24 retracted. The Court retracted it, didn't it?

25 MS. KEATING: I think, maybe I'm not quite

1 getting --

2 COMMISSIONER JACOBS: There was a statement, but
3 it's no longer there, okay? That's the efforts of
4 vacating the rule, isn't it? The verbiage is there, but
5 it has no binding legal effect. Is that what vacation of
6 a rule does?

7 MS. KEATING: As far as the FCC rule, yes.

8 COMMISSIONER JACOBS: Okay. Now, here's the
9 essence of my point. If you follow the logic that you've
10 given us, unless that binding effect is there, we have no
11 ability to carry out the substantive provision, okay?

12 MS. KEATING: Oh, you're saying that unless
13 there's an FCC rule, the Commission can't do anything?

14 COMMISSIONER JACOBS: Right.

15 MS. KEATING: No, that's not what I'm saying.

16 COMMISSIONER JACOBS: That's the argument that I
17 understood.

18 MS. KEATING: No, sir. That's not what I'm
19 saying at all. What I'm saying is you have got a federal
20 court interpretation of the Act. And I'm saying
21 regardless of your state law authority and regardless of
22 whether or not you had relied on the FCC rule or if you
23 had come up with your own rationale under the Act --

24 COMMISSIONER JACOBS: It would have to stand the
25 test of the federal court's interpretation.

1 MS. KEATING: Right.

2 COMMISSIONER JACOBS: I understand.

3 CHAIRMAN DEASON: Let me ask you this question.

4 Under Staff recommendation that we consider, if we follow
5 that recommendation, what is the effect of that? Is the
6 effect of that -- for example, in cross connects, is the
7 effect of that is there shall be, under no circumstances,
8 cross connects allowed or the effect of that decision is
9 we're not saying anything about cross connects?

10 MS. KEATING: We're recommending that you're not
11 saying anything about cross connects.

12 CHAIRMAN DEASON: Okay. Then, what position
13 does that put the parties in when there is an ALEC that
14 wants -- two ALECs that want to be able to cross connect?

15 MS. KEATING: They negotiate it, like they do
16 everything else that's not addressed in rules.

17 CHAIRMAN DEASON: They negotiate it.

18 MS. KEATING: That's correct. And you don't
19 even have to go back necessarily and look at this, because
20 if the FCC ultimately comes up with rules that withstand
21 federal court scrutiny that address these issues, they
22 apply to ILECs that are operating in Florida. I mean, you
23 don't necessarily ever have to revisit these, unless you
24 determine --

25 CHAIRMAN DEASON: Supply on a going-forward

1 basis, right?

2 MS. KEATING: Right.

3 CHAIRMAN DEASON: The question is what's going
4 to happen in the meantime until the FCC gets some rules
5 that withstand challenge?

6 MS. KEATING: The parties will have to negotiate
7 between themselves and determine whether or not cross
8 connects are something they want to agree to.

9 CHAIRMAN DEASON: So, if there's no basis in law
10 for cross connects, how can BellSouth allow there to be --
11 they'd be violating the law, then. Or are you saying the
12 federal law is if they want to do it they can, but you
13 can't make them.

14 MS. KEATING: Exactly.

15 CHAIRMAN DEASON: That's the law.

16 MS. KEATING: I mean, there may be some reason
17 that they're willing to agree to cross connects. There
18 may be some benefit that they can reap within the context
19 of the agreement, particularly a negotiated agreement.

20 Now, I don't think that you could require it in
21 an arbitration, but if they're willing to agree to it
22 within the context of a negotiated agreement, I think, you
23 know, they're entitled to do that.

24 MS. KAUFMAN: Chairman Deason, could I respond
25 to that? Would that be appropriate?

1 CHAIRMAN DEASON: Sure, go ahead.

2 MS. KAUFMAN: I think that there will be no
3 cross connects. I mean, I think that what will happen is
4 if you don't take action on these issues that are
5 remaining in this docket, you know, I can't imagine what
6 would move the ILECs to voluntarily say, okay, we'll allow
7 you to cross connect. And that's the problem, that if you
8 don't do anything, then it becomes an impediment to
9 competition.

10 You know, I won't rehash yours. There was a
11 disagreement, as you've said, over what the district court
12 did and what meaning ought to be attributed to it, but I
13 would stand on my earlier statement that the district
14 court did not say to the FCC you may not have any rules
15 about cross connects. And as you said, if that had been
16 their view, there would be no reason to remand it to the
17 FCC for further consideration.

18 CHAIRMAN DEASON: Let me ask this question.
19 I'll throw this to Staff. If we do not reconsider the
20 decision and, for example, on cross connects what is the
21 effect of not -- our decision would stand and that would
22 stand for the proposition that if an ALEC -- two ALECs
23 wish to cross connect, well, then, the incumbent has to
24 allow it? I know they can challenge it, but I'm just
25 ignoring that. Just assume they didn't want to challenge

1 it.

2 MS. KEATING: That's correct. That's how it
3 would be.

4 CHAIRMAN DEASON: Then, the ALEC would be able
5 to go to BellSouth and say, according to FPSC decision, we
6 want to cross connect, and you've got to do it. That
7 would be the effect?

8 MS. KEATING: Yes, sir.

9 CHAIRMAN DEASON: Now, if that's the situation
10 and, say, there is a challenge and we get overturned or in
11 the meantime, say, there's no challenge and the FCC adopts
12 a rule which does not contemplate that, do those cross
13 connects then have to be removed when the issue is finally
14 settled or once they're in they're in? Or is that up --
15 again, that's up to the incumbent to do what they want?

16 MS. KEATING: I believe, at that point, if you
17 had contradictory rules, the FCC rules say you cannot
18 require cross connects and the state order says you are
19 required to do cross connects. The FCC rule outweighs the
20 state order, but --

21 CHAIRMAN DEASON: I realize that. What happens
22 in the meantime?

23 MS. KEATING: But if they want to agree to that,
24 then, I believe that they could do that. I mean, I don't
25 think you're going to see a rule that -- and this again,

1 is my own opinion, but I don't think you're going to see a
2 rule that comes out and says --

3 CHAIRMAN DEASON: Take out cross connects?

4 MS. KEATING: Right. You're not going to see
5 that. And you're not going to see a rule that says,
6 ILECs, don't do cross connects. If you see anything, it
7 would be can't be required or are not required. Or
8 actually, there wouldn't even be a rule on it.

9 CHAIRMAN DEASON: It would just be up to the
10 parties to negotiate it.

11 MS. KEATING: But when there's a conflict, I
12 mean, the FCC rule wins out. But if they want to agree to
13 it, that's up to them.

14 CHAIRMAN DEASON: Any other questions? Did we
15 contemplate making a decision today or are we just going
16 to put it on a future agenda?

17 MS. KEATING: The notice is not specifically
18 indicated for a decision, but it is indicated as a
19 continuation of the discussion at agenda.

20 CHAIRMAN DEASON: So, if we wanted to make a
21 decision, we could?

22 MS. KEATING: I believe that you can.

23 CHAIRMAN DEASON: Commissioner Jacobs, what's
24 your desire?

25 COMMISSIONER JACOBS: On the one hand, I'd like

1 to move this on as quickly as possible, but I think I want
2 to go back and review both the Court decision and the
3 items in the record that were cited.

4 CHAIRMAN DEASON: Okay, that's fine. You
5 probably need to consult with Commissioner Jacobs and
6 myself. Maybe we'll just put off a decision until we get
7 FCC rules, how about that?

8 MS. KEATING: You could wait until I come back
9 from maternity leave. That'd be probably about the same
10 time.

11 CHAIRMAN DEASON: Okay. Thank you all for your
12 participation. It's been enlightening. I don't say that
13 the decision's any easier, but at least it's been
14 enlightening. This motion hearing is concluded.

15 Thank you all.

16 (Hearing concluded at 4:55 p.m.)

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1 STATE OF FLORIDA)

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: CERTIFICATE OF REPORTER

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COUNTY OF LEON)

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5 I, KORETTA E. STANFORD, RPR, Official FPSC Commission
6 Reporter, do hereby certify that the Emergency Scheduling
7 Conference in Docket Numbers 982845-TP and 990321-TP was
8 heard by Commissioners Deason and Jacobs at the time and
9 place herein stated.

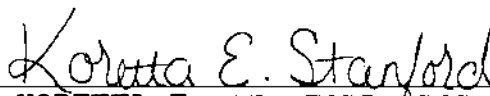
10 It is further certified that I stenographically
11 reported the said proceedings; that the same has been
12 transcribed under my direct supervision; and that this
13 transcript, consisting of 96 pages, constitutes a true
14 transcription of my notes of said proceedings.

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

20 DATED this 27th DAY OF SEPTEMBER, 2000

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KORETTA E. STANFORD, RPR
FPSC Official Commission Reporter
(850) 413-6734

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