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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Oral Arguments

January 14, 2004
Jefferson City, Missouri
Volume 1

In the Matter of Southwestern Bell)
Telephone, L.P., d/b/a SBC)
Missouri's Proposed Tariff Revisions) Case No. TT-2004-0245
Restricting Commingling of Unbundled)
Network Elements with Wholesale)
Facilities and Services.)

NANCY M. DIPPELL, Presiding,
SENIOR REGULATORY LAW JUDGE.

STEVE GAW, Chair
CONNIE MURRAY,
ROBERT M. CLAYTON, III,
COMMISSIONERS.

REPORTED BY:

KELLENE K. FEDDERSEN, CSR, RPR, CCR
ASSOCIATED COURT REPORTERS

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1 P R O C E E D I N G S

2 JUDGE DIPPELL: This is Case TT-2004-0245, in
3 the matter of Southwestern Bell Telephone, LP, doing
4 business as SBC Missouri's proposed tariff revisions
5 restricting commingling of unbundled network elements with
6 wholesale facilities and services.

7 My name is Nancy Dippell. I'm the Regulatory
8 Law Judge assigned to this matter, and it's January 14th at
9 approximately 8:30 a.m., and we've come here today for oral
10 arguments regarding the motions to suspend this tariff or to
11 reject it. And I'd like to begin with entries of
12 appearance.

13 Mr. Poston, would you begin?

14 MR. POSTON: Mark Poston, appearing for
15 the Staff of the Missouri Public Service Commission, P.O.
16 Box 360, Jefferson City, Missouri 65102.

17 JUDGE DIPPELL: Thank you. Mr. Dandino?

18 MR. DANDINO: Michael Dandino, Office of the
19 Public Counsel, Post Office Box 2230, Jefferson City,
20 Missouri 65102, representing the Office of the Public
21 Counsel and the public.

22 JUDGE DIPPELL: Mr. Lumley?

23 MR. LUMLEY: Good morning. Carl Lumley,
24 representing MCImetro Access Transmission Services, LLC,
25 130 South Bemiston, Suite 200, Clayton, Missouri 63105.

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1 JUDGE DIPPELL: Mr. Comley?

2 MR. COMLEY: Good morning, Judge. Mark W.
3 Comley, appearing on behalf of AT&T Communications of the
4 Southwest, Inc. My mailing address is 601 Monroe, Suite
5 301, Post Office Box 537, Jefferson City, Missouri.

6 JUDGE DIPPELL: Mr. Lane?

7 MR. LANE: Good morning, your Honor. Paul
8 Lane, representing Southwestern Bell Telephone, LP, doing
9 business as SBC Missouri. My address is One SBC Center,
10 Room 3520, St. Louis, Missouri.

11 JUDGE DIPPELL: Thank you. I will ask counsel
12 to speak into the microphone whenever you-all are making
13 your arguments and objections and whatever today, and for
14 the actual beginning, I'll ask you to come up to the podium
15 and make a brief statement and be subject to some questions.

16 Basically, I'm going to let -- I'm going to
17 start with Southwestern Bell, since it's their tariff, and
18 then I'll ask the intervenors to come up, and then I'll ask
19 Staff to do the same and Office of the Public Counsel, if
20 they would like. I'm going to waive the time limits in the
21 Chapter 2.140 rule for oral arguments. We're not going to
22 be necessarily abiding by those today.

23 I'm hoping that you-all can help me understand
24 a little better some of the technical aspects of exactly
25 what commingling is and explain that to me, as well as how

1 interconnections and tariffs live together and work
2 together. That would be helpful, if you could try to
3 explain some of those basics for me. And as well, I'd kind
4 of like to hear from Southwestern Bell exactly what's
5 required to implement this FCC rule physically. What does
6 SBC have to do to allow commingling?

7 I don't believe that there would be any
8 factual disputes as to those things. There may be some
9 dispute, I'm not sure, as to whether AT&T and MCI agrees
10 with what Bell will say that they need to do to implement
11 those, but I'll let you-all tell me if you disagree with
12 that when you come up. And then as we go along, there may
13 be questions for you as we go, and so we may interrupt you
14 and ask.

15 I want to get some of those basic questions
16 answered, and I also want to get some of the -- you-all made
17 lots of good arguments in your pleadings, but a lot of it
18 presumes that the Commission has knowledge of what goes on
19 at the FCC and how -- how these things have come to be and
20 how these technical aspects work together, so I'd like a
21 little bit of background information about that.

22 So with that said, I'm going to go ahead,
23 then, and ask if Mr. Lane would come up and sort of begin
24 with argument about this tariff.

25 MR. LANE: Good morning.

1 JUDGE DIPPELL: Good morning, Mr. Lane.

2 MR. LANE: My name is Paul Lane, and I
3 represent Southwestern Bell Telephone, LP, doing business as
4 SBC Missouri.

5 JUDGE DIPPELL: Let me remind everyone to turn
6 off their cellphones and beepers and pagers and so forth.

7 MR. LANE: My apologies.

8 This is a tariff that Southwestern Bell has
9 filed to implement part of the terms of the FCC's triennial
10 review order. Part of the order permitted commingling,
11 which is a fancy way of saying the interconnection of two
12 different types of services.

13 One group of services that we offer are access
14 services. We've offered those for years, since well before
15 1984 when the divestiture occurred, but that's the time
16 people look to when we implemented different access tariffs.
17 That permits interexchange carriers to order the facilities
18 they need to originate or terminate calls to customers.

19 The other group of services that we offer are
20 called unbundled network elements. Those were required as a
21 result of the 1996 Federal Telecommunications Act. That
22 permits carriers that are local carriers to order different
23 services and facilities that they may need to help them
24 provide services in competition with SBC Missouri.

25 Prior to the FCC's triennial review order,

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1 those two were considered separate and different and
2 distinct services. You ordered unbundled network elements
3 through one path. You ordered access through another path.

4 SBC has groups set up, separate groups, to
5 handle those two types of orders, to handle maintenance and
6 trouble reports on the circuits that are involved and has
7 separate billing functions that we go through to bill these
8 to the carriers. The FCC's order permitting commingling of
9 access services with unbundled network elements is a change
10 that causes us to need to change how we operate, so that we
11 can take the orders from customers that may want to combine
12 unbundled network elements with special access, for example.

13 We also have to change our processes so that
14 when a customer calls in a trouble report and we need to
15 work it, that we have the maintenance practices in effect to
16 allow that to take place, and we need to take action so that
17 we can properly bill customers for those that order a
18 combination of unbundled network elements or special access
19 or other access service.

20 So I hope that's background. I may not be
21 able to go much deeper than that, but you asked that we try
22 to address generally what commingling was and what steps we
23 need to take to do that. Does that answer your question?

24 JUDGE DIPPELL: That does answer very
25 generally, but I'm wondering if you can give me just a

1 little bit more detail on what exactly does SBC have to do
2 to implement billing changes. Is that -- is that hiring
3 more personnel, is that that programming, what kind of
4 things are involved in that?

5 MR. LANE: Okay. And I don't know that I can
6 stand here today and tell you that I'm the expert in all of
7 the functions that have to take place to make this occur. I
8 can point out to you that the FCC in its triennial review
9 order in the paragraphs where it implemented commingling, if
10 recognized, in response to complaints that were raised by
11 Verizon and others, that operational and billing
12 difficulties and issues had to be worked through before
13 carriers were ready to implement commingling.

14 And in paragraph 583 of that order, the
15 Commission made it clear that they understood that and
16 recognized it and said that's why they were ordering that as
17 part of the process; if the carrier wanted to place itself
18 into a position where it could engage in commingling, that
19 it needed to do so pursuant to changes in its
20 interconnection agreements and would negotiate those
21 pursuant to the terms of their contracts. And that's in
22 paragraph 583. They make that very clear.

23 In terms of the specifics, we do have separate
24 groups. We have an access group that takes what are called
25 ASRs, or access service requests, from carriers that are

1 interexchange carriers to work their orders. We have a
2 whole separate group and whole separate process that deals
3 with local carriers that are ordering unbundled network
4 elements. Those are ordered through our local operations
5 center and our local service center. That's called LSR,
6 local service request.

7 And so if you've got a facility that is doing
8 both things or that connects the two things, meaning
9 connects special access with an unbundled network element,
10 then you need to have some way to make sure that you can
11 take the order that you know. We've got a local operation
12 center that doesn't take the access service request. We've
13 got an access group that doesn't take the local service
14 request. We've got to make those to be able to talk to each
15 other and we've got to be able to work our records in such a
16 way that we can identify what's being ordered and we can
17 tell the technicians what they need to do.

18 Same things happen, obviously, when there's a
19 trouble report. All things are identified by circuits, for
20 example. If they're over on the access side, we need to
21 know what the circuit number ID number is. We've got to
22 take that and that's what we use to direct the technicians
23 and so forth as to what they need to do to make it work.

24 Billing I probably know even less about, but
25 we have a separate billing system we use and processes and

1 programing that we use to bill unbundled network elements
2 and a different one that we use, different set of
3 processes -- I think it's the same system, but a different
4 set of processes that we use to bill for access service.

5 So you've got a facility that may be doing
6 both things and you've got to set it up so that, you know,
7 okay, we'll bill this part of the facility at the unbundled
8 network element rate and we've got this part of the facility
9 that we're going to have to bill under the access rate, and
10 we have to make those two fit together.

11 I probably can't go much deeper than that, but
12 I hope to give you some idea that there's some work involved
13 in trying to make those things happen. That's why the FCC
14 set up the process that they did. You've got two things.
15 You've got to change your interstate tariffs. They
16 obviously don't address intrastate, but that's why we're
17 here, because you have to have a similar tariff in effect on
18 the intrastate rate just like the FCC said you've got to do
19 on the interstate side.

20 And they said you also have to amend your
21 interconnection agreements to make this happen to recognize
22 that some of the general things that I've just told you
23 about, about ordering, maintenance and billing need to be
24 worked through. And so they said, like with everything else
25 in the TRO, it's not self-executing. You have to engage in

1 a negotiation process, and you look to your interconnection
2 agreement to see what it tells you to do with regard to
3 that. Some of them have change of law provisions or
4 intervening law provisions; others do not.

5 The FCC said follow the change of law
6 provisions when those are there in the contract, do what
7 they tell you to do, if either side wants to take advantage
8 of or implement the changes that were invoked as a result of
9 the TRO. If you don't have those in your contract, then the
10 FCC set up a separate process that said, we'll treat this as
11 if it's a request for engaging in interconnection agreement
12 negotiations. Here is the timeline that's involved. It was
13 set up and the parties could come, seek arbitration in front
14 of the Commissioner. There's similar arbitration to get the
15 issue resolved, if they're not able to work it out in the
16 negotiation process.

17 So here we are now. We've filed a tariff at
18 the FCC, pursuant to their directions. AT&T, MCI and others
19 objected to the tariff on the interstate level. The FCC
20 reviewed it, and they allowed it to go into effect. For
21 this Commission, both AT&T and MCI's primary claim is that
22 the proposed tariff violates the terms of the FCC's
23 triennial review order.

24 AT&T in their motion to suspend or reject, the
25 very first paragraph where they get into the substance of

1 their claim, paragraph 5, they make it very clear that their
2 primary claim is that this violates the terms of the FCC's
3 TRO.

4 They say, quote, first and most fundamentally,
5 by unilaterally imposing conditions on commingling rights,
6 the proposed tariff revisions plainly fail to comply with
7 the Commission's TRO and the FCC's rules that permit
8 commingling.

9 MCI says the same thing in their motion to
10 suspend or reject. Again paragraph 5, within their first
11 substantive paragraph it deals with the complaints. They
12 say, quote, tariff sheets purport to implement rules adopted
13 by the FCC regarding commingling, but instead contain
14 provisions that would restrict MCI and other carriers from
15 exercising their rights under FCC rules to commingle UNEs
16 and wholesale facilities.

17 Both of these companies face an insurmountable
18 hurdle here. Despite making the exact same arguments to the
19 FCC, the FCC reviewed and allowed virtually identical
20 tariffs to go into place. As we said in our various
21 responses, the only differences between the FCC tariff that
22 was allowed to go into effect and the tariff that we propose
23 here is different numbering of the sections, because those
24 two tariffs aren't identical. And the only other difference
25 is the reference in the tariff to we say the FCC, Federal

1 Communications Commission, and in the federal filing we
2 simply say Commission because that's who we're dealing with
3 there.

4 Those are the only differences in the tariff.
5 They are not substantive differences. The substance of the
6 tariffs are absolutely identical and they've been approved
7 by the FCC. That should be enough. The case should be
8 closed. This thing should be approved.

9 The only claims they raise are arguments that
10 I would only describe as specious. AT&T and MCI say things
11 like, well, the FCC doesn't really review the tariffs; they
12 only look at them to see if they're patently unlawful. They
13 do look at them to see if they're patently unlawful, but
14 that's the only thing they do. We've attached the FCC's
15 decision in this case to our filings here, and they make it
16 clear that not only do they look to see whether it was
17 patently unlawful, but they also looked at it to see whether
18 it should be rejected or suspended and investigated, the
19 same kind of claims that are made here.

20 And the FCC found that the parties have not
21 presented issues regarding the transmittals that raise
22 significant questions of lawfulness that require
23 investigation of the tariff transmittals listed in this
24 report. So they did more than say it wasn't patently
25 unlawful. They said they didn't raise enough of an issue to

1 even bear investigation or suspension of the tariff.

2 The next thing AT&T and MCI tell you is, well,
3 this decision's not really final from the FCC. There's
4 petitions for reconsideration that can be filed. You can
5 ask the FCC to rehear it. Well, that's true. I don't
6 disagree with that, but they don't tell you that they didn't
7 ask the FCC to review it. They didn't ask the FCC to rehear
8 it. There's nothing pending at the FCC with regard to that,
9 and the time for them to do that has long since passed, back
10 at the end of November, and here we are in mid January. So
11 to tell you that it's not final because of petitions for
12 reconsideration or rehearing can be filed, that's true but
13 really it's a little disingenuous, in my opinion, because
14 they didn't tell you that they haven't asked that to be
15 done.

16 Essentially their claim amounts to this, that
17 this Commission knows better than the FCC how to interpret
18 and to apply the FCC's triennial review order. With all due
19 respect, I think the FCC is in a better position to know
20 what the requirements of its TRO are and how those should be
21 interpreted and applied. The FCC has looked at this. The
22 same complaints were made by AT&T and MCI. The Commission
23 did not find that those claims had any validity and allowed
24 the tariff to go into effect, and it is in effect now, and
25 we have substantially the same tariff here ready to be

1 approved.

2 I don't think there's any other issue that
3 requires the Commission to make any other decisions, but
4 I'll address a couple of other points because they were
5 raised, but I don't think they're germane to what's before
6 you today.

7 One of them is, are amendments to
8 interconnection agreements necessary in order to allow this
9 commingling to take place? I'll make two points. First is,
10 as I said, the tariff that we have at the FCC is identical
11 in substance to the tariff we have here. Both of them
12 contain a reference to the need to amend interconnection
13 agreements. The FCC allowed it to go into effect.

14 Second, the FCC's TRO is unequivocal that
15 amendments to interconnection agreements are required.
16 Paragraph 583 of the triennial review order makes that
17 abundantly clear. Let me read the last two sentences of
18 paragraph 583. Quote, finally, we conclude that the billing
19 and operational issues raised by Verizon do not warrant a
20 permanent commingling restriction, but instead can be
21 addressed through the same process that applies for other
22 changes in our unbundled requirements adopted herein, i.e.
23 Through change of law provisions in interconnection
24 agreements. We expect that change of law provisions will
25 afford incumbent LECs sufficient time to complete all

1 actions necessary to permit commingling. That is
2 unequivocal.

3 Second, there's objections raised to
4 provisions in the proposed tariff that call for notice to be
5 given to customers in the event that the commingling
6 obligations are modified or removed as a result of pending
7 appeals. I have five points, I guess, to make on that
8 topic. First is that the FCC approved the same language, so
9 that should answer the question. Second, commingling is
10 permitted only because of the triennial review order. If
11 the triennial review order is revised on appeal, those
12 commingling obligations do go away and the tariff has to be
13 cognizant of that and cause those obligations to go away as
14 well.

15 I'll note that we included provisions that
16 give carriers 30 days notice in advance in writing of that.
17 If there's any issue raised about whether the Court of
18 Appeals or the Supreme Court or the FCC or whomever changes
19 its commingling obligations requirements, they disagree with
20 our notice, it says they've got 30 days to convert back to
21 whatever services they really want to have now that
22 commingling's not permitted.

23 They can address that in front of the
24 Commission if they feel it's necessary, and they can address
25 it at the FCC if they think it's necessary, because, again,

1 the same provision is contained in the FCC tariff as well.

2 Third, there's references to our Local Plus
3 tariff and some not very well explained references to what
4 was called a morphing clause in that case. And I'll explain
5 that. Some of the Commissioners here weren't involved in
6 that. We had a Local Plus tariff that we filed that allowed
7 LATA-wide toll calling to customers at a flat rate. That
8 was something that we were interested in filing and there
9 was some strong sentiment from certain members of the public
10 that they wanted that as well.

11 And we were willing to implement Local Plus at
12 the time, but we were very concerned about the obligations
13 to allow that service to be resold and whether it could be
14 aggregated so that companies could order one Local Plus
15 service and serve multiple customers. We couldn't have
16 offered the service under those circumstances, so we
17 included a provision in the Local Plus tariff that says if
18 anybody tries to aggregate this and if the law changes such
19 that we're required to allow them to aggregate it, current
20 customers are grandfathered and you can't order any more
21 Local Plus. It goes away.

22 That's what Staff was inappropriately, in my
23 opinion, referring to as a morphing clause, but it was
24 designed to take into effect our concern, and a very
25 legitimate one, that you can't have a flat-rated service

1 like Local Plus and have it aggregated to where you can
2 serve multiple customers. The implication in the filings
3 here is that the Commission didn't agree with that so-called
4 morphing clause, but if you read the Local Plus Order, the
5 Commission made it very clear that they weren't deciding the
6 issue in that case.

7 In the Report and Order in Case No. TT-98-351
8 that was issued on September 17th of 1998 -- this copy is
9 page 39. It may be page 40. I've seen two different
10 versions. I guess that's a result of the electronic system.
11 Commission said, quote, because the Commission is rejecting
12 this tariff, the issue of the so-called morphing clause is
13 moot. However, the Commission notes that in order for a
14 company to withdraw a tariff, it must follow Commission
15 procedures, including obtaining approval for discontinuance
16 of service.

17 As you may know from reading the Order, if
18 you've had a chance to do that in the Local Plus case, the
19 Commission rejected the Order but encouraged us to refile it
20 with a minor change -- I don't want to say minor -- with a
21 change that was a hybrid service that partook both of local
22 and long distance. So we refiled it under the appropriate
23 tariff as the Commission had ordered.

24 With regard to the clause that was at issue,
25 it did become part of the tariff. When we refiled it under

1 the Local Plus tariff at the time it was Section 48.2(C) (4).
2 It was a provision that reads as follows: This tariff shall
3 only be effective as long as the use restrictions and the
4 rules and regulations in this tariff remain in effect for
5 all users, including any exchange telecommunications company
6 or any other company reselling this service and their
7 customers.

8 In the event any of these restrictions or
9 rules and regulations are held not to apply to all such
10 users, on notification by the telephone company to the
11 Commission, this tariff shall not be available except to
12 existing subscribers of the service at existing service
13 levels at existing locations. SWBT shall also have the
14 right to withdraw this service offering in its entirety.

15 So the so-called morphing clause was allowed
16 to go into effect and was approved by the Commission when
17 the Local Plus tariff filing took place after the Report and
18 Order in TT-98-351.

19 Carriers also note here that, SBC did file to
20 remove Local Plus from the tariff and that's what they
21 should do here. The reason that we filed to withdraw the
22 service was because the withdrawal had nothing to do
23 whatsoever with the use restriction issue that included that
24 so-called morphing clause. We were taking a terrific
25 financial beating as a result of calls that were being made

1 to small ILECs in the state who were encouraging their
2 customers to utilize the service to call Internet service
3 providers that were located in the small ILEC's territory.

4 They would let the services stand up and run
5 for hours and hours and days. We were paying anywhere from
6 5 to 12, 13 cents a minute to them to terminate the calls.
7 We couldn't afford to keep going with the service on that
8 basis. So we filed to withdraw and the Commission approved
9 the withdrawal of the service.

10 Had we had an issue with use restrictions, we
11 wouldn't have had to go through that, because the tariff
12 already contained those provisions that said that stops
13 immediately, only existing customers, existing locations and
14 existing service levels. So any implication to this
15 Commission that it had rejected the morphing clause or that
16 it didn't allow it to go into effect or that we didn't
17 follow up when push came to shove and it was time to
18 withdraw it, they are all false. Again, if you look at the
19 records, you'll see that's clear.

20 I think that responds to the bulk of the
21 objections that were raised to the tariff by various CLECs,
22 but I'd be happy to answer any questions that the Commission
23 has.

24 JUDGE DIPPELL: Thank you, Mr. Lane. Chairman
25 Gaw, do you have questions for Mr. Lane?

1 CHAIRMAN GAW: I would like to hear everybody
2 and then ask questions.

3 JUDGE DIPPELL: Hear from everybody and then
4 ask questions. Okay.

5 Commissioner Murray?

6 COMMISSIONER MURRAY: I might just prefer to
7 go ahead and ask Mr. Lane while he's there.

8 Mr. Lane, thank you, first of all, for
9 refreshing my memory as to some of the history here.

10 MR. LANE: There's a lot of cases.

11 COMMISSIONER MURRAY: A lot of history and a
12 lot to try to remember and keep straight.

13 In terms of the language in the TRO that
14 support your interpretation of the renegotiation of the
15 interconnection agreements, you're saying, as I understand
16 it, that any interconnection agreement requires
17 renegotiation even if it's silent as to commingling?

18 MR. LANE: Yes, your Honor, or Commissioner.

19 COMMISSIONER MURRAY: And could you again
20 reference that language?

21 MR. LANE: Yes. It's paragraph 583 of the
22 TRO. Again, that's the specific reference to commingling
23 and the need to change interconnection agreements. The
24 Commission -- the FCC in that case said for commingling,
25 follow the same thing that you're following for all the

1 other changes that are required by this TRO. For all of
2 those you have to go through the interconnection agreement
3 amendment process for that to take effect.

4 And that's described more specifically with
5 regard to all of the issues under the TRO in paragraphs 700
6 through 706. That section is entitled transition period.
7 Starts out recognizing that these things aren't
8 self-executing and goes through the framework that carriers
9 must go through to allow the changes in the TRO to take
10 effect.

11 COMMISSIONER MURRAY: That's all I have right
12 now. Thank you.

13 JUDGE DIPPELL: Commissioner Clayton?

14 COMMISSIONER CLAYTON: I'll wait.

15 JUDGE DIPPELL: All right. Thank you,
16 Mr. Lane.

17 MR. LANE: Thank you.

18 JUDGE DIPPELL: MCI filed the first motion, so
19 I'll have you come up first, Mr. Lumley.

20 MR. LUMLEY: Good morning. Before I begin my
21 argument, this is my first time back, I just wanted to
22 publicly acknowledge our regret and sorrow for the loss to
23 our whole community.

24 With regard to the matter at hand, I would
25 go -- I certainly can't go any greater in depth in terms of

1 explaining the technicalities of commingling than Mr. Lane
2 did. Overall, we're talking about different ways of getting
3 traffic from one place to another, and typically we start
4 looking at using special access facilities. You're looking
5 for the chance for higher volume, higher capacity
6 facilities, different rate structures to get higher volumes
7 of data traffic or other types of traffic from one place to
8 the other, and the FCC has recognized it's appropriate to
9 combine various types of facilities.

10 We have three primary concerns with this
11 tariff. The first is that under the FCC's rules, SBC is
12 expressly required to permit commingling. Instead, we
13 believe they're very cleverly trying to restrict
14 commingling.

15 Secondly, through unspecified reference to
16 other intrastate tariffs, we believe that they're, again,
17 trying to impose undefined restrictions on carriers and
18 their use of commingling.

19 And thirdly, they have the footnotes in the
20 tariff which allow them to unilaterally withdraw commingling
21 when they deem appropriate, as opposed to when the
22 Commission allows them to.

23 In each instance we believe these provisions
24 of the tariffs afford them the opportunity to discriminate
25 between carriers and to abuse their position and impede

1 competition.

2 On the first point, we believe that the
3 tariffs should simply state that commingling is permissible.
4 Instead, what Southwestern Bell has done is included
5 language that purports to incorporate interconnection
6 agreement restrictions, and specifically in Section 5.5.1 of
7 the proposed tariff we have the language of, to the extent
8 and subject to interconnection agreements.

9 Now, recognizing it's a disputed point,
10 nonetheless our position is that any restrictions in our
11 interconnection agreement, which for MCImetro is the M2A
12 with some arbitrated adjustments, as you-all are aware, that
13 any restrictions on commingling are simply abrogated under
14 the provisions of Section 18 of the general terms and
15 conditions.

16 The language that Mr. Lane was pointing to
17 from the FCC's order does not say that any specific change
18 to interconnection agreements is required. Instead, it
19 acknowledges that if parties maintain that changes are
20 necessary, there is a process to accommodate those disputes.

21 We understand that we're going to have a
22 dispute with them about this, but I don't want you to
23 believe for one minute that the FCC said, you need to change
24 this sentence or that paragraph or that section of any
25 contract. They didn't look at any such thing. They

1 acknowledged that parties were telling them that they felt
2 changes were necessary, and they said, well, there's ways
3 you can handle that.

4 We submit that required system changes -- and
5 we'll assume for the moment that there are required system
6 changes. We haven't verified that. I certainly haven't,
7 but I'm willing to assume that they would require system
8 changes. That doesn't equate to contract changes. Contract
9 changes say, deliver this product to us by this date at this
10 price. It doesn't say how to do it. The agreements do not
11 dictate these types of things. It dictates performance.

12 There's two concerns here. One is that these
13 unstated restrictions can be applied on a case-by-case basis
14 by Southwestern Bell. So instead of having a uniform tariff
15 on access services, which has always been subject to your
16 control, and by being uniform precludes discrimination,
17 instead they're going to be able to do what they see fit
18 with each carrier.

19 When I said that these restrictions are
20 clever, what I also see here is a whipsaw effect. First, we
21 have an FCC order that says restrictions on commingling are
22 illegal, you must allow commingling. Yet Southwestern Bell
23 submits a tariff to you that says, we're incorporating
24 restrictions in interconnection agreements.

25 Well, first of all, we say that any existing

1 restrictions are illegal. Are you somehow now endorsing
2 what we claim has been withdrawn by the FCC by bringing them
3 back in through a tariff that you're approving? I don't
4 know the answer to that. I suspect the argument will be
5 made some day.

6 But secondly, with regard to the access
7 services -- because again, commingling is bringing two
8 different kinds of services together. With regard to access
9 services, it's still under your jurisdiction with tariffs.

10 This is our chance to know what are the
11 conditions, what are the terms of getting the service, and
12 you have the opportunity to approve or disapprove those and
13 we have the opportunity to tell you our positions on such
14 things. If all we have is a statement that it's subject to
15 these interconnection agreements, so we're shipping it over
16 here -- and this kind of goes to the question that the judge
17 indicated she had, how do tariffs and agreements work
18 together? We move it over here, okay, so now the tariff's
19 done. We don't have this form anymore.

20 Go to the interconnection agreements, sure,
21 unbundled elements are governed by Section 251 and 252, and
22 we have arbitration processes and we bring those to you, but
23 no, no, no, MCI, special access services are not subject to
24 these things. This is simply a contract negotiation between
25 parties and there's no governmental supervision whatsoever.

1 I have a very strong concern about that. I've
2 told you in numerous arguments when we go into negotiations
3 with Southwestern Bell on these agreements, the bottom line
4 is, we're told if we don't have to do it and we don't want
5 to do it, we're not going to do it. It's not the kind of
6 contract negotiation between Business A and Customer B where
7 Business A is saying, what do we got to do to get your
8 business? That's not the kind of negotiations we have.
9 It's if we don't have to do it and we don't want to do it,
10 we're not going to do it. So we're very concerned about not
11 being told now, what are the terms and conditions of getting
12 access services under commingling.

13 It should be resolved in the tariff, not in
14 some amorphous zone between tariffs and Section 252
15 requirements. So we believe that, and on this major point,
16 that the tariff should either just say commingling is
17 permitted if they don't intend to have any specific tariff
18 restrictions or should tell us what the terms and conditions
19 are going to be.

20 Our second concern is this amorphous
21 reference, again, in Section 5.1.1, saying that commingling
22 is subject to applicable intrastate tariffs. Which ones?
23 We have no idea what they're talking about. I believe Staff
24 is in error when it says, at page 3 of their comments, that
25 it's some specified service. There's no identification

1 whatsoever. It just says intrastate tariffs. Personally, I
2 think this was a mistake. They had this general language in
3 their interstate tariff and they didn't bother to take it
4 out.

5 Here we are in the intrastate regime, and
6 under your rules they're supposed to tell us what tariffs
7 they're talking about. Specifically Section 392.220
8 requires tariffs to make plain statements of the terms and
9 conditions, and then your Rule 3.545, subsections 11E and
10 12L, require provisions of tariffs to be specific and clear
11 when they're referring to other restrictions. And I submit
12 that the statement that it's just subject to other
13 intrastate tariffs doesn't tell us near enough, and this
14 lack of clarity, again, creates an opportunity for them to
15 discriminate.

16 They tell a carrier, hey, oh, that's subject
17 to interstate tariff 36. They tell Carrier B, no, that's
18 subject to intrastate tariff 38, and we don't know who's
19 getting treated how.

20 Our third point has to do with this ability in
21 their footnotes to unilaterally cancel commingling. The
22 language basically says if they get an order anywhere that
23 they think allows them to cancel it, they can cancel it.
24 Doesn't say it has to be a final order, doesn't say what
25 happens on appeals. They get to decide, and they don't

1 necessarily have to decide the same for everybody at the
2 same time.

3 Your statutes and rules that govern procedures
4 here require companies to file withdrawals of their tariffs
5 so that you know they intend to withdraw a service and so
6 that you can provide a forum for parties to object to that.
7 And specifically that's 392.220 and, again, your rule 3.545.

8 When Mr. Lane was discussing the Local Plus
9 history, this wasn't an argument that we had gotten into
10 specifically in our pleadings, but I think AT&T did, but I
11 took note that the ultimate tariff language that he was
12 reading to you indicated not notice to customers of intent
13 to withdraw, notice to the Commission of intent to withdraw,
14 and further language that they have a right to withdraw the
15 tariff under your rules, not to unilaterally cancel it.

16 And finally, it had a provision that existing
17 customers were going to be grandfathered, that this was
18 language that was just saying, we're not going to offer it
19 to anybody new, which is totally different from pulling the
20 rug out from under people who have made business plans and
21 are relying on the service.

22 What's at stake is, who has control over the
23 30-day process? They say, well, our tariff includes
24 requirement that we'll give people 30-days notice of what
25 we're going to do, but that gives them control. The 30 days

1 is up and it's over.

2 Under your processes, if they file a tariff
3 proposal that gives you 30 days notice that they're going to
4 withdraw a tariff, you have the right to suspend that and
5 extend the time period and make sure that, whatever you
6 decide, things are done in an orderly manner.

7 I certainly understand that you're going to
8 have serious concerns about the fact that similar tariffs
9 were submitted to the FCC and allowed to go into effect. I
10 don't have any illusions about that.

11 There's two points to be made. First of all,
12 as we all know, as we all know, human beings make mistakes,
13 different government agencies look at things differently.
14 The system of government in this country is set up so there
15 are multiple ways of trying to get to the right answer.
16 That's why we have federal governments and state
17 governments.

18 We believe the FCC made a mistake. This is
19 your tariff. You have an opportunity to get it right.
20 You're not bound by the FCC's judgment, and this is an area
21 of significant concern to us.

22 I do want to clarify, we did not state nor in
23 any way suggest that we had filed for reconsideration with
24 the FCC. We certainly did not. What we said was, we
25 continue to have the right to file complaints at the FCC to

1 get this fixed. We intend to do it. MCI had been working
2 with various ILECs across the country to get them to
3 voluntarily revise these tariffs, fix this problem. If they
4 don't do it soon, complaints will be filed. I verified it
5 yesterday. That's still the company's plan.

6 So we do not accept that the FCC has gotten
7 this right or that their action is final, and we're asking
8 you to look at this from a fresh look from your own
9 perspective. It's your own tariff. We believe that we've
10 identified significant concerns, and again, we don't believe
11 that the tariff is proper because it's incorporating
12 unstated restrictions in interconnection agreements that may
13 or may not be subject to your authority under Section 252 on
14 specified restrictions and unidentified intrastate tariffs.

15 And then this ability to just totally withdraw
16 it whenever they feel that, you know, some agency, some
17 court has said some sentence that they think is
18 justification for them to get around an obligation that's
19 important to us, but obviously something that they have no
20 interest in doing whatsoever.

21 When they put in footnotes like this, they
22 underscore the point, if they see any opportunity whatsoever
23 to get around having to allow us to do this, they're going
24 to take it away. We're very concerned about that. We
25 appreciate your time this morning.

1 JUDGE DIPPELL: Thank you.
2 Chairman Gaw, did you have any questions for
3 him right now?
4 CHAIRMAN GAW: I'll wait.
5 JUDGE DIPPELL: Commissioner Murray?
6 COMMISSIONER MURRAY: I just have one right
7 now. Thank you.
8 Good morning.
9 MR. LUMLEY: Good morning.
10 COMMISSIONER MURRAY: Your statement about the
11 footnote being able -- or allowing SBC to treat different
12 carriers differently, where do you see that in the footnote?
13 MR. LUMLEY: Well, they certainly don't state
14 it in the footnote. My point is, if I'm a company, I have a
15 tariff and I'm offering service to customers, and I come to
16 you and say, I want to cancel the service. Now the tariff's
17 gone, everybody's been treated the same. Or if you say, no,
18 you can't terminate it, the tariff remains in effect. Under
19 their provisions under these footnotes, they can give
20 carriers -- their customers 30 days notice that they intend
21 to withdraw it.
22 But then what happens? Carrier A, well, we'll
23 negotiate with you and we'll let it stay in existence for a
24 year. Carrier B, you can have it for 60 days, not on a
25 tariff basis anymore, but we'll let you do that. MCI, drop

1 dead, 30 days, that's it. That's what we're worried about.

2 COMMISSIONER MURRAY: The language, first of

3 all, it says the tariff would go away?

4 MR. LUMLEY: Correct.

5 COMMISSIONER MURRAY: These tariff provisions?

6 MR. LUMLEY: Right.

7 COMMISSIONER MURRAY: But then after

8 notification customers must either convert to such UNEs or

9 UNE combinations to a comparable service or disconnect such

10 UNEs or UNE combinations from those wholesale services. How

11 does that allow commingling to continue for some customers

12 and not others through negotiation?

13 MR. LUMLEY: Well, our position would be that

14 they would be free -- they would then view commingling as

15 strictly a voluntary offering, and they could continue to do

16 it for some people for whatever the right consideration was,

17 whatever rights they have to give up or whatever money they

18 had to pay, but they wouldn't have to do it uniformly

19 anymore because it's no longer tariffed access services.

20 COMMISSIONER MURRAY: And what would prevent

21 them from doing that today, negotiating certain commingling

22 with certain carriers and not with others?

23 MR. LUMLEY: Because that would be a tariff

24 violation, I believe.

25 COMMISSIONER MURRAY: Violation of the current

1 tariff?

2 MR. LUMLEY: Well, current as defined as
3 wherever we end up after this -- after changes are made, but
4 yes.

5 COMMISSIONER MURRAY: I'm talking about the
6 tariff that's in effect right now.

7 MR. LUMLEY: Then I didn't -- could you
8 restate your question? I missed it.

9 COMMISSIONER MURRAY: What would prevent them
10 from negotiating different terms if SBC decided that it
11 wanted to negotiate terms with one specific carrier to allow
12 commingling? Is there something that would prevent that
13 now?

14 MR. LUMLEY: I think what prevents it now is
15 the fact that we have a new FCC rule that requires them to
16 do that. If you went back in time, say, a year ago when
17 they weren't required to --

18 COMMISSIONER MURRAY: Okay. That's what I
19 want to do. Go back.

20 MR. LUMLEY: Yeah. Because with that rule
21 there, we would maintain that they would be violating the
22 FCC rule as well, and then you have to realize what we're
23 talking about is them continuing in the future sometime,
24 that there's been some action that's taken the rule away and
25 you aren't required to.

1 So if we assume an environment under which
2 commingling is strictly a voluntary offering, it is
3 problematic. I don't know that there will be any controls
4 over how they treat one carrier to another.

5 COMMISSIONER MURRAY: Prior to the TRO, wasn't
6 commingling allowed, although it wasn't required? It could
7 have been done voluntarily, could it not?

8 MR. LUMLEY: I would agree with that, yes. It
9 wasn't being done with Southwestern Bell to any great
10 extent. I can't stand here and say it wasn't done under any
11 circumstances. I don't believe it was done much at all, but
12 as I stand here, I can't -- I can't identify what would have
13 prevented them from voluntarily doing that, no.

14 COMMISSIONER MURRAY: So what you're saying
15 could occur if the TRO is reversed as to commingling and it
16 becomes voluntary again could have happened previously?

17 MR. LUMLEY: But -- yes, but the difference
18 being there could be a significant dispute between the
19 parties under this footnote, whether the rule has actually
20 gone away or not.

21 COMMISSIONER MURRAY: Yes, I understand that,
22 but aside from that. I mean, I'm just addressing --

23 MR. LUMLEY: You could ultimately get back
24 to -- you know, the Supreme Court could have a definitive
25 ruling that there's something wrong with this rule or

1 whatever and you could get back to an environment, yes, I
2 would have to agree, that becomes a totally voluntary
3 offering.

4 I haven't looked at it at any great detail so
5 I'm not trying to foreclose arguments, and maybe there is
6 something wrong with them treating people differently under
7 that regime.

8 That's not the regime that I've been looking
9 at. I mean, they can have -- if they have a tariff and
10 they're purporting to take it away, but maybe they aren't
11 taking it away from everybody at the same time --

12 COMMISSIONER MURRAY: But that would be
13 through interconnection negotiations if it did not take it
14 away from everybody at the same time, according to this
15 footnote, correct?

16 MR. LUMLEY: I'm not sure that they would
17 classify it as interconnection negotiations. I still --
18 they clearly believe that there's significant difference
19 between negotiating compliance with the Telecommunications
20 Act, the FCC rules on involuntary and what have you versus
21 things that they do voluntarily, and they've -- I've been
22 here when they've argued to you, you can't make us do that.
23 We've chosen to do that, but you can't make us do that.
24 They've argued that a number of times.

25 COMMISSIONER MURRAY: Okay. That's you all I

1 have right now. Thank you.

2 COMMISSIONER CLAYTON: I'll wait.

3 JUDGE DIPPELL: Thank you, Mr. Lumley.

4 Mr. Comley, did you have --

5 MR. COMLEY: May it please the Commission?

6 I'm Mark Comley and I represent AT&T Communications of the
7 Southwest, Inc. And I'm grateful to Mr. Lumley for treating
8 the issue so well and bringing you up to date.

9 At the beginning, I'm going to confess to you
10 that my technical knowledge about the extents to which
11 Southwestern Bell will have to reconfigure its operations to
12 allow commingling is minimal. Matt Kohly from AT&T is here
13 and, if necessary, I think he could probably give you the
14 extent of his knowledge if you have questions in that
15 direction.

16 Let me just take an opportunity to emphasize
17 some of the points that you've already heard, but let me put
18 it from the point of view of AT&T. Our position is that the
19 FCC has made commingling an unrestricted right for CLECs, a
20 right, and the objective is to forbid restrictions on the
21 CLECs' ability to commingle unbundled network elements
22 without our wholesale access services. We submit that the
23 Southwestern Bell tariff in front of you is a way of
24 restricting that right.

25 The points that we would like to bring to

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1 your attention for your thoughtful consideration is
2 Section 5.1.1 -- Section 5.1.1, that's right, and the way in
3 which interconnection agreements are placed into the
4 combination there.

5 As Mr. Lane told you, it's SBC's contention
6 that in every case there is going to be a requirement for
7 renegotiation of the contract, and I think in citing Section
8 538 of the Order -- and I do not have a copy of that Order
9 in front of me and I'm taking for granted that he read it
10 accurately -- it referred to choice of law provisions in the
11 agreement.

12 I would not say it is in any way unequivocal
13 that the FCC expects active and aggressive renegotiation of
14 interconnection agreements in order for commingling to be
15 available to CLECs. I think also their pleadings refer to
16 paragraph 700 through 706 of that same order, and as
17 interpretations vary of that order, I would submit this,
18 that those paragraphs refer to in general that there may be
19 requirements among parties to enter renegotiations in order
20 to affect the provisions of the TRO, not necessarily
21 commingling. So again, I would submit to the Commission
22 that it is not an unequivocal requirement of the FCC that
23 the parties enter negotiations in order to allow
24 commingling.

25 The other point is that negotiations may not

1 be necessary. Let's look at the change of law provisions.
2 There's also severability provisions in these agreements.
3 The severability provision would be something to the effect
4 that in the event certain provisions are considered invalid,
5 the rest of them are valid.

6 So, say, for instance, there is a provision --
7 and there is one in AT&T's agreement -- that says
8 commingling is prohibited. Since now the FCC has said that
9 is invalid, is there any reason to renegotiate the agreement
10 because of the severability clause? I think it could be
11 carrier by carrier, whether or not there is any need for
12 renegotiation, and to that extent, we would disagree with
13 the Staff's assessment as well.

14 What would happen in negotiations? I think
15 Mr. Lumley has covered some of that, but -- and also the
16 word "cleverness" has come up, and I'd say it again, is this
17 a situation where negotiations, lawful negotiations, are
18 being used as a clever means of restricting and delaying a
19 CLEC's ability to make identification of commingling in its
20 competitive challenges to the others in the marketplace.

21 Another item that comes to mind -- and I'm
22 going to say this rhetorically. I haven't examined this too
23 much. But in the discussions today, we're talking about
24 negotiations of inter-- renegotiations of interconnection
25 agreements as a means of permitting commingling. Let's

1 assume, although there's no way of knowing, whether -- let's
2 assume that the FCC or perhaps a court of jurisdiction
3 concludes that commingling is not permitted.

4 If negotiation was entered in order to permit
5 commingling, then what would be necessary under the choice
6 of law provisions as Southwestern Bell has intimated that
7 renegotiation occur before it's terminated pursuant to a
8 judicial decree. I haven't looked at that very long, but I
9 think that if we have to renegotiate in the beginning in
10 order to permit the service, then maybe it's important for
11 renegotiation to occur to end the service later.

12 The other point that has been brought to your
13 attention, and the one that we want to emphasize greatly, is
14 the way in which the footnote in the tariff gives a
15 considerable amount of discretion to Southwestern Bell in
16 determining whether or not this service should terminate.
17 Local Plus was mentioned. I want to point out to the
18 Commission -- I think it's in paragraph 6 of our motion.
19 Let me confirm that. Where AT&T talks about the effects of
20 local -- excuse me. It's paragraph 12. Paragraph 12.

21 I think we did very well in accurately
22 reporting that the issue concerning the morphing clause in
23 that -- that filing was considered moot. At the same time,
24 I think the point should be made that when it came time for
25 Southwestern Bell to withdraw the service of Local Plus, it

1 did so in the conventional way. It filed a tariff
2 discontinuing the service. It was something that was
3 brought to your attention. We think the same procedures
4 should apply here.

5 A neutral -- a third party, a neutral party of
6 the Commission itself should be given the opportunity to see
7 whether or not the interpretation Southwestern Bell places
8 upon any judicial decree or any new regulation or any
9 regulatory agency's decree that commingling is no longer
10 permitted, we think you should be the judge of that. We
11 should have an opportunity to challenge it, just like we
12 would do in any other conventional tariff filing.

13 The FCC activity. I join Mr. Lumley in
14 telling you that it is no secret that the FCC has approved a
15 tariff of similar design and similar language, but I must
16 tell you as well that I am not here because AT&T is sitting
17 aside and going to let that decision go its way. I've been
18 authorized to tell you that in the event that there is a
19 complaint filed about the FCC's decision in this -- about
20 this tariff, that AT&T and perhaps others of the same group
21 that it is in at the FCC level will join.

22 That is the extent of my authority at this
23 time. But I'll assure you that we're proceeding on the
24 assumption that AT&T would not be approaching you today if
25 it did not believe there was something seriously wrong and

1 unlawful about the FCC's decision.

2 I sense that you are being invited to abdicate
3 your duties, as the FCC touted as already exercising them.
4 I look at your duties as quite different. One thing that
5 you have the FCC doesn't have, and that is the duty to
6 review interconnection agreements and their amendments.
7 What Southwestern Bell is proposing in the footnote and in
8 the way that ordering informa-- eligibility is allowed under
9 the tariff, it may involve a mountain of work for you.

10 We think that it's unnecessary. We think
11 there's an unrestricted right to commingling. That should
12 not be restricted in any way by the use of negotiations. It
13 should just simply say, this is going to be the tariff; this
14 is how it's going to be offered. There should not be any
15 kind of restriction on it, including what's in the tariff
16 right now.

17 I think I've covered most everything that I
18 wanted to, and we're grateful for the opportunity.

19 JUDGE DIPPELL: Thank you. Mr. Chairman, did
20 you have any --

21 CHAIRMAN GAW: No.

22 JUDGE DIPPELL: Commissioner Murray, did you
23 have any questions for Mr. Comley right now?

24 COMMISSIONER MURRAY: I'll wait. Thank you.

25 COMMISSIONER CLAYTON: I'll wait.

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1 JUDGE DIPPELL: All right. Thank you,
2 Mr. Comley.

3 Mr. Poston?

4 MR. POSTON: Good morning. I will be brief.

5 As we've already discussed, SBC is now
6 required to permit commingling pursuant to the FCC's TRO,
7 and SBC's proposed tariff changes to permit commingling are
8 for the most part identical to the tariff changes the FCC
9 allowed in SBC's interstate tariff.

10 In Staff's review of the proposed tariff
11 changes, the Staff considered the fact that the FCC allowed
12 the same tariff to effectuate the FCC's TRO to be very
13 significant. The main -- the main intervening party
14 opposition, the two intervening parties opposed basically
15 two sections of SBC's proposed changes.

16 First is the section stating that SBC will
17 commingle to the extent provided by and subject to the terms
18 of the requesting carriers in the interconnection agreement.
19 The Staff took the position that amendments to
20 interconnection agreements are only necessary if commingling
21 is specifically prohibited by the interconnection agreement,
22 or if a change of law provision requires it. An example of
23 an interconnection agreement which prohibits commingling is
24 SBC's M2A, Attachment 6 UNEs, at Section 2.2 specifically
25 says UNEs may not be connected or combined with access

1 services.

2 So the M2A's change of law provision should be
3 filed to remove this prohibition, and in recommending
4 approval of this tariff language, the specific
5 interconnection agreement portion, the Staff was guided by
6 the fact that the FCC allowed SBC's interstate tariff to
7 contain the same language.

8 The second section objected to by the
9 intervenors is the footnote, which ceases SBC's commingling
10 obligation under the tariff if an FCC order or court
11 decision eliminates such obligation.

12 Before SBC could deny commingling to a CLEC,
13 we believe the orders or decision would have to be clear.
14 And if there were questions as to whether SBC's commingling
15 obligation truly ceased by law, the Commission could look to
16 see if the FCC allows SBC to eliminate the commingling
17 obligation for interstate services. Again, it's important
18 to note that the FCC allowed this provision to SBC's
19 interstate tariff as well.

20 That's all I really have as an opening, and I
21 will attempt to answer any questions you may have.

22 JUDGE DIPPELL: Mr. Chairman, did you have any
23 questions?

24 CHAIRMAN GAW: No.

25 COMMISSIONER MURRAY: I'd like to ask one now.

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1 Thank you.

2 The change of law provision in the MCA would,
3 I believe you said, remove -- automatically remove the
4 prohibition against commingling; is that correct?

5 MR. POSTON: Can you repeat that?

6 COMMISSIONER MURRAY: The change of law
7 provision in the MCA would -- I don't mean the MCA.

8 JUDGE DIPPELL: M2A.

9 COMMISSIONER MURRAY: M2A. Thank you. Too
10 many acronyms. In the M2A would automatically remove the
11 prohibition against commingling; is that right?

12 MR. POSTON: I actually don't have the
13 language of the M2A's change of law provision in front of
14 me.

15 COMMISSIONER MURRAY: Okay. I thought that's
16 what I heard you say.

17 MR. POSTON: What I was saying was that in the
18 M2A, commingling is specifically prohibited, and so I would
19 think in order to remove that section, you would have to go
20 to the change of law provision.

21 COMMISSIONER MURRAY: And the change -- you
22 don't know what the change of law provision says?

23 MR. POSTON: Not specifically for the M2A,
24 sorry.

25 COMMISSIONER MURRAY: Okay. That's all I have

1 right now. Thank you.

2 JUDGE DIPPELL: Okay. Thank you, Mr. Poston.

3 Mr. Dandino, did you want to make a statement?

4 MR. DANDINO: We have no comment on this.

5 Thank you.

6 JUDGE DIPPELL: All right. Okay, then,

7 Mr. Chairman, did you have some questions that you wanted to

8 ask? Would you like me to call the attorneys back up or how

9 would you like to --

10 CHAIRMAN GAW: Unless there's a problem where

11 we get into the screen, I'll just --

12 JUDGE DIPPELL: As long as everybody will

13 remember to speak into their microphones, I'll just let you

14 remain there.

15 CHAIRMAN GAW: Thank you, Judge. I would -- I

16 guess I should ask all my questions to Public Counsel first,

17 just so he can get equal time here, even if he doesn't want

18 it. If I could, let me ask a few questions. And I want

19 everybody that wishes to express an opinion that hasn't been

20 expressed to do that. So if I fail to go around to you

21 specifically, that doesn't mean I don't want to hear from

22 you.

23 First of all, let me ask whether or not all of

24 the agreements that you-all are aware of out there have

25 change of law provisions in them. There's some -- there was

1 some nuance of a question that came up about whether or not
2 there may be a situation where an interconnection agreement
3 didn't have that, didn't have a change of law provision in
4 it. I can't imagine that. It seems to me to be
5 boilerplate, but I just am curious.

6 JUDGE DIPPELL: Mr. Lane, are you aware?

7 MR. LANE: I can say that I'm not aware of any
8 interconnection agreement that doesn't contain some method
9 to take change of law into account. There are variations in
10 how that is ordered.

11 The M2A has greater, I think, restrictions on
12 change of law than some of the other agreements because of
13 the way it was approved by the Commission. We gave up
14 certain rights to change certain UNEs and prices and so
15 forth for some period of time, so that there's some things
16 that -- change of law that we wouldn't be able to take
17 advantage of under the M2A that we would under other
18 interconnection agreements.

19 But there are provisions. I think
20 Section 18.3 and 18.4 of the M2A are the most applicable to
21 the situation here, and while they're lesser language on how
22 to do the change of law that you see in other
23 interconnection agreements, there's enough there to get the
24 job done.

25 CHAIRMAN GAW: And Commissioner Murray had

1 asked a question of Staff in regard to the M2A change of law
2 provision. Can you give us a little more detail perhaps
3 about what that -- how that would interrelate to the matter
4 before us?

5 JUDGE DIPPELL: Mr. Lane, could you pull your
6 microphone over so it's picked up? Thank you.

7 MR. LANE: I can come up.

8 JUDGE DIPPELL: That would be fine. Thank
9 you.

10 MR. LANE: I don't have a loud voice. I
11 apologize.

12 Let me just put it into context so it's clear.
13 As I said at the beginning, we're dealing with two different
14 regimes, one of people who order access services,
15 interexchange carriers ordering access services under either
16 a federal or state tariff, and another group, local carriers
17 that are ordering services under an interconnection
18 agreement under the Telecommunications Act to provide local
19 service.

20 And now we're talking about a situation where
21 those two things will be allowed to be commingled, and so I
22 don't think it's rocket science to say, all right, if you're
23 going to allow it and you've got two different regimes,
24 you've got to set the stage in both regimes to let it
25 happen. You've got to change your tariffs and you've got to

1 change your interconnection agreements.

2 All we have in the tariff is a reference that
3 says, okay, you can do it under the tariff, but you also
4 have to do whatever you're required to do under your
5 interconnection agreement because you're dealing with a
6 different set of circumstances or you're dealing with UNEs,
7 and you can't deal with the UNEs in the access tariff.

8 And so with all due respect to Mr. Comley, who
9 didn't have the TRO in front of him, it is unequivocal that
10 the FCC intended that all changes required by the TRO be
11 reflected in interconnection agreement changes. They said
12 it absolutely, specifically with regard to commingling in
13 paragraph 583, and they referenced their general discussion
14 in paragraph 700 to 706.

15 Frankly, there were -- the RBOCs, who thought
16 they were going to get some relief under the TRO had argued
17 that the changes should be self-executing, that once the
18 order was issued, it's done. That's what they asked the FCC
19 to order, some of them did.

20 The FCC rejected that specifically and said,
21 we're not going to do that; these are not self-executing.
22 Just look at paragraph 700 to 706 and they'll tell you that.
23 They say you've got to go through the change of law
24 provisions. And so what you have to do is then go and look
25 at your change of law provisions. Either the carrier can

1 implement it or the provider, in our case SBC Missouri, can
2 implement it.

3 Section 18.4 tells you how to do it under the
4 M2A, and the applicable provisions of the other agreements
5 tell you how to do it in those cases. But, in general, you
6 negotiate, and if you're not able to agree with it, you
7 bring the matter to the Commission and the Commission
8 resolves it, just like they do any other dispute under
9 Section 251 and 252 of the Act. It's not a -- it's not a
10 complicated process.

11 I don't know if that answers your question
12 specifically or not, but I can read all of 18.4. You know,
13 it's 20, 30 lines long, but that's what it says.

14 CHAIRMAN GAW: Okay. And that's what --
15 you're talking about when you say 18 through 24 of what?

16 MR. LANE: 18.4 of the general terms and
17 conditions of the M2A.

18 CHAIRMAN GAW: Okay.

19 MR. LANE: I'll just read a couple of
20 sentences from it that I think tell you what you're
21 supposed to do. It says, in such event -- and that event
22 means some change of law -- the parties shall expend
23 diligent effort to arrive at an agreement regarding the
24 appropriate confirming modifications to the agreement. If
25 negotiations fail, disputes between the parties concerning

1 the interpretations -- interpretation of the actions
2 required or provisions affected by such governmental actions
3 shall be resolved pursuant to the dispute resolution process
4 provided for in this agreement.

5 There are obviously separate sections that
6 describe that dispute resolution process, and the parties
7 can follow those.

8 CHAIRMAN GAW: Mr. Lane, it's -- in regard to
9 the effect of the difference in position that Bell is taking
10 from Staff's position and the need to renegotiate when the
11 agreement is silent on commingling, can you address that a
12 little more? I'm trying to -- well, we're not really -- not
13 necessarily dealing with that specifically in the tariff.

14 MR. LANE: Right.

15 CHAIRMAN GAW: It's important for me to know
16 the impact and the effect of what comes afterwards. And I'd
17 like to understand a little bit more about why Bell is
18 taking -- as I understand it, Bell is taking the position
19 that all of these are going to have to be renegotiated
20 whether they're silent or whether there's a specific
21 provision. Do you want to address that a little more for
22 me?

23 MR. LANE: Sure. I think you can look at it
24 as a basic contract law issue. Parties have agreements,
25 contracts that define their respective rights, duties and

1 remedies. Conceptually, if you want to be able to do
2 something affirmative, if you want to be able to commingle
3 in this case, there has to be something in your agreement
4 that tells you that you're allowed to do that. You're not
5 allowed to do whatever you want whenever you want just
6 because you want to do it unless there's a specific
7 prohibition.

8 Contracts are born by the parties negotiating,
9 discussing and reaching some agreement. There's really no
10 difference between a contract that has an expressed
11 prohibition on commingling and a contract that doesn't
12 address it. In both cases, the carrier is not permitted to
13 commingle; one because there is an express prohibition
14 because he's expressly told not to, and two, if there's not
15 an express prohibition, it's because that carrier's act of
16 commingling imposes rights, duties and obligations upon the
17 company that they haven't agreed to. There's no authority
18 to force a company to do those things that are required to
19 allow commingling if there's not a contract that tells you
20 how you're going to do it, when you're going to do it, which
21 ones they get to do it with.

22 There's limitations on commingling under the
23 FCC's order. Is it their contention that they can simply
24 ignore the limitations under the FCC's order if the contract
25 is silent on it and demand that it be done? I don't think

1 so. So it really comes down to a basic contract law issue.
2 You can't impose rights, duties and obligations on another
3 party unless you've negotiated an agreement and have a
4 contract that calls for it.

5 CHAIRMAN GAW: Are you aware of whether or not
6 Bell has negotiated any commingling provisions up to this
7 point in time?

8 MR. LANE: I know a little. I'm not going to
9 say -- I don't do that every day. We've got a separate
10 group of lawyers and a separate group of people primarily
11 located in Dallas that handle that, but I can tell you what
12 I know about it in general.

13 CHAIRMAN GAW: They're not using you there,
14 too?

15 MR. LANE: On that, no. They should, though.

16 CHAIRMAN GAW: That's a mistake.

17 MR. LANE: The TRO contains, you know, a broad
18 spectrum of provisions, some of which, from our perspective,
19 we find acceptable and some of which we don't particularly
20 like. But obviously, if we're going to implement it, we
21 have issued some notices to carriers under their
22 interconnection agreements -- not under the M2A, but under
23 other interconnection agreements saying we want to
24 renegotiate provisions 1, 2, 3, 4, 5 and 6.

25 And then those carriers can -- they need to --

1 they have to -- I think under the contracts, they have to
2 negotiate those, but they can also identify, well, we want
3 to renegotiate and discuss issue 7, 8, 9, 10, 11, 12, 13,
4 14. And so that's what's taking place so far, is that
5 there's been, not just on commingling, but on implementing
6 the TRO in general, there have been negotiations that take
7 place.

8 I don't believe -- I'm not aware of any
9 written amendment to the interconnection agreement that's
10 been submitted to this Commission in Missouri for approval,
11 but if we ever get to that --

12 CHAIRMAN GAW: I suspect not either, but I'm
13 just curious about what in the world a provision like that
14 has to contain. Is it something that just has a few lines
15 to it that says commingling is permitted, or are there
16 specific provisions about the implementation that may be
17 unique from one carrier to another?

18 MR. LANE: There will be specific provisions.

19 CHAIRMAN GAW: On the commingling issue alone?

20 MR. LANE: On the commingling issue alone.

21 Obviously, the other issues under the TRO also require
22 changes in language. We've got to tell people how they go
23 about ordering something that's commingled. We've got to go
24 and work out the agreements on how you submit trouble
25 reports and where you send them to for facilities that are

1 commingled, and then we have to have the billing stuff set
2 up.

3 All of those things require contractual
4 references, so that we know what we're supposed to do and
5 what they're supposed to do and the process works.

6 CHAIRMAN GAW: So in addition to -- if I
7 understand your argument you're making, from a practical
8 standpoint, you're saying if an agreement is currently
9 silent on commingling, that would not be sufficient to
10 take -- in following Staff's analysis, it would not be
11 sufficient for that to remain silent if you're going to
12 implement commingling?

13 MR. LANE: Right.

14 CHAIRMAN GAW: There would have to be some
15 additional language which would require renegotiation?

16 MR. LANE: Right. You know, again,
17 paragraph 583, which I recommend again to you for reading,
18 it references the operational and billing difficulties that
19 are associated with commingling and tells you that that's
20 why you're going to have to go through the interconnection
21 agreement process.

22 And the carriers may differ on this.
23 BellSouth may be different from us. We may be different
24 from CenturyTel or from Sprint, in terms of their
25 obligations to do it and how quickly they can do it. You've

1 got to negotiate that. This is all hypothetical, because I
2 don't know.

3 It might be we say, we can't do -- we can't
4 take special -- we can't take one particular type of service
5 over to your collocation cage until we get new racks in
6 place, and if there is not racks there that are available
7 for us to bring it to you, then it's going to take 45 days.

8 I'm just -- I'm making all this up, but those
9 are the kind of things that have to be placed into the
10 contract so that you know what they're permitted to order
11 and what our obligation will be. It can't be self-executing
12 because there's not an agreement as to exactly what steps
13 have to be taken to implement it.

14 CHAIRMAN GAW: Mr. Lane, if I could, let me
15 see if I can get responses on what we've just been talking
16 about. I have some other things, but --

17 MR. LANE: Okay.

18 JUDGE DIPPELL: Mr. Lumley?

19 MR. LUMLEY: Several points to make in
20 response to your question. First of all, and I, too, invite
21 you to take a look at the TRO and the paragraphs that have
22 been identified, and I believe that what you will see is the
23 FCC has acknowledged that there's a possibility that
24 contract negotiations might be required, but they have not
25 said in any way that they are mandating these changes.

1 They've just acknowledged the possibility.

2 Turning to the M2A and the specific question
3 about the change in law provisions, Section 18 of the
4 general terms and conditions has many provisions, one of
5 which is 18.5, which is very short and says that, in
6 essence, if there is a ruling that a provision is illegal,
7 it's abrogated.

8 If we turn to the FCC's rules, specifically
9 51.318, what we see is commingling is just another form of
10 combinations. And you know from our arbitration
11 combinations is a hot-button issue. Southwestern Bell has
12 confirmed they agree with that point because they've
13 incorporated the language of Section 51.318 into the tariff
14 in terms of eligibility for certain types of combinations
15 involving commingling.

16 Why am I telling you all of that? Because
17 when you go to Attachment 6 of the M2A, there is a sentence,
18 as Mr. Poston identified, that prohibits commingling. We
19 believe it's been abrogated. We believe that otherwise we
20 have a complete agreement in terms of combinations, and that
21 there are no necessary changes. But ultimately you don't
22 have to decide that point now.

23 I understand, standing here, that I have a
24 dispute with Southwestern Bell about whether or not contract
25 changes are going to be required. I understand I don't get

1 to dictate the result of that dispute. What I'm concerned
2 about is, this is the access tariff. This is my forum for
3 what are the terms and conditions of access service. I want
4 to know now in front of you, as the decisionmaker on
5 tariffs, what are those terms and conditions?

6 I don't want to get into a contract
7 negotiation that I don't even believe is necessary and not
8 only be told, here's changes that are necessary, in SBC's
9 opinion, under Sections 251 and 252 about unbundled elements
10 and combinations of elements and these FCC rules, but by the
11 way, here's these other changes and, you know, nobody can
12 tell us what to do on these other changes. We get to
13 decide, and you have to take it and you have to like it.
14 And that's what I'm worried about.

15 It ultimately raises the question, why isn't
16 this tariff straightforward? Why doesn't it just say
17 commingling is permissible under these terms and conditions?
18 Why do we have vague references to interconnection
19 agreements and unidentified tariffs and footnotes that allow
20 immediate cancellation? It's because they don't want to do
21 it, and I have to be extremely concerned about being limited
22 strictly to contract negotiations with somebody that doesn't
23 want to do what I'm asking them to do.

24 A tariff requirement is in front of you, and
25 you have clear jurisdiction over what our tariff says.

1 You have clear jurisdiction, if it gets to you, under a
2 252 arbitration. I don't know if you have jurisdiction to
3 tell them what unstated terms and conditions are about
4 something that they're saying isn't subject to tariff or
5 interconnection. And that's my ultimate concern.

6 CHAIRMAN GAW: Just to vary a little bit from
7 the question that Mr. Lane was responding to, could you
8 respond on behalf of your company as to, first of all,
9 whether it's accurate that the time for challenging the
10 federal tariff has passed and, if so, why the -- why your
11 company chose not to pursue challenging the action at the
12 FCC?

13 MR. LUMLEY: Well, the time, as I understand
14 it -- and I won't tell you that I'm the absolute expert on
15 FCC matters, because I practice here in front of you on a
16 regular basis.

17 But as I understand it, the time to seek
18 reconsideration of their decision to allow their tariff to
19 take effect has passed. I also understand that our FCC
20 attorneys intend to file a complaint to challenge the
21 tariff, and I, therefore, believe that they think they have
22 the right to do that if they can't resolve this on a
23 voluntary basis and get that tariff changed.

24 Now, I can't articulate for you the exact
25 decision-making process, but I have a pretty good idea of

1 this from my experience. There's a whole different record
2 to take to some court when all you have is, you know, a
3 tariff and some comments, versus filing a complaint and
4 putting together all your evidence, and I suspect that they
5 concluded that they would not be able to get relief from a
6 court from the limited record on a tariff review, and if
7 they can't get it resolved by negotiation, they'd have to
8 put on a complaint case and build the kind of record they
9 need, first of all, to convince the FCC to change its mind,
10 but secondly, to enable a reviewing court to see what's
11 going on.

12 CHAIRMAN GAW: Is there a difference in the
13 standard of review, if you know, between the FCC and this
14 Commission in regard to the rejection of tariffs that are
15 filed in front of those respective bodies?

16 MR. LUMLEY: My understanding is that the
17 legal standard is essentially the same, but that the bodies
18 exercise their jurisdiction much differently for a number of
19 reasons, including the fact that the FCC is responsible for
20 the whole country, I suspect, has something to do with it.

21 They don't tend to get embroiled in these kind
22 of disputes quite as often, although they have plenty of
23 their own tariff disputes, and they've also gone more and
24 more towards the regime of detariffing things, too. And
25 there's a lot of different political pressures at play as

1 well at the FCC.

2 CHAIRMAN GAW: Thank you. Who wants to go
3 next?

4 JUDGE DIPPELL: You can stay at your seat as
5 long as you speak into the microphone, Mr. Comley.

6 MR. COMLEY: I think Mr. Lumley has covered
7 most of that, and on the FCC issues that you brought up,
8 Mr. Chairman, I have never practiced there myself. As a
9 child I found mysticism in the Masonic Lodge, and I think
10 it's very much like that there, so -- at least that's been
11 my observation speaking from Missouri.

12 CHAIRMAN GAW: Staff?

13 JUDGE DIPPELL: Mr. Poston.

14 MR. POSTON: If -- the Staff's interpretation
15 of the TRO, if I could hit that first, is more in line with
16 Mr. Lumley's interpretation. When we look at the paragraph
17 583, we don't see that that paragraph specifically requires
18 changes to the interconnection agreements before commingling
19 can occur. It references complaints that were made
20 regarding billing and operational issues and goes on to say
21 that those issues can be addressed through changes, the
22 change of law provision of interconnection agreements.

23 I don't see where in there there is a specific
24 requirement that interconnection agreements have to be
25 changed. And if you look back at the paragraph 700 through

1 706, that is just a general reference to changes that might
2 need to be made to interconnection agreements based on the
3 entire TRO. There's no reference in there to commingling
4 specifically.

5 CHAIRMAN GAW: How would a commingling -- let
6 me ask you this: How would it be possible for two
7 companies, Bell and another company, to know how to
8 implement commingling without any language that governs or
9 guides the provisions of how that commingling takes place?
10 Is it such that it's not -- that all of the commingling
11 issues are going to be handled exactly the same way in
12 Staff's mind, so there's no need for language?

13 How do you get to the point where you suggest
14 that it's not necessary to have anything in the
15 interconnection agreement in order for the parties to know
16 what the rules are regard to commingling? Is it from the
17 Order? Is it something -- I'm trying to understand that
18 position.

19 MR. POSTON: I think one of the problems is
20 that we don't fully understand all the technical aspects of
21 commingling. When we looked at it, we looked at that UNEs
22 are provided pursuant to an interconnection agreement and
23 wholesale services are provided pursuant to the tariff. And
24 commingling is just a linking of services from one and
25 services from another, and we didn't know if perhaps that

1 would just be a billing change or something like that, that
2 didn't necessarily need to be changed in the interconnection
3 agreement.

4 There's been no terms of an interconnection
5 agreement that have been specifically pointed to, to us,
6 that need to be changed.

7 CHAIRMAN GAW: Okay. So am I understanding
8 you correctly that Staff really doesn't know whether it's
9 necessary to have language added to an interconnection
10 agreement?

11 MR. POSTON: I don't think language would need
12 to be added if it was silent. We just don't know. I heard
13 Mr. Lane say that there are things about collocating and
14 billing and things that would need to be added into the
15 interconnection agreement, but I don't know, without
16 verifying how those are addressed in current interconnection
17 agreements, whether that is necessary.

18 CHAIRMAN GAW: So is -- tell me how that would
19 develop, then, down the road if -- with Staff's position.
20 It seems to me like you're saying it's not necessary, but
21 then you're following it up with, we really don't know
22 whether it's necessary or not yet.

23 I'm trying to understand how you get to -- are
24 you saying it really doesn't matter at this stage, that that
25 issue will be determined later if the parties have a

1 dispute? I'm just trying to follow you.

2 MR. POSTON: If -- I think if a party can show
3 that a change is needed to the interconnection agreement
4 before commingling can occur, and as far as we know that
5 showing has not been made in this case, but if they can show
6 that, before we can commingle we need to change this
7 agreement between the parties, then we would have to agree.
8 But to this extent, that showing has not been made.

9 CHAIRMAN GAW: So is your -- is it more
10 accurate to say that your position is that you don't know
11 whether or not the language -- that language is required in
12 dealing with commingling in an interconnection agreement at
13 this stage?

14 MR. POSTON: Yeah, that's probably correct.

15 CHAIRMAN GAW: Anybody else want to venture
16 any response to that?

17 MR. DANDINO: Commissioner?

18 JUDGE DIPPELL: Mr. Dandino?

19 MR. DANDINO: I just wanted --

20 CHAIRMAN GAW: I knew there would be a way.

21 MR. DANDINO: I can't resist. I'm sorry.

22 You know, I have not studied this whole thing
23 in depth, of course, but just listening to this and kind of
24 going through this, is that if the TRO creates the
25 obligation for commingling, then basically all we're talking

1 about is how to carry that out.

2 And so right now, whether it's the
3 interconnection agreement tariff or not, it seems like it
4 appears to be operational on Southwestern Bell's. They have
5 the system, they have the method of implementing it, even
6 though it's in separate divisions for the access and for
7 the -- and for the UNEs, but it's a matter of them being
8 able to, you know, for their own internal operations to do
9 it together, to link them together.

10 Now, and of course, I'm talking from way on
11 the outside, but that's kind of the impression I'm getting,
12 and I just throw that out for the Commission's
13 consideration, and perhaps Mr. Lane can discuss that.

14 CHAIRMAN GAW: I don't know that he was
15 thinking he was going to discuss it.

16 MR. LANE: I'll make one comment.

17 CHAIRMAN GAW: Go ahead, Mr. Lane.

18 MR. LANE: You know, the implication is -- is
19 that commingling's required, so that's really easy.
20 Everything's said and done, we'll just go on and you're
21 required to do it. We have obligations to provide unbundled
22 loops and unbundled switching and other unbundled network
23 elements under the Act, and it's an obligation that was
24 clear from the Order, but it doesn't just happen. You have
25 to work through all of the processes to make this work.

1 You-all have seen the M2A. This is -- this is
2 half of it here (indicating). There's another one that's
3 just as big. It contains all of the information that's
4 necessary from a process perspective to implement this
5 simple directive to make unbundled network elements
6 available. The thought that these things just happen and
7 that there's nothing to negotiate and nothing to resolve is
8 absurd.

9 MR. LUMLEY: If I might follow up, I was not
10 making such an absurd statement. My statement was that that
11 two-volume document deals with combinations of network
12 elements and facilities, and that's all we're talking about,
13 and all that happens is you eliminate the restriction on
14 this particular combination.

15 MR. LANE: We don't do this today.

16 CHAIRMAN GAW: Well, that's where I'm going, I
17 think. I want to -- my question to tie this up is, I mean,
18 we're talking about an issue here, but I'm not -- what I
19 want to know is, is there anything in this tariff that
20 answers that question and, therefore, is it really an issue
21 for us?

22 MR. LANE: No, it's not an issue and it
23 doesn't have to be in the tariff. What it has to be in is
24 the interconnection agreement. That's where you do the
25 discussions and the negotiations to make it happen.

1 CHAIRMAN GAW: Well, what I'm trying to
2 understand is, is there any language in this tariff that the
3 parties believe is slanting this issue one direction or
4 another? Is this something that's going to come back in
5 front of us if the parties have a dispute?

6 MR. LANE: I don't think so. We're not
7 maintaining that the tariff resolves anything on the
8 interconnection side. That is brought to you if there's not
9 agreement reached under Section 251 and 252 of the Act, and
10 you'll make the decision.

11 CHAIRMAN GAW: That's Bell's position. Does
12 anybody disagree with that?

13 MR. LUMLEY: And that's precisely our concern,
14 is that we're not being told in this tariff what are the
15 terms and conditions under which access services will be
16 provided in a commingling environment. It's all being left
17 up to the interconnection agreement. They're not
18 necessarily going to agree later that the terms and
19 conditions of access services are governed by the rules that
20 govern interconnection agreements.

21 And so we're going to be left with, we didn't
22 get our hearing here because they didn't tell us what the
23 issues were, and there won't be a hearing later because
24 there's nobody to hear us anymore.

25 CHAIRMAN GAW: And I guess it begs the

1 question that if they file the tariff that sets forth terms
2 and conditions on the access side, on commingling, isn't
3 that -- wouldn't there be at least the potential of an
4 objection similar to what's here about it being a unilateral
5 position that is not negotiated, not subject to negotiation?

6 MR. LUMLEY: Well, it's not unilateral because
7 you can say no.

8 CHAIRMAN GAW: We can but -- all we can do is
9 say no and continue to go before the next tariff filing.

10 MR. LUMLEY: But we've always been able to
11 work out tariff disputes here.

12 CHAIRMAN GAW: Who else wants to dive into
13 that for me?

14 MR. COMLEY: Well, I would add that by the
15 approach you just described, you're still maintaining the
16 control over the regulation of access services in the state,
17 and I think that's the essence of our request here.

18 JUDGE DIPPELL: Mr. Lane?

19 MR. LANE: Very briefly, let me point out
20 again that the FCC has this same issue, right? It's not
21 different. They have approved the tariff that says resolve
22 these in your interconnection agreement. It's the same
23 language there, and so they expect that to happen, that
24 these matters will be negotiated and discussed in the
25 interconnection agreement, and that's what will happen.

1 CHAIRMAN GAW: Let me move on to --

2 JUDGE DIPPELL: Commissioner, before you do

3 that, I think we need to take just a short break. We can

4 collect on your thoughts on those last comments. Let's take

5 a ten-minute break and come back in here at 20 after, by the

6 clock in the back of the room.

7 (A BREAK WAS TAKEN.)

8 JUDGE DIPPELL: I interrupted the Chairman's

9 questioning, and then I let him leave the room, so we're

10 going to ask Commissioner Murray -- I know she has some

11 questions. So if she can pick up with some of her

12 questions, and then we'll go back to Chairman Gaw's line of

13 questioning later.

14 And as I said that, he entered the room, so --

15 I just said I let you escape. We'll let you go ahead, then,

16 and continue, Commissioner -- Mr. Chairman.

17 CHAIRMAN GAW: Thank you very much. Just to

18 follow up on where we were a while ago, is it the position

19 of AT&T and MCI that there should be additional -- and I'm

20 not talking about the disputes about the language that are

21 in there, but are you saying there should be additional

22 language in this tariff provision?

23 MR. COMLEY: Yes.

24 CHAIRMAN GAW: And what language would that

25 be?

1 MR. LUMLEY: I think what it comes down to
2 is --

3 CHAIRMAN GAW: I mean, I'm not saying word for
4 word.

5 MR. LUMLEY: Right.

6 CHAIRMAN GAW: I want to know what you're
7 wanting in there.

8 MR. LUMLEY: What we want in there is any
9 terms and conditions that they say restrict the access
10 service component of a commingled facility. And I guess the
11 way to get to it is, if they were to submit to you, here's
12 what needs -- here's what they say needs to be changed in
13 the contracts, then we would be able to tell you, no, E, G
14 and J in that list belong in the tariff and need to be
15 resolved in this proceeding. But they haven't identified
16 for us anything.

17 I mean, you have to remember, our position is
18 we don't need any new language, but we're concerned about
19 being blindsided by proposals later. So tell us what it is
20 that they say belongs in the contract so that we can tell
21 you, no, some of that belongs in the tariff.

22 But absent that, we would say all the tariff
23 needs to say is that commingling is permitted, period, and
24 not all these other references to unstated restrictions.

25 CHAIRMAN GAW: Okay. Anything else on that?

1 (No response.)

2 CHAIRMAN GAW: All right. Let me go to the
3 language that's in there. I want to work through this.
4 Beginning the first -- beginning the first paragraph, where
5 in that first paragraph do you believe language becomes --
6 that the language is -- should not be there?

7 MR. LUMLEY: Are you talking about
8 Section 5.1.1?

9 CHAIRMAN GAW: Yes.

10 MR. LUMLEY: Okay. Basically, everything
11 after the third line in that first paragraph. So it would
12 end "obtain from the telephone company," period. And the
13 rest of that paragraph should come out.

14 CHAIRMAN GAW: Okay.

15 MR. LUMLEY: Now, the next paragraph as I --
16 that's what I was talking about when I said they
17 incorporated the provisions of 51.318. So we're not
18 objecting to that restatement of the rules.

19 CHAIRMAN GAW: You don't have a problem with
20 the second paragraph in that, in 5.1.1?

21 MR. LUMLEY: Right, because that continues on.
22 They're just duplicating FCC rule language there.

23 CHAIRMAN GAW: Is it necessary that it's in
24 here?

25 MR. LUMLEY: I don't think it's necessary.

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1 Every time we do these kind of things, it creates the
2 problem and when the rules change, the tariffs lag behind,
3 but it's still the rule language. We're not objecting to
4 it.

5 CHAIRMAN GAW: Okay. Let me go --

6 MR. LUMLEY: And just to clarify one --

7 CHAIRMAN GAW: Go ahead.

8 MR. LUMLEY: When I was speaking to that first
9 paragraph, that includes the footnote.

10 CHAIRMAN GAW: Yeah. I'm ignoring the
11 footnote question for the time being.

12 Mr. Lane, what's the im-- what would be the
13 impact of just putting -- if a new tariff, if there was
14 suggestion that the -- that this tariff should be rejected
15 and a new tariff filed, what would be the impact from Bell's
16 standpoint on just ending it there with a period after
17 company?

18 MR. LANE: I don't know that would -- what
19 that would resolve.

20 CHAIRMAN GAW: Well, I don't know that it
21 resolves anything other than this concern about this
22 additional language, but I'm trying to see how that impacts
23 Bell in a negative way.

24 MR. LANE: We still have, then, the issue of
25 how you implement it. You still -- you can't --

1 COMMISSIONER GAW: It doesn't resolve that
2 issue.

3 MR. LANE: Right.

4 CHAIRMAN GAW: But the issue isn't resolved,
5 as I understand it, with the language in.

6 MR. LANE: Well, it depends on what happens if
7 the language isn't in. Is it -- does MCI win its argument
8 that they get to do whatever they want and they don't need
9 to do anything in the interconnection agreement?

10 CHAIRMAN GAW: Well, how could that occur --
11 how could that occur since you-all are a necessary element
12 to them implementing anything?

13 MR. LANE: And if that's true, then they
14 should have no objection to it. If they recognize that they
15 have to go through the negotiation process, then having this
16 language in there simply reflects that you have to go
17 through the negotiation process to work out everything.

18 If you take it out, does MCI now win its
19 contention that they don't have to do any negotiations and
20 we just have to give it to them however they want, wherever
21 they want, whenever they want? And that's why it's there.

22 CHAIRMAN GAW: How could they implement that
23 without you-all cooperating?

24 MR. LANE: Well, if we don't cooperate, then
25 it couldn't be implemented, but they could file a complaint

1 with you. They could file suit against us, claiming that we
2 have refused to follow the terms of the interconnection
3 agreement that permit them to commingle because we wouldn't
4 do X, Y or Z, right?

5 CHAIRMAN GAW: Well, I'm not sure. That's
6 what I'm trying -- I'm trying to explore this just so I'm
7 understanding better. But there's nothing in the -- there's
8 nothing in the agreement now that allows commingling. So if
9 there's nothing in the agreement that allows commingling,
10 how would they be able to interconnect? I understand
11 your --

12 MR. LANE: Their position is --

13 CHAIRMAN GAW: I know.

14 MR. LANE: But then you have to decide who
15 wins, right? Their position is, is that the restriction on
16 commingling automatically goes away under Section 18.4. I
17 don't agree with that, but that's their position.

18 And then they say, okay, so the restriction
19 under the M2A is gone. You have to do whatever we want,
20 whenever and wherever we want. However they think it should
21 be implemented, they will simply say, that's what we get to
22 do, and you haven't done it, so I'm going to file a
23 complaint with the Commission, I'm going to file a lawsuit
24 against you, I'm going to claim that you haven't done it.

25 And that's the purpose of having that in

1 there. You've got to have those things resolved. The FCC
2 has said unequivocally that you're supposed to do it in an
3 interconnection agreement, and these statements to the
4 contrary are simply false. If you read section -- or
5 paragraph 583, they say so.

6 CHAIRMAN GAW: If that is correct, then why
7 did you -- why is this language in here if it's correct?
8 And I know that you've got it in your federal -- your
9 federal filing, and that may very well be the only reason
10 it's in there, but if you're -- if you're correct that
11 that's what the federal ruling says, then why is that extra
12 language even necessary? Why is it needed?

13 MR. LANE: Again, you go back to what we're
14 dealing with here is two separate regimes, interexchange
15 carriers under access tariff, this is how they order. Local
16 carriers under the act, they go under the interconnection
17 agreements. We're talking about commingling, either using
18 one facility for both things or taking two different
19 facilities, one from each and putting them together. You
20 have to have those things identified.

21 The tariff can't control the UNE issues
22 because the UNE issues aren't included in the tariff.
23 They're included in the interconnection agreement. So
24 you're dealing with two things, and you can't solve the
25 issue by saying, well, we're just going to talk about one.

1 You have to refer to it so that you know, yes, we have to go
2 and do the interconnection agreement amendment to make it
3 happen.

4 MR. LUMLEY: But that's exactly our point,
5 that you can't resolve the two issues in one place. That's
6 what this language tries to do. It tries to shift it all to
7 one place. And what we're saying is resolve the terms and
8 conditions of the access -- the tariffed access component
9 here, and if -- and our position is, not that there aren't
10 any provisions and so we can do whatever we want; our
11 position is the contract already governs combinations in
12 detail and that's what will apply. But if we have a dispute
13 over the contract, we can resolve that there.

14 CHAIRMAN GAW: Isn't there -- isn't it
15 possible that that's one of the reasons that Bell put the
16 language in here, or if applicable of the telephone company
17 intrastate tariffs? I mean, isn't that some acknowledgement
18 that you have to find the answers in both places?

19 MR. LUMLEY: No, because that's referring to
20 some other tariff. There is no -- there is no such
21 limitation on the reference to interconnection agreements,
22 but even if there was, that still leaves us hanging, because
23 we're objecting to that tariff language, too. What does it
24 mean? What is it telling us? If applicable, which tariff,
25 which --

1 CHAIRMAN GAW: Mr. Lane hasn't responded to
2 that, I don't think, in his comments before, but I'll go
3 back to you, Mr. Lane. The criticism that they don't know
4 what that language is referring to, what tariff it's
5 referring to in that very last provision of that first
6 paragraph, or if applicable of telephone company intrastate
7 tariffs.

8 MR. LANE: That refers to the collocation
9 tariff that we have in Missouri. That is the -- some states
10 have interconnection agreements that are -- a lot of them --
11 a lot of the terms are in tariffs. I think those are
12 probably unlawful or not mandated by the Act. There's a lot
13 of court cases on that.

14 But in Missouri the only one we have is a
15 collocation tariff which we agreed to as part of the
16 Missouri 271 interconnection agreement process. And so to
17 the extent they have something that involves commingling
18 that pertains to collocation that has an issue, then you
19 have to look under the collocation tariff that we have in
20 Missouri to see how that's resolved.

21 CHAIRMAN GAW: So is that one tariff that
22 you're referring to?

23 MR. LANE: Well, it's the only one that comes
24 to mind, you know. I know that that specifically would
25 apply in this circumstance. I mean, in general, you know,

1 the tariff itself has a lot of -- the access tariff is also
2 very thick, and I can't sit here and tell you that there's
3 no provisions in that that would have any applicability
4 here, but I can tell you that the collocation tariff
5 certainly does.

6 But again, you know, the tariffs are there,
7 and if they don't agree with an interpretation, it's not as
8 if they're not capable of complaining. I think they've
9 shown that they are. And if they don't think that we're
10 applying the tariff correctly or fairly or uniformly, they
11 can take that complaint to you as they've done in other
12 cases.

13 Again, I mean, the FCC's -- this is their
14 order that we're interpreting. They've approved the precise
15 same language for the interstate tariff. The interstate
16 tariff is what is used in the vast predominance of cases.
17 There's very little special access that's ordered under
18 intrastate tariffs. There's some, so it's important, but
19 the vast majority of it is ordered under interstate tariffs
20 because the interstate special access is cheaper than the
21 intrastate.

22 If you've got a facility that's used for both,
23 at least 10 percent is used for interstate, the interstate
24 rules allow you to go under the interstate tariffs all the
25 time. A lot of this is stuff that won't matter at the end

1 of the day because they don't even order under the
2 intrastate tariffs. Most order under the interstate
3 tariffs, because that contains this identical language.

4 They made the same argument to the FCC. The
5 FCC didn't buy it. They could have asked for
6 reconsideration or rehearing. Public notice that we've
7 attached to our filing says precisely that. Some
8 implication has been raised that they thought they had a
9 better case if they waited and filed a complaint, and the
10 implication is that there would be some sort of hearing that
11 was held and they could take the decision then to court and
12 have better evidence.

13 I may have the dubious distinction of being
14 the only lawyer in the room that practiced FCC law. They
15 don't hold hearings. They haven't had a hearing up at the
16 FCC in more than 20 years. The same arguments, the same
17 objections that they're making that they made up there with
18 regard to the tariff, that's the same way they'd handle it
19 if they filed a complaint case. They'd have a -- their
20 pleading, the answer, the Commission would discuss it with
21 the parties or whatever and issue their decision. There is
22 not a hearing, there's not cross-examination, there's not
23 witness testimony. It hasn't been done in 20-plus years.

24 CHAIRMAN GAW: Mr. Lane, would you prefer that
25 kind of practice, by the way?

1 MR. LANE: Sometimes.

2 CHAIRMAN GAW: Good answer.

3 In regard to the footnote -- I've got to stop
4 and let some other Commissioners ask some questions.

5 Mr. Lane, the -- it does appear that the
6 footnote -- first, if you would allow the cessation of this
7 without Commissioner review, that's another issue, but it
8 does appear that it would allow it without -- without it
9 being final. And is that the intent? Do you have something
10 in mind here in regard to some -- to this language that's
11 different than what I heard expressed as concerns by some of
12 the parties?

13 MR. LANE: The change takes place only on --
14 it says -- and I'm reading from the seventh line down --
15 shall cease to be effective as of the effective date of the
16 Commission order or the issuance of the court's mandate. If
17 this change in commingling obligations is one that comes
18 from the judicial system, a court's mandate does not issue
19 until it's final. If the decision is issued at the Court of
20 Appeals, for example, there's no mandate issued until after
21 the time for them to try to take it to the Supreme Court or
22 whatever has taken effect. That's when the mandate issues.

23 The effective date of the Commission order is
24 going to be stated by the FCC if it's the FCC at the time
25 that they issue it. It becomes effective then, and we would

1 implement it then. If there's an appeal of that and they
2 get a stay, then it wouldn't be the -- it wouldn't take
3 effect because it would have been stayed. So it wouldn't --
4 the effective date provision wouldn't come into play.

5 So if the concern is that this is going to be
6 implemented before you have a final order, the language of
7 that makes it clear that that's not true.

8 CHAIRMAN GAW: If -- once you're out, let's
9 say there is a -- and I realize there probably would not
10 necessarily be any gaps, but if there is a gap and it says
11 any regulatory or judicial review, and in the event the FCC
12 or a court pursuant to any regulatory judicial review
13 vacates, stays, remands, reconsiders or rejects the portion
14 of the triennial review requiring ILECs to permit
15 commingling, then these things occur -- well, let's assume,
16 first of all, and ignore the argument that that is -- could
17 somehow be your independent interpretation of that order.
18 I'm talking about Bell.

19 Let's assume that there's then a reinstatement
20 of the order. Do they have to start all over with all of
21 these -- these kind of proceedings that may occur after this
22 one is done, or does it just automatically go back to the
23 way it was and the commingling provision goes right back
24 into effect? I can't tell what happens with this.

25 Just tell me what happens if it's rejected or

1 if it's turned down, that there's an immediate succession or
2 whatever you've got in here, I don't know, but it does not
3 say what happens if it's placed back into effect. What
4 happens if that occurs? Does it just immediately go back as
5 quickly as it went off? Is it a light switch that goes back
6 and forth or does it just turn one direction?

7 MR. LANE: I'm going to have to try to
8 interpret what your question is.

9 CHAIRMAN GAW: Most people have to.

10 MR. LANE: I didn't mean that in a derogatory
11 sense. If the premise is -- is that the same order goes
12 from in effect to not in effect to in effect again, I don't
13 see that that can happen. There's only one place where the
14 Court of Appeals -- Court of Appeals for the DC Circuit in
15 this case is the one that has all the consolidated review,
16 and if they -- if they reject it, the Supreme Court doesn't
17 change it, then the mandate will issue and it will be
18 effective and it won't come -- the obligation won't come
19 back into play.

20 If the obligation, the only way the obligation
21 can spring anew is if the Court of Appeals rejects it, it's
22 gone, and the FCC in some subsequent order does something
23 else with it. And at that time, then, we would have to
24 implement whatever the new order is from the FCC that
25 requires it, because that's the only place where a new order

1 could spring up again is if the FCC does it. And if they
2 do, then we would have to do just what we're doing here,
3 follow the terms of the order and implement it.

4 And this tariff I don't think would spring
5 back up again. We'd have to implement whatever the new
6 order was that came into effect. I don't know whether it
7 would be the same or different. And the odds are that it
8 would be different.

9 CHAIRMAN GAW: It's very possible, though,
10 that if the FCC left this order in place, the Court of
11 Appeals said, no, we disagree with that, we reject that, and
12 if it did go up to the Supreme Court, they could flip it
13 back the other direction. Now, what --

14 MR. LANE: Then the mandate wouldn't have
15 issued and our obligation would not have ceased because the
16 mandate would not have issued.

17 CHAIRMAN GAW: Anybody disagree with that?

18 MR. LUMLEY: With the point about the mandate
19 specifically or with all of it?

20 CHAIRMAN GAW: With what was stated about
21 Footnote 1.

22 MR. LUMLEY: I would disagree. We have the
23 situation now where we have an FCC rule in effect. There's
24 a court review going on. That situation could arise again.
25 Are we to keep going back and forth through this process, as

1 you've observed? They're filing a tariff. They should just
2 follow the regular procedures to change it in the future,
3 not have this unilateral right to pull it.

4 MR. COMLEY: The thought comes to mind that
5 there could be a dispute about whether the mandate was
6 properly issued. There have been occasions in our own
7 Supreme Court when mandates have been questioned. Giving
8 Southwestern Bell the opportunity to say when a mandate is
9 or isn't final I think would be unfair.

10 And the other thing is, if -- if a decision
11 has come down, all the parties here would know its effect.
12 If Southwestern Bell were to file a withdrawal tariff, as
13 it's done in the past, and there was any disagreement, then
14 as Mr. Lane has pointed out, we have filed complaints
15 before, we'll do it again. But if there is no dispute about
16 whether or not a decision has been filed regarding the
17 future of commingling, then there won't be any problem for a
18 30-day termination.

19 The other issue for the Commission is whether
20 or not 30 days terminating is fair to those people who may
21 be utilizing the services. We thought over the break that
22 Southwestern Bell is asking for a considerable amount of
23 lead time in order to get this commingling started, but yet
24 they would expect its customers to have 30 days to get rid
25 of it. So there's another item to think about the footnote.

1 But the long and short of it is, the better
2 practice would be to insist that Southwestern Bell eliminate
3 the footnote and use its traditional kind of withdrawal
4 tariff to properly warn customers and then properly withdraw
5 it.

6 CHAIRMAN GAW: Staff have anything on this?
7 Just if you do. I'm not --

8 MR. POSTON: No, not anything in addition to
9 what we've already said.

10 CHAIRMAN GAW: Thank you, Judge. That's all I
11 have.

12 JUDGE DIPPELL: Commissioner Murray, did you
13 have some questions?

14 COMMISSIONER MURRAY: I do. Thank you.

15 For Mr. Lumley and Mr. Comley, is it your
16 client's concern that the tariff as it is written would
17 allow SBC to delay or possibly avoid implementation of the
18 commingling requirements?

19 MR. LUMLEY: That is part of our concern, yes.

20 MR. COMLEY: Yes.

21 COMMISSIONER MURRAY: And for Mr. Lane, is
22 SBC's concern regarding the change of law regarding the
23 event that the FCC is reversed on this issue, is SBC's
24 concern that the CLECs could or would delay the withdrawal
25 of the provision of the UNE -- the combinations that are

1 required here?

2 MR. LANE: Yes.

3 COMMISSIONER MURRAY: So each side is really
4 concerned that the other's going to delay what is best for
5 each other?

6 MR. COMLEY: With one difference, I think.
7 The position we're taking is that we would be reliant upon
8 you using the orderly procedures of the Commission in order
9 to withdraw the service.

10 COMMISSIONER MURRAY: But you would also be
11 able to file an intervention and say that and delay the
12 process of that tariff becoming in effect, would you not?

13 MR. COMLEY: Through the procedure that you
14 permit.

15 MR. LUMLEY: Only if -- only if you agree.
16 You would have to suspend the tariff. Just by our filing
17 something it doesn't delay it. You would have to agree that
18 we've raised a significant issue.

19 MR. COMLEY: And if not, it goes into effect.

20 COMMISSIONER MURRAY: And Mr. Lumley and
21 Mr. Comley again, is it your position that commingling is a
22 process that will be identical for every carrier requesting
23 it and that all terms and conditions can and should be
24 placed in the tariff?

25 MR. LUMLEY: It's our position that the access

1 service part of commingling, yes, should be uniform for
2 everyone. Not having inspected everybody's interconnection
3 agreement, I'm not in a position to comment on the
4 difference between those agreements.

5 Now, in large part, I think most companies
6 have adopted the M2A, which is essentially what my client
7 has, although it does have some arbitrated differences. But
8 here our concern is that the access service component be
9 uniformly available to everybody.

10 COMMISSIONER MURRAY: Mr. Comley?

11 MR. COMLEY: Mr. Lane brought up two items, I
12 think, ordering the service and also reporting troubles or
13 troubleshooting service. I may be wrong on the second one.
14 At the same time, I would think that how to order the
15 service could be something either in their tariff already or
16 something that could be added to this tariff.

17 These are just examples, following up on what
18 Mr. Lumley has said. The same thing with reporting
19 troubles. And Mr. Lumley's already pointed out that these
20 constitute combinations of services and that's already
21 covered.

22 So I think there is a possibility that there
23 could be some uniformity established by the tariff to cover
24 the provision of commingling services.

25 COMMISSIONER MURRAY: Now I will ask each of

1 you -- and I'll start with you, Mr. Comley, this time --
2 what if SBC said to your client, the commingling that you
3 are requesting requires certain things to be done by both
4 carriers, and in order for us to provide our part, we need
5 an agreement from you that you will provide your part of
6 those necessary things to provide this commingling?

7 MR. COMLEY: Well, I think you've kind of hit
8 the center of the dispute. To what extent the parties would
9 consider those really material issues in providing that --
10 and I'll assume -- I'll make the assumption that they are
11 all valid -- the first question would be, are they not
12 covered yet in the agreements that we've already reached?
13 And if those situations exist, my thoughts are that, well,
14 yes, there would necessarily need to be some more
15 negotiation on how to implement the service.

16 COMMISSIONER MURRAY: And if the tariff is
17 written as you would like it to be written, you would be
18 able to come back to the Commission at that point and say,
19 their tariff says it's available; they've got to make it
20 available to us, and they haven't.

21 MR. COMLEY: I'm presuming that all carriers
22 and all people in regulation, they do have duties of good
23 will and good faith among them, and I think if they're
24 interested in serving the customer, they're going to do it
25 the best they possibly can and will make it happen, if

1 necessary.

2 MR. LUMLEY: And to clarify, we're not
3 suggesting that you have to limit them to deleting the
4 language we're objecting to. If they believe that there are
5 truly terms and conditions that need to be stated in the
6 tariff, then they should present them so that we can see
7 them.

8 What we're concerned about is they haven't
9 done that, and we don't know what it is they think -- so
10 we're not trying to say that the results here should be
11 limited to taking out what we've objected to. If the goals
12 they try to accomplish need to be accomplished in another
13 way, they have a right to supply that alternative language.

14 COMMISSIONER MURRAY: And that's why my first
15 question was, is it your position that all of the process
16 that would be required would be identical for every carrier
17 and, therefore, could be set out in general terms and
18 conditions in a tariff?

19 MR. LUMLEY: And with regard to the access
20 services, they should be. We've all been ordering these
21 services under tariffs for years.

22 COMMISSIONER MURRAY: But what about the fact
23 that UNEs have never been combined with the -- been required
24 to be commingled with the access?

25 MR. LUMLEY: Well, I could be wrong, but my

1 understanding is that in other states -- not SBC states, but
2 in other states -- it has been done. So this is not like
3 it's my understanding something that's never occurred
4 before. It's just something Southwestern Bell wasn't
5 willing to do.

6 COMMISSIONER MURRAY: Do you know if there is
7 a general tariff that accomplishes all of the -- that sets
8 out all of the terms and conditions necessary in other
9 states for interconnection agreement that provides those?

10 MR. LUMLEY: I don't know.

11 COMMISSIONER MURRAY: Mr. Comley?

12 MR. COMLEY: No, I do not know.

13 MR. POSTON: I don't know.

14 COMMISSIONER MURRAY: All right. Mr. Lane, I
15 just wanted to ask you --

16 MR. LANE: I'm sorry.

17 COMMISSIONER MURRAY: -- in regard to the --
18 what is necessary to implement this commingling provision,
19 whether there would be different requirements depending on
20 different carriers and how you currently are connected with
21 each carrier or whether all of these implementation
22 processes would be identical such that they could be set
23 forth in a general tariff?

24 MR. LANE: I don't believe they could be set
25 forth in a tariff, and I don't believe that it is even

1 lawful to require that to be done. The FCC in paragraph 583
2 has made it clear that these commingling process and billing
3 issues are to be resolved via interconnection agreement
4 negotiations. They say that unequivocally in the last two
5 sentences of paragraph 583.

6 I don't think this Commission has the
7 authority to say, I'm going to make you put all the
8 provisions with regard to ordering UNEs that we're going to
9 be commingling, commingled and all other processes on
10 billing for UNEs to be put forth in an access tariff,
11 because the FCC has directed, appropriately under the Act,
12 that that be the subject of interconnection agreement
13 negotiations.

14 They do vary. I mean, I'm not going to speak
15 to commingling, because I don't know all the operational
16 details, but in our interconnection agreements, if you're
17 going to order Item A, anybody that orders Item A, probably
18 the process is the same. It might vary depending upon which
19 interface they choose to order it under, but the carriers
20 don't always order Item A.

21 They order, you know, A plus or A minus, and
22 in those circumstances, all of the interconnection
23 agreements have what's called a bona fide request process
24 that has to be gone through. If they want something
25 different than what's already provided in the contract, then

1 you've got this bona fide request process that you go
2 through in order to implement that.

3 I don't think that we can sit here today and
4 even imagine all of the things that they might want to say,
5 I want to commingle this in this way, and then be able to
6 put all of the processes into a tariff to get that done.
7 Again, the FCC, they didn't require that in their tariff.
8 They simply said, you'll handle it in the interconnection
9 agreements, and they said that in paragraph 583.

10 So that's the route to go, and I don't think
11 the Commission really has the authority to say, hey, you're
12 going to try to figure out all of these processes, all of
13 these carriers in advance and you account for every one of
14 them and you put it all into the access tariff. Because the
15 access tariff can only deal with access services. It can't
16 deal with the UNE side of the house. That's required under
17 the Act to be done via interconnection rates.

18 COMMISSIONER MURRAY: And, Mr. Lane, before
19 you sit down, what is your position in terms of a fear or a
20 concern that SBC could use this requirement renegotiating an
21 interconnection agreement to either delay or to prevent
22 actuating the provision of the commingling?

23 MR. LANE: The process that's involved under
24 the interconnection agreements has time limits that are
25 involved with it, in terms of going through the dispute

1 resolution process and then lets it get brought to the
2 Commission. And the Commission can act under either an
3 expedited process, if it wants or some other process. It
4 will be up to the Commission at that point to handle it
5 within the time frames that are set out or in the
6 interconnection agreement, if I'm following your question
7 correctly.

8 COMMISSIONER MURRAY: You are.

9 MR. LANE: The implication that we would be
10 able to discriminate against carriers is also false. If
11 the -- I think it was raised in the context of the footnote.
12 If the requirement to provide commingling goes away, are you
13 going to treat carriers differently? We'll do, let's say,
14 30 days for this carrier, 90 days for this carrier,
15 120 days. That can't be done because the tariff itself says
16 that the tariff goes away in 30 days and these are converted
17 over to -- back to special access, like they were in the
18 first instance.

19 If we reach some agreement with the carrier to
20 do something different on the UNE side, we have to take that
21 and put it in an interconnection agreement and bring it to
22 the Commission, and the Commission has to approve it before
23 it goes into effect. And at that point it becomes available
24 to any other carrier under Section 252(I) of the Act. So
25 there's not a possibility that we can discriminate among

1 carriers if the commingling obligation goes away.

2 COMMISSIONER MURRAY: And then let me follow
3 up with that. If you renegotiate some interconnection, one
4 interconnection agreement that provides for commingling, is
5 that, then, subject to the most favored nation provision
6 that --

7 MR. LANE: Yes, Commissioner. That is
8 Section 252(I) of the Act, yes. If the commingling
9 obligation goes away, the triennial review order, and we
10 nevertheless voluntarily agree with Carrier A that we're
11 going to let him commingle under the interconnection
12 agreement, we'd have to put that in writing, we'd have to
13 bring that to the Commission, the Commission would have to
14 approve it, and at that point it would become available
15 for any other carrier to do the exact same thing under
16 Section 252(I).

17 COMMISSIONER MURRAY: Mr. Lumley and
18 Mr. Comley, how could they possibly discriminate between
19 carriers?

20 MR. LUMLEY: Because we're not talking about
21 the unbundled element part of this that's governed by these
22 rules. We're talking about the access facilities, and
23 they're going to maintain, in my opinion, that they're not
24 subject to the time limits that he's talking about. If we
25 ask for something that they now say, well, the tariff

1 doesn't say that, so we don't have to do it, and it's not
2 part of these negotiations, and likewise 252(I) isn't going
3 to apply, if their bottom line position -- and this gets
4 back to a question that the Chairman had. If their bottom
5 line position is they don't really need any new language,
6 that they could take out these three lines that we objected
7 to and be in the same position, that eliminates my concern.

8 My concern is that they're insisting on this
9 language because they want to say that the access service
10 component, that all the details about that aren't going to
11 be tariffed. We're going to deal with them in a contract,
12 but it's not going to be a contract under the federal
13 statutory rules about these contracts. It's just going to
14 be a regular old bilateral contract with no time limit on
15 negotiations and no rules as to what they have to do.

16 And we're very concerned about being
17 surprised. If they can state that there are no terms and
18 conditions that are missing on access services and all
19 they're talking about is the unbundled elements part of
20 this, that's fine, but they aren't saying that. They're
21 saying, we want to insist that this language be in here so
22 that we can negotiate contractual restrictions on the
23 availability of the access service part of what's being put
24 together.

25 COMMISSIONER MURRAY: Wouldn't those

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1 contractual negotiations be interconnection agreements?

2 MR. LUMLEY: I believe their position would be
3 that we're still talking about tariffed access services, not
4 unbundled elements, and that, therefore, they aren't
5 governed by that.

6 COMMISSIONER MURRAY: Mr. Lane, would you
7 respond to that, please?

8 MR. LANE: That is incorrect, Commissioner.
9 On the interconnection side, as we've discussed, anything we
10 agree to needs to be put into a contract that's filed with
11 this Commission and becomes available.

12 On the access side, if the tariff goes away
13 because the commingling obligations go away, there is no
14 tariff that's out there. These would automatically be
15 converted back to special access or whatever access applies.

16 That's what the tariff requires. We're not
17 permitted by law to offer services -- intrastate services
18 that are to be tariffed must be tariffed by the Commission.
19 We can't operate outside of the tariff without it being an
20 interconnection agreement that has to be brought before the
21 Commission for approval. The premise is incorrect.

22 COMMISSIONER MURRAY: And, Mr. Lumley, are you
23 indicating that SBC could require contractual agreements
24 outside of the Telecommunications Act requirements for
25 interconnection agreements?

1 MR. LUMLEY: That's our concern in trying to
2 figure out the intent of the language they put in here.
3 Instead of saying, you can commingle access services and
4 here's the terms and conditions of that, they've said, you
5 can commingle subject to this contract.

6 And we're very concerned that when we get over
7 to the contract, they're going to say, now, we're talking
8 about unbundled networks, we're talking about FCC rules, and
9 when we're talking about access services, we're talking
10 about whatever we want to do. And we're very worried about
11 that.

12 COMMISSIONER MURRAY: Mr. Comley, do you have
13 a comment on that?

14 MR. COMLEY: I have not explored that part of
15 the argument with AT&T, so I'll defer to Mr. Lumley on that.
16 That was his position.

17 COMMISSIONER MURRAY: Does the Staff have any
18 further clarification or any clarification at all on that
19 issue?

20 MR. POSTON: Not at this time.

21 COMMISSIONER MURRAY: How about Office of the
22 Public Counsel?

23 MR. DANDINO: I have nothing to add,
24 Commissioner.

25 COMMISSIONER MURRAY: I -- frankly, I don't

1 understand your position, Mr. Lumley. I'm trying to, but I
2 don't understand. So maybe I'll let you try again.

3 MR. LUMLEY: I mean, Mr. Lane has conceded the
4 point in his comment that we have two different regimes
5 here. We have tariffed services, and the tariff's not going
6 away. We're still talking about tariffed services. And
7 then we have the variety of unbundled elements that they're
8 required to make available through interconnection
9 agreements. Now we're being allowed to connect the two.

10 What we want to know is, are there terms and
11 conditions regarding the tariff services that they are not
12 telling us about, but instead they've said --

13 COMMISSIONER MURRAY: I'm sorry. Let me stop
14 you. Tariffed services referencing access?

15 MR. LUMLEY: Correct. This access services
16 that we're now being able to connect to unbundled elements.

17 COMMISSIONER MURRAY: But they're already
18 tariffed, correct?

19 MR. LUMLEY: They're already tariffed, but
20 they're not just saying, you can now connect them to
21 unbundled elements. They're saying, you can connect them
22 subject to the contract.

23 Now, if the only terms and conditions in the
24 contract are going to be regarding unbundled elements, we
25 know what the rules of the game are. But if they're going

1 to come forward then and say, in addition to those, here's
2 some additional terms and conditions regarding the tariff
3 service, that's where we have a problem, because we don't
4 believe we have any protection anymore. We've already got
5 the tariff, and the tariff says it's subject to the contract
6 and all the power's shifted to them in that area.

7 COMMISSIONER MURRAY: Does this -- if this
8 tariff goes into effect, does it affect the access tariff
9 that's currently on file?

10 MR. LUMLEY: This is the access tariff. It's
11 a change to that tariff.

12 COMMISSIONER MURRAY: This changes that tariff
13 completely or substitutes for it?

14 MR. LUMLEY: Certain pages of it, correct.

15 COMMISSIONER MURRAY: Mr. Lane, how could you
16 change your terms and conditions related to access based
17 upon this tariff?

18 MR. LANE: I frankly don't understand Mr.
19 Lumley's argument, Commissioner. As I understand the
20 discrimination claim that they were making, it goes like
21 this: If the commingling obligation goes away, then you
22 might treat people differently, and we'll say as to one that
23 30 days applies, but as to you, you get to keep getting
24 service under the tariff.

25 But that's not what the tariff says. The

1 tariff says that when the obligation goes away, you'll get
2 notice and you'll have 30 days to convert these over to
3 whatever service you want, and if you don't choose a
4 service, it goes to access.

5 Over on the interconnection agreement side,
6 that then has to control all of the -- any additional
7 obligations that we have at that point, and the Commission
8 has control over the interpretation of the interconnection
9 agreement, as well as, obviously, control if they complain
10 about our application of the tariff in some future
11 negotiation. So the Commission is going to retain control
12 under either scenario.

13 COMMISSIONER MURRAY: Okay.

14 MR. LUMLEY: Just to clarify, I did not
15 understand what your question had to do with the footnote
16 about it potentially going away in the future. I was
17 addressing the startup of the services and the contract
18 negotiations that they're saying must take place before we
19 can get them, and I believe that a gap is being created. So
20 I wasn't -- I didn't understand what your question had to do
21 with the footnote.

22 COMMISSIONER MURRAY: Frankly, I don't
23 remember what my question was anymore.

24 MR. LANE: And if that's his response, then I
25 would say that the FCC has already decided that issue. It

1 said that the operational and billing issues that have to be
2 resolved will be resolved in interconnection agreement
3 negotiations. That's paragraph 583.

4 They've demonstrated that that's what they
5 intended by allowing this tariff to go into effect over the
6 same objections that were raised. So I consider it an
7 argument that doesn't have any merit.

8 COMMISSIONER MURRAY: I just want to pursue
9 that just a little further, and I don't know necessarily
10 it'll be with you, Mr. Lane, first, so you can sit down.

11 In that, Mr. Lumley, you pointed out that this
12 would be changing part of the access tariff that's currently
13 in existence?

14 MR. LUMLEY: Correct.

15 COMMISSIONER MURRAY: Assuming the FCC gets
16 reversed on requiring provision of commingling and assume
17 that this tariff as it's written is approved here, then
18 according to this, the telephone company will provide
19 customers that have commingled UNEs and/or UNE combinations
20 with wholesale services obtained under this tariff written
21 notice that they must either convert such UNEs or UNE
22 combinations to a comparable service or disconnect such UNEs
23 or UNE combinations from those wholesale services.

24 What is the effect, if any, or what would be
25 the change, if any, to the current access tariff as it is

1 today following a reversal of the FCC on the TRO?

2 MR. LUMLEY: Okay. I think I understand your
3 question, and by taking -- essentially the footnote takes
4 the new language away, and so my understanding would be that
5 we would be reverting back to what is today the existing
6 tariff in effect.

7 But the concern we have is, if we didn't have
8 the footnote, and so Southwestern Bell felt it was time to
9 go back, they would file new tariff pages reverting back and
10 that would uniformly occur for everyone.

11 Under the footnote, they could send my client
12 the 30-day notice the first second possible, and they could
13 wait six months to send the 30-day notice to somebody else,
14 because the tariff is still here and the tariff says it goes
15 away when they say it goes away.

16 If they withdraw a tariff, they have to do it
17 uniformly for everyone. They can't file a tariff and say,
18 Commission, we're going to take it away from MCI today and
19 AT&T tomorrow. They're just going to take it away on 30
20 days, but under this provision, they get to choose when and
21 if to send the notice, and that's how we each get affected.

22 COMMISSIONER MURRAY: But then the next
23 sentence, failure to provide instructions to convert or
24 disconnect within 30 days as described above, and that's
25 described in that notice sentence, I believe.

1 MR. LUMLEY: That's within 30 days after
2 getting the notice. They started by sending the notice, and
3 there's nothing in here that says they have to notify all
4 customers at the same time.

5 COMMISSIONER MURRAY: In that event, the
6 telephone company will provide customers that have
7 commingled UNEs or UNE combinations written notice. Would
8 you be more comfortable if it said will provide within
9 X number of days written notice?

10 MR. LUMLEY: No. My point is it doesn't say
11 will provide all customers at the same time the 30-day
12 notice.

13 COMMISSIONER MURRAY: Would you be comfortable
14 with it if it did that?

15 MR. LUMLEY: I still don't like it as much as
16 the regular process, but that gets it pretty close to what
17 would happen if they simply filed new tariff pages.

18 But the one difference would remain, and that
19 is, if they filed a tariff to take it away, you have the
20 right to suspend that and extend the 30-day period for
21 whatever length of time you decide is appropriate. Whereas,
22 under this language, it's 30 days and there really isn't --
23 you've already approved the tariff and you wouldn't have the
24 ability to impose a new tariff change on them.

25 You have the ultimate process of filing a

1 complaint and forcing them, but it would not be
2 contemporaneous. So if it's a new tariff provision, you're
3 in control of the time clock. Maybe it's only 30 days
4 because the change is appropriate, but maybe it's longer
5 because you think there's a question.

6 Under their language, they get to decide that
7 it's only 30 days and that's it, and there's nothing I can
8 do about it and there's nothing the Commission can do about
9 it. But I would agree that if it said they're going to give
10 the notice to everybody at the same time, it would at least
11 eliminate the discrimination aspect of it.

12 COMMISSIONER MURRAY: Mr. Lane, is that -- is
13 that something that SBC is intending to do, to give all
14 customers notice at the same time?

15 MR. LANE: Absolutely. I don't read it that
16 way. I don't read Mr. Lumley's concern into it. But I can
17 tell you that we will give all customers notice, we'll
18 provide it to them on the same day. I think that's an
19 affirmative obligation on us. It says we will provide
20 customer notice, and we will do that.

21 COMMISSIONER MURRAY: To every customer at the
22 same time?

23 MR. LANE: Yes. I mean, you know, look at it
24 logically. We disagree with the commingling obligation
25 that's imposed by the FCC. We don't think it's appropriate.

1 We appealed it. If the courts agree with us that the
2 commingling provision is unlawful, yeah, we're going to
3 provide the notice to tell them that we're not going to do
4 it anymore. This isn't all a game. There's a purpose in
5 having that there.

6 The thought that we'll have won and we'll
7 choose to give notice to MCI on day one and we'll give it to
8 AT&T two years later, I don't see that the tariff would
9 permit that, but I can assure you that's not what we're
10 going to do.

11 MR. LUMLEY: I can give you a specific example
12 that's pending before you, and that's the collocation power
13 dispute where Southwestern Bell took the position that it
14 was entitled to charge different rates than it had been
15 charging and yet it notified various carriers months apart
16 that it was changing the rate. And part of -- part of that
17 dispute is that some people were required to -- or it was
18 demanded of them to put money in escrow and others were
19 given side deals where they didn't have to, or at least
20 that's the allegations.

21 So we are concerned when tariff language is
22 not specific and affords that kind of opportunity, because
23 we've had experiences in the past.

24 COMMISSIONER MURRAY: Any comment, Mr. Lane?

25 MR. LANE: No. Other than to refer back to

1 the tariff. It says we will provide the customers the
2 notice, and it's obviously our intent to do so, because we
3 think the commingling obligations are inappropriate under
4 the TRO. It's in our interests to give the notice, and I
5 can assure you we will.

6 COMMISSIONER MURRAY: I don't suppose you'd
7 have any objection to changing that language to say that
8 specifically?

9 MR. LANE: I don't, no.

10 COMMISSIONER MURRAY: Then, Mr. Lumley -- I'm
11 sorry. I mean Mr. Lane. In the footnote, you were talking
12 about the -- when a -- when a mandate issues and it issues
13 only when an Order is final, but the language in that
14 footnote also includes, as of the effective date of the
15 Commission order or the issuance of the court's mandate.
16 And I'm trying to figure out why -- with the scenario that
17 you gave in terms of where the TRO is today and the possible
18 outcomes, why would you need the language in there effective
19 as of the effective date of the Commission order?

20 MR. LANE: I'd say there's two potential
21 circumstances for that, Commissioner. The first is if the
22 FCC on its own volition decides in a year or two years or
23 whatever that commingling is not appropriate and it conducts
24 a proceeding and it decides to change the obligation and
25 eliminate it. If that's the case, it's not really a

1 judicial review that's occurred. It's simply the Commission
2 issuing a new order that eliminates an obligation.

3 COMMISSIONER MURRAY: That would be an
4 instance where perhaps they were upheld, but then later
5 decide that commingling should no longer be required?

6 MR. LANE: Yes.

7 COMMISSIONER MURRAY: Go ahead.

8 MR. LANE: A second potential alternative is
9 if the court does not reject the commingling obligation but
10 questions some aspect of it and sends it back to the FCC to
11 review or reconsider. In that case the obligation would
12 remain in effect while the FCC is reconsidering or reviewing
13 it. And if the FCC decides at that point to change or
14 eliminate the obligation, then on the effective date of the
15 Commission's order is when the obligation would cease. So
16 there's two possible circumstances.

17 COMMISSIONER MURRAY: All right. Thank you.
18 But then as to the effective date, is the Order final as of
19 the effective date?

20 MR. LANE: On the FCC's order, the Order is
21 final as of the effective date. That's when the parties
22 have to comply with it. If a party is in great disagreement
23 with what the FCC has ordered and they are able to take it
24 on appeal and get a stay of some sort, then the Order
25 wouldn't become effective at that point.

1 COMMISSIONER MURRAY: But this footnote does
2 not provide for that. It's just immediately upon whatever
3 the -- when the Order is issued, and it has an effective
4 date on it as it's issued, this would -- this provision
5 would take effect in this tariff, correct?

6 MR. LANE: I can understand that argument. I
7 don't think that's how it would be applied. I don't think
8 the Order would have become effective at that point, and so
9 we couldn't -- I don't think we could implement it.

10 But if it's -- if that's the concern, if we
11 say, unless stayed, I wouldn't have a problem with adding
12 unless stayed, but I don't think it's necessary because the
13 Commission's Order would never become effective if it is
14 stayed.

15 COMMISSIONER MURRAY: But if it were on appeal
16 and not stayed during the appeal, there would still be a
17 dispute as to whether this Commission Order was final, would
18 there not?

19 MR. LANE: It would be the exact same
20 circumstance that we're in now, that while the Order is in
21 effect, it must be complied with. So we'd be reversing the
22 situation and we're assuming that the FCC decided we're not
23 going to require commingling, well, that decision not to
24 require commingling would also be honored until and unless
25 something happens.

1 And if it does, then we would have to comply
2 with it at that time, just like we're complying with this
3 now, even though we're appealing it and asking that it be
4 reversed.

5 COMMISSIONER MURRAY: Okay.

6 MR. LANE: So the same thing would apply to
7 them. If they lose and the commingling obligation goes
8 away, they have to live with that. If they want to appeal
9 it, they have to live with it until it's reversed.

10 COMMISSIONER MURRAY: And then we get back
11 into the situation that Chairman Gaw raised earlier, where
12 we would be going from is required to not required to being
13 required again, assuming that the FCC were reversed at that
14 point, correct?

15 MR. LANE: Right. And my -- certainly it's
16 quite possible that we're into obviously far out
17 hypotheticals, in terms of time and years, but if the
18 Commission, I presume, would change some aspect of the
19 commingling obligation, if it were to reimpose it, then
20 parties would have to react to that. And I don't know that
21 this tariff that we have today would be -- what the
22 appropriate tariff would be in the case of some new order
23 down the line.

24 If we see back here on 5.1.1, there's a number
25 of provisions that, as Mr. Lumley noted, incorporate the

1 current rule, that current rule changes in some respect and
2 this tariff would have to be changed as well, and what we
3 would be doing would be filing an appropriate tariff to
4 implement this new FCC decision.

5 COMMISSIONER MURRAY: Okay. Thank you. And
6 Mr. Lumley and/or Mr. Comley, with regard to the reference
7 to the telephone company intrastate tariffs -- and I believe
8 Mr. Lane said this was collocation tariffs in Missouri -- do
9 you think that the specific tariffs should be referenced
10 here?

11 MR. LUMLEY: Yes, that's exactly our concern.
12 And if they change that language to say, if applicable to
13 collocation tariff, that would solve that concern. But
14 right now, it's -- it could be anything, and he even
15 admitted that he wasn't sure that it was only the
16 collocation tariff. And that's the kind of uncertainty that
17 we're concerned about.

18 COMMISSIONER MURRAY: And you're saying if it
19 said with -- interconnection agreement with the telephone
20 company or if applicable to the collocation tariffs, would
21 that resolve that concern?

22 MR. LUMLEY: It would solve our concern about
23 the reference to the tariffs. It wouldn't solve our concern
24 about the reference to the agreements.

25 COMMISSIONER MURRAY: Mr. Comley?

1 MR. COMLEY: Yes, that's exactly right.

2 COMMISSIONER MURRAY: I think that's all.

3 Thank you, Judge.

4 JUDGE DIPPELL: Thank you. Commissioner

5 Clayton?

6 COMMISSIONER CLAYTON: Good morning. I'm not

7 going to take too much more time here. I had some

8 elementary questions for the parties, and I think just to

9 start off, I'd like to address this to Mr. Lane, if at all

10 possible. And if something comes up that someone has an

11 interest, please speak up.

12 Is it a fair statement, Mr. Lane, that no

13 interconnection agreements now that involve SBC have any

14 language that relates to commingling?

15 MR. LANE: No, that would not be accurate.

16 COMMISSIONER CLAYTON: Okay. What

17 interconnection agreements would make reference to

18 commingling, or is it the reference is prohibiting

19 commingling?

20 MR. LANE: The latter.

21 COMMISSIONER CLAYTON: So then there would be

22 none that would authorize commingling basically?

23 MR. LANE: That's correct.

24 COMMISSIONER CLAYTON: Okay. Prior to the

25 triennial review, could you tell me, was commingling

1 permissible or impermissible? Was it possible in that
2 triennial review now mandates its availability, or was it
3 not permissible? Or -- I mean, if SBC wanted to do it,
4 could they do it?

5 MR. LANE: I would certainly say it was not
6 required. The interconnection agreements that existed said
7 that it wasn't permitted. If you're asking could we have
8 agreed to it even though it wasn't a requirement?

9 COMMISSIONER CLAYTON: Sure. If you wanted to
10 do it, could you do it?

11 MR. LANE: I assume that we would be able to
12 do that in the context of an interconnection agreement
13 brought to the Commission.

14 COMMISSIONER CLAYTON: Okay. Prior to the
15 TRO, are you aware of SBC having commingling on an
16 intrastate basis in any of its states?

17 MR. LANE: No.

18 COMMISSIONER CLAYTON: There's been a lot of
19 discussion regarding the tariff filed before the FCC that
20 was approved in one way or another. Would you explain to me
21 the difference between commingling on an interstate basis
22 versus as intrastate basis?

23 MR. LANE: I don't think there's a difference.
24 The only difference is that you have interstate services
25 that are offered under the interstate tariff that could be

1 commingled with.

2 COMMISSIONER CLAYTON: Could you give me some
3 examples and help me with a service that will cross state
4 lines that could be commingling, commingled?

5 MR. LANE: Okay. First of all, most of the
6 services that we offer wouldn't cross state lines. They
7 would be utilized by other carriers in connection with
8 communications that cross the state lines, and so that's why
9 they'd be ordered under the interstate tariff.

10 They're being used in connection with their
11 provision of interstate service. That's how access
12 generally works. If your -- if you're going to carry a long
13 distance call, you pay us access under the interstate
14 tariffs and it's an interstate call.

15 COMMISSIONER CLAYTON: So basically we're
16 talking the same thing with interstate versus intrastate
17 commingling?

18 MR. LANE: The services are the same. If you
19 had an intrastate special access service that you wanted to
20 commingle with an unbundled network element, then you'd need
21 to look at the intrastate tariff. As I said before, most of
22 these ordered are an interstate tariff, the vast majority of
23 them.

24 COMMISSIONER CLAYTON: Okay. Considering that
25 the FCC, if we assume or they have approved the federal

1 tariff, the interstate tariff, do we have the discretion to
2 reject the interstate? Do we have the legal ability to
3 reject it as being unlawful under state law or are we bound
4 by the FCC decision?

5 MR. LANE: I guess it depends on what you do.
6 I think that if you have a single circuit that is capable of
7 both, I'm not -- if it's inseparable service, then the
8 preemption rules would apply. I don't know whether that's
9 the case here or not. It may not be.

10 I do think you're bound to follow the FCC's
11 triennial review order decision, and that's made it clear, I
12 think, what you're supposed to do here.

13 COMMISSIONER CLAYTON: So the TRO mandates
14 that we approve the tariff?

15 MR. LANE: The TRO certainly mandates that we
16 file an interstate tariff under Footnote 1803 or 4 and,
17 obviously, you're going to have interstate tariff, then you
18 need to mirror it on the intrastate side. I clearly think
19 it's absolutely appropriate for you to approve it. I think
20 you may be required to -- we haven't really presented that
21 argument to you, except in the context of saying that you
22 can't do this, you can't make us put the terms and
23 conditions of all of this in the tariff itself, because the
24 FCC has decreed under the triennial review order that you're
25 to use the interconnection process for that.

1 I think in some areas you would be preempted,
2 but not necessarily in every area. I know that's
3 wishy-washy, but I think that's an accurate statement.

4 COMMISSIONER CLAYTON: I'm a politician. I
5 can handle it.

6 Section 583 of the TRO is the section that you
7 make reference to that mandates contemplation of commingling
8 in interconnection agreements; is that correct?

9 MR. LANE: That's the paragraph number of the
10 TRO that dictates that these process and billing issues are
11 to be resolved in interconnection agreement negotiations.

12 COMMISSIONER CLAYTON: The language that you
13 read made reference to amendments to interconnection
14 agreements in the same manner as in other changes in either
15 federal law or -- or changes in service, and I was wondering
16 if you could clarify exactly what section paragraph 583
17 says.

18 MR. LANE: I'll read the two sentences, and
19 then I'll answer what I think was the question. The last
20 two sentences of paragraph 583 say, finally we conclude that
21 the billing and operational issues raised by Verizon do not
22 warrant a personal commingling restriction, but instead can
23 be addressed through the same process that applies to other
24 changes in our unbundling requirements adopted herein, i.e.
25 Through change of law provisions in the interconnection

1 agreements. We expect the change of law provision will
2 afford incumbent LECs sufficient time to complete all
3 actions necessary to permit commingling.

4 The reference to the same process means that
5 under the TRO, all of the changes that are to be implemented
6 as a result of the decision are to be done via
7 interconnection agreements, and the Commission, FCC explains
8 that process in paragraph 700 through 706. And this says
9 commingling is to be treated like those other provisions.

10 COMMISSIONER CLAYTON: And what paragraph was
11 that?

12 MR. LUMLEY: That was paragraph 700.

13 MR. LANE: Paragraph 700 through 706 are the
14 operative paragraphs that tell us and you that you are to
15 make changes required by the TRO pursuant to interconnection
16 agreement changes.

17 COMMISSIONER CLAYTON: Can you give me an
18 example of another change that it would be referring to,
19 another change pursuant to the Order outside of the
20 commingling issue?

21 MR. LANE: Well, I should be able to. Let me
22 think a minute. I hadn't thought of it. Anything that's
23 required by the decision that's different from what the
24 rules had been.

25 COMMISSIONER CLAYTON: Can you give me a

1 specific example?

2 MR. LANE: Let's take, I guess, changed our
3 obligations with regard to the provision of broadband
4 service. And if to the extent it changed those obligations,
5 then we would need to implement back the interconnection
6 agreements change of law provisions and go from there.

7 COMMISSIONER CLAYTON: So -- and I'm not sure,
8 broadband is kind of a difficult issue on whether it
9 involves us or not, but did you have to file tariffs or
10 modify interconnection agreements with regard to broadband?

11 MR. LANE: We have not filed any tariffs.
12 That is not a service that's offered under tariffs. All of
13 the interconnection agreement materials are, other than
14 collocation, are not pursuant to tariff. They're pursuant
15 to 252 process.

16 I don't know where we stand in terms of
17 notifying all carriers. I do know that we have sent notices
18 to carriers other than those that had the M2A. We sent
19 notices out saying that we're invoking the change of law
20 provisions in your agreement to accomplish changes to X, Y
21 and Z as a result of the TRO and that those processes are
22 going through now.

23 COMMISSIONER CLAYTON: What occurs when you
24 invoke those change of law provisions? Does that involve
25 renegotiation of the particular issue in an interconnection

1 agreement?

2 MR. LANE: Yes. And then that has to be
3 brought to the Commission for approval, if we agree, and if
4 we don't, then it can be arbitrated by the Commission, if we
5 don't agree.

6 COMMISSIONER CLAYTON: Is this the first such
7 change since the TRO or have there been prior changes that
8 you-all have made either by invocation of change of law
9 clause or the other changes that's referenced there in
10 paragraph 583?

11 MR. LANE: This is the only tariff, and will
12 be the only tariff, as far as I know, that will be affected.

13 COMMISSIONER CLAYTON: So there's nothing else
14 like this; is that a fair statement? There are no other
15 issues that would involve the same process as this?

16 MR. LANE: No other issues that will involve
17 the interplay of a tariff and an interconnection agreement.

18 COMMISSIONER CLAYTON: I've got a lot of
19 questions on my notes and a lot of them have been answered
20 as we've gone along here.

21 I want to be clear from SBC's position of why
22 it feels that we shouldn't follow the normal process if the
23 TRO was reversed, why you shouldn't go through the normal
24 withdrawal tariff. And I just want to be clear on that.
25 Could you answer that again for me?

1 MR. LANE: Yes. The obligation to permit
2 commingling is one that's imposed only as a result of the
3 TRO, and that if the TRO goes away, then the tariff change
4 here should also go away to reflect that it's no longer
5 required. Absent having that in there, then it would be
6 either a short period of time, an extended period of time or
7 permanent, that we'd have to continue to do commingling
8 pursuant to the tariff.

9 COMMISSIONER CLAYTON: How much time would it
10 normally take if you filed a withdrawal tariff on a -- on
11 such an issue? I know this is a different issue, but what's
12 the normal time that it would take to actually end the
13 service?

14 MR. LANE: That is up to you. We would
15 file -- normally if you were doing a withdrawal you'd do it
16 on the same number of days.

17 COMMISSIONER CLAYTON: How long does that take
18 from your perspective?

19 MR. LANE: A week -- typically file, depending
20 on the service, on either a 10 or 30 days notice.

21 COMMISSIONER CLAYTON: Does it normally take
22 longer than 30 days?

23 MR. LANE: Yes, I mean, on the withdrawal
24 side, there's not a lot of tariffs that have been withdrawn.
25 I've been doing this particular job consecutively for the

1 last seven years and the only one that really comes to mind
2 is the Local Plus, and that did take more than 30 days.

3 COMMISSIONER CLAYTON: How long did that take?

4 MR. LANE: I don't remember. But -- and let
5 me say that it's not just the length of time. It's not even
6 absolute, right? That's -- that's the concern from our
7 perspective. It's not just a timing thing. If you don't
8 approve it, then the withdrawal doesn't take effect, but the
9 provision is here only because we're required to do it under
10 the TRO.

11 So if the TRO goes away, the provision ought
12 to go away. We shouldn't have to go through the process of
13 asking whether we can withdraw it and be subject to the
14 Commission telling us, you're going to do it anyway, even
15 though it's not a requirement under the TRO.

16 COMMISSIONER CLAYTON: So it's a matter of
17 concern that the Commission will not follow federal law; is
18 that the concern?

19 MR. LANE: I'd probably put it more
20 delicately, but --

21 COMMISSIONER CLAYTON: Well, put it more
22 delicately, then.

23 MR. LANE: I would say that our concern is
24 that we would not be permitted to have an immediate
25 withdrawal of a provision that exists solely because the FCC

1 has ordered it, and that Order becomes unlawful. Even --
2 you know, I don't know who will be here. I don't know when
3 this might occur, but I can assure you that it's likely that
4 carriers would object to the withdrawal of the tariff, just
5 like they're objecting to the provisions in this.

6 And if things hold true to form, typically
7 when somebody objects to a tariff, you wind up suspending it
8 for at least some period of time, typically, not always, in
9 order to inform yourselves, so that you know that you're
10 making the right decision.

11 You know, that's -- I understand that. But
12 from our perspective, making the tariff change only because
13 it's required under the TRO and we ought to have a provision
14 in there that says if the TRO goes away, the obligation goes
15 away. It's also appropriate to have something in the tariff
16 that says what happens at that point.

17 And we've taken care of that. We said, we'll
18 give you 30 days notice, you convert these back to some
19 special access service just like we have today. And if in
20 that period of time, if there's some claim that we're not
21 properly following the FCC or appellate court's decision,
22 I'll assure you that some carrier will object and you'll
23 have an opportunity to decide whether it's appropriate or
24 not. But in the first instance, it should be in the tariff.

25 COMMISSIONER CLAYTON: Can you think of any

1 other example? You've been in this industry for some time.
2 Can you think of any other example where there's an
3 automatic trigger for the ending of a service?

4 MR. LANE: The one that comes to mind -- the
5 only one that I have that comes to mind is the Local Plus.
6 It had a provision in there that if the use restrictions
7 changed, then that service was no longer available to
8 anybody else and would only continue for those existing
9 customers at existing locations because the use restrictions
10 were being complied with with regard to those customers.

11 COMMISSIONER CLAYTON: I don't think I have
12 any other questions.

13 JUDGE DIPPELL: Chairman Gaw?

14 CHAIRMAN GAW: Just hopefully briefly, Judge.

15 I want to follow up on the Local Plus issue
16 because I am -- I am a little confused about the --
17 Mr. Lane, your -- what I took to be a statement early on
18 that there was an automatic trigger. And I know that that
19 was the case in the original language that was -- that I
20 thought you said was rejected but that the Commission didn't
21 reach the issue about whether or not that was appropriate or
22 not to have an automatic trigger.

23 But then I thought you said that there was an
24 automatic trigger or implied that there was an automatic
25 trigger in the follow-up tariff.

1 MR. LANE: Right.

2 CHAIRMAN GAW: And yet I also heard you say, I
3 thought, that when the Local Plus issue came -- that it did
4 come before the Commission in regard to the removal of -- of
5 that service?

6 MR. LANE: Right.

7 CHAIRMAN GAW: So I'm --

8 MR. LANE: Do you want me to put it in
9 context?

10 CHAIRMAN GAW: I need a little bit of fill in
11 there, because it's not tying together for me.

12 MR. LANE: The provision to which carriers had
13 objected in the Local Plus tariff was one that said that --
14 and I'll read the sentence. This tariff shall only be
15 effective as long as the use restrictions and the rules and
16 regulations in this tariff remain in effect for all users,
17 including any exchange telecommunications company or other
18 company reselling this service and their customers. In the
19 event any of these use restrictions or rules and regulations
20 are held not to apply to all such users, upon notification
21 by the telephone company to the Commission, this tariff
22 shall not be available except to existing subscribers of the
23 service at existing service levels at existing locations.
24 SWBT shall also have the right to withdraw this service
25 offering in its entirety.

1 So the provision that was questioned was one
2 that said that the tariff goes away as to any new customers
3 at any new locations if it's ever determined that we have to
4 let carriers resell it without a restriction that says one
5 customer only. The specific concern that we had, as I said
6 before, was that we didn't want to get into a situation
7 where a carrier claimed that it could aggregate two dozen
8 customers and serve them with one Local Plus line. We knew
9 that that service was not financially viable at that point.

10 So when we filed the tariff, we included that
11 provision. The parties objected to it. The Commission
12 said, well, we're not going to decide it because we're
13 rejecting this tariff. But when we refiled it with the same
14 language in it, the Commission approved the tariff. Now,
15 when it came time to withdraw the tariff --

16 COMMISSIONER GAW: I know that you don't
17 believe there's probably any difference, but did the
18 Commission approve it with an Order or was it allowed to go
19 into effect?

20 MR. LANE: Honestly, I don't remember.

21 CHAIRMAN GAW: That's okay. Go ahead.

22 MR. LANE: When it came time to withdraw the
23 service, the reason that we filed to withdraw it was because
24 we were not invoking that particular clause. There's been
25 no change in the use restriction issue, the aggregation

1 issue that we were concerned about. Had that happened, then
2 it would have happened automatically. Instead it was other
3 concerns that led us to withdraw the tariff.

4 The other concerns were what I described. It
5 was being used for purposes that we didn't expect it to be
6 used, and it was very harmful financially to us.

7 CHAIRMAN GAW: Does Bell believe that all
8 tariffs have to have a specific beginning date?

9 MR. LANE: Yes. I mean, that's -- I think
10 that's statutory. You have to file it with an effective
11 date.

12 CHAIRMAN GAW: Yes. And within those -- and
13 within the tariffs that are filed, does Bell believe that
14 there's any similar requirement that they have a specific
15 ending date?

16 MR. LANE: Not a requirement.

17 CHAIRMAN GAW: So in regard to terminating a
18 tariff, if there is no ending date that's mentioned, then
19 normally, barring some special language, the tariff would go
20 on indefinitely unless it's withdrawn?

21 MR. LANE: Correct.

22 CHAIRMAN GAW: But it could also include a
23 specific ending date?

24 MR. LANE: Correct.

25 CHAIRMAN GAW: And in both of those cases,

1 there would be notice in the tariff of either the fact --
2 there would have to be notice that would be given by either
3 an action by Bell to specifically withdraw a tariff with no
4 ending date on one hand, by doing something, by filing
5 another tariff that would take it out of existence?

6 MR. LANE: You'd have to file -- the existing
7 tariff that you were going to withdraw doesn't have to say,
8 I can withdraw this if I ask the Commission.

9 CHAIRMAN GAW: No, it doesn't say that, but in
10 order to do that --

11 MR. LANE: But in order to accomplish it,
12 yeah.

13 CHAIRMAN GAW: -- you have to file something
14 else?

15 MR. LANE: Right.

16 CHAIRMAN GAW: And if there is a specific
17 ending date, if you change that, you have to file something
18 else?

19 MR. LANE: Right.

20 CHAIRMAN GAW: Won't extend it?

21 MR. LANE: Yes.

22 CHAIRMAN GAW: But in this case there would be
23 no --

24 MR. LANE: Or extend the effective date.

25 CHAIRMAN GAW: In this case, there would be

1 nothing -- in both of those situations, the Commission would
2 have a review of that, it would be in front of the
3 Commission if there was -- if the Commission chose to take
4 some action?

5 MR. LANE: In both cases? I know the one.
6 I'm not sure both.

7 CHAIRMAN GAW: If you had to file something
8 new or if you wanted to extend or change the termination?

9 MR. LANE: Oh, yeah. Yes. I'm sorry. Yes.

10 CHAIRMAN GAW: And we would know the specific
11 termination date in the original filing, since it would be
12 included if that were -- if there were a termination date
13 included.

14 MR. LANE: Yes.

15 CHAIRMAN GAW: But in this case we will not --
16 this is the only time that I can think of that we would not
17 either be approving the specific time of its ending or we
18 would be reviewing whether or not a new tariff should come
19 into effect that would end an existing tariff?

20 MR. LANE: You're approving it, that the
21 withdrawal would take place on the occurrence of the
22 specific event, which is what happened in the Local Plus
23 case, when you approved a tariff that said, you can't apply
24 it to any new customers or any new locations if the use
25 restrictions change. So you approved or allowed to go into

1 effect, whichever it was, and whatever. I'm not sure
2 there's a distinction there, but I -- I think not everybody
3 agrees with that.

4 But in either case, that was allowed to go
5 into effect with an event that could occur in the future,
6 approving the withdrawal of the service as to new customers
7 in that case upon the happening of an event in the future.
8 And this is the same as that. It's an event that could
9 happen in the future that you're approving the withdrawal.

10 CHAIRMAN GAW: Do you believe that this
11 so-called event that could happen would be so crystal clear
12 as the sun coming up in the morning? In other words, there
13 would be no disagreement about whether or not the sun was
14 rising over the horizon?

15 MR. LANE: Yes, I think it's that clear.

16 CHAIRMAN GAW: There's not any room for people
17 to suggest, well, the wording is not exactly the same in
18 this new order? There's been some adjustment, some
19 modification to this provision so that there's some dispute
20 about whether or not this is really something that's been
21 rejected or if it's something that's really just a
22 modification, but it doesn't rise to that level?

23 MR. LANE: The issuance of a court mandate is
24 a pretty clear event.

25 CHAIRMAN GAW: So you don't think there's any

1 grounds or any possibility that the parties would be
2 disputing the effect of what occurs where they would need
3 some -- somebody like this Commission to decide whether or
4 not indeed this right was gone away?

5 MR. LANE: I don't think so, but obviously
6 we've got the same tariff at the FCC, and if the FCC doesn't
7 agree, people can take their complaint there if they have
8 one, or they take can it to you under the intrastate tariff,
9 if they have one. That's what -- 30 days provision when we
10 convert, that's there for you to review and to determine at
11 that point if there's really any legitimate question.

12 And let me say what, you know, a real concern
13 that I have is, is that there may be complete agreement that
14 the federal tariff requires it. I mean, the federal
15 rescission requires it. It really has gone away. If we
16 don't have this provision in here, I will almost guarantee
17 that we will have carriers that come in and say, well, I
18 agree that it went away for federal purposes, but you've got
19 the authority and you should order this under state law.

20 And we've seen examples of that in the case
21 with regard to broadband, where parties are trying to
22 contend -- I don't think there's any pending before you --
23 but parties are contending that, hey, we know the federal
24 law and the TRO took it away but, by golly, let's make them
25 do it under state law. And people have filed pleadings with

1 you to that effect.

2 So that's one thing we don't want is to now
3 face -- only because we've got a federal obligation to
4 do so, it should go away.

5 CHAIRMAN GAW: And I understand why you would
6 be in that position, but you're asking -- it appears to me
7 that you're asking this Commission to give up our right to
8 look at these things in most of the cases so that your
9 concerns are satisfied.

10 That's what's bothering me about this more
11 than -- because if I understand you correctly, even though a
12 complaint could be filed within that 30 days, in order to --
13 if the Commission were to see some merit to that -- and I
14 don't know that there could be a scenario where that would
15 happen, but if they did -- if we did, we would have to act
16 within that 30-day period in order to prevent the
17 disconnection of this commingling.

18 MR. LANE: Right. I agree with that. And I
19 would say, though, that this provision is there only because
20 there's an obligation in the TRO, and if that obligation
21 goes away, so should this.

22 And to the extent you have a period of time to
23 act, you'd have the same period of time to act on a notice
24 of withdrawal, right? If we -- if we didn't have this
25 provision in here and we've just filed a notice of

1 withdrawal, you'd have 30 days to decide whether you
2 permitted that to be withdrawn or not, right?

3 CHAIRMAN GAW: But we could extend that, could
4 we not?

5 MR. LANE: Yeah. You can suspend the tariff,
6 is what you can --

7 CHAIRMAN GAW: Yes, that's what I'm saying.

8 MR. LANE: Suspend the notice of withdrawal.

9 CHAIRMAN GAW: But under this, we wouldn't
10 have that option. That's the distinction I'm seeing.

11 MR. LANE: I don't disagree with the
12 distinction, but I don't think that that should be a concern
13 because it is here only because it's a federal obligation,
14 and if the federal obligation goes away, so should the
15 tariff provision.

16 CHAIRMAN GAW: And I'm not -- I don't think
17 we're disputing that issue, although I know you have some
18 concerns that some states have gone down that path.

19 MR. LANE: Right.

20 CHAIRMAN GAW: But in this case, it does put
21 us in a position where we're giving up what we normally
22 would have, would retain normally.

23 MR. LANE: Actually, like in the Local Plus
24 you're deciding, yes, if this event occurs, I will permit it
25 to be withdrawn. That's what you're being asked to approve.

1 And if there -- and so I don't know that that is any
2 different six months from now or nine months from now,
3 right? You still say, well, okay, it's not required, so --
4 and I'm not sure why you would undergo a different analysis
5 or process unless there was some desire to continue to
6 impose it.

7 CHAIRMAN GAW: I can't speak for why they
8 allowed it on the first one, on the Local Plus. I can't
9 speak to that, but I am -- I guess I'm just trying to make
10 sure I understand what we would be doing here, and whether
11 or not there are any potential ramifications to that that
12 would cause me to think there could be some possibility that
13 it would be appropriate for us to review what really has
14 taken place and evaluate whether or not what Bell believes
15 is the case is really the case, if other parties are
16 disagreeing.

17 MR. LANE: I'll say this, that I can't imagine
18 this happening. To me, it's going to be absolutely 100
19 percent clear, but if it's not, right, if it's not clear, if
20 the commingling didn't go away, then the tariff obligation
21 is still there and we've acted appropriately because the
22 condition subsequent never occurred, right?

23 CHAIRMAN GAW: Well, that's what's not clear
24 to me here about whether that is the case with this tariff
25 language in part, is whether or not there is -- this is --

1 this is allowing this to be a unilateral decision about how
2 to interpret what's happened at the federal level.

3 MR. LANE: I don't think there's any
4 unilateral interpretation at all. It says that it's
5 vacated, it goes away, the obligation is gone, and it lists
6 how that can occur.

7 If that doesn't happen, if that obligation
8 didn't go away, then this tariff provision, this footnote
9 does not come into effect and we are still obligated. And
10 then if we have failed to do something that we were still
11 obligated to do, carriers have all the remedies that they
12 would have against us at this point.

13 So it's not a unilateral decision. I don't
14 agree with those that have characterized it that way.
15 Because if we're wrong, the tariff never went away. And
16 who's going to decide if we were wrong, either you or the
17 FCC, okay?

18 CHAIRMAN GAW: Well, I understand your
19 position. Thank you, Mr. Lane.

20 Is there a need to respond to that?

21 JUDGE DIPPELL: Mr. Lumley?

22 MR. LUMLEY: Actually, I had a few quick
23 responses to Commissioner Clayton's questions. He was in a
24 flow of questions and I didn't want to interrupt. I can
25 wait on that, too.

1 JUDGE DIPPELL: Why don't you go ahead and
2 respond, Mr. Lumley?

3 CHAIRMAN GAW: If he could respond to whether
4 or not there's any response to my questions first.
5 Commissioner Clayton has some additional questions anyway.

6 MR. LUMLEY: One of my responses is actually
7 to your line of questions, too, and the bottom line point,
8 and you've been underscoring it, is that it's a question of
9 who decides it's the right time for it to go away. Under
10 the tariff, they get to decide in the first instance, under
11 the proposed tariff. Under normal procedures, you would get
12 to decide in the first instance.

13 The other aspect of it is, who gets to decide
14 how much time it takes? Under the proposed tariff it's 30
15 days. You'd be preapproving that. Under normal conditions,
16 you would decide how much time you have to make the
17 decision.

18 Additionally, the very first question
19 Commissioner Clayton asked was what -- what provisions of
20 interconnection agreements deal with commingling? I want
21 you to understand that our position is all of the
22 combination provisions deal with commingling, because it's
23 another form of combinations. So we don't agree that it's
24 just that one sentence, prohibition. We think there are
25 substantial provisions that deal with what needs to happen.

1 You asked whether you have the legal authority
2 to reject this tariff. We say absolutely. It's an
3 interstate tariff. It's in your jurisdiction. We've raised
4 questions about the clarity and the meaning of language, and
5 it's clearly your authority to decide these kind of issues.

6 And, finally, there was a discussion again
7 about paragraph 583 of the TRO. Again I want to emphasize
8 that that language, the FCC acknowledged that there can be
9 issues to be resolved in interconnection agreements. It did
10 not say that there are any specific issues that must be. It
11 left that for future determination by you for Missouri as to
12 whether or not agreements need to be changed.

13 CHAIRMAN GAW: I'm done. Thank you.

14 JUDGE DIPPELL: Commissioner Clayton, you said
15 you had some additional questions?

16 COMMISSIONER CLAYTON: Can you think of any
17 other examples in paragraph 583 that there's this other
18 changes language that are in there? Would you agree with
19 Mr. Lane that there are -- really there are no examples that
20 would be similar to this case?

21 MR. LUMLEY: I would think, for the most part,
22 we're talking about obligations that are dealt with in
23 interconnection agreements. In this instance, since we're
24 talking about commingling tariff services with unbundled
25 elements, it is the instance that raises this -- this dual

1 track that we're wrestling with.

2 I can't sit here today and rule out the
3 possibility of collocation issues, since we have a
4 collocation tariff. I can't think of an example, but it's
5 certainly a possibility.

6 COMMISSIONER CLAYTON: I know you have several
7 concerns with this tariff, but I just want to focus on this
8 question at the start, the concern of this indirect delay
9 which I think is kind of what you suggested earlier. Is
10 that a fair characterization?

11 MR. LUMLEY: Yes.

12 COMMISSIONER CLAYTON: Or possibility of
13 delay, I guess would be a way to characterize it. Explain
14 to me again, what is your request or your suggestion? I
15 know you want us to reject this tariff, but how do you want
16 the tariff to read with regard to implementation of the
17 commingling? Do you want a time limit of when it has to be
18 done? Do you want specific language, terms? Could you
19 elaborate on that?

20 MR. LUMLEY: Our concerns would be dealt with
21 by deleting the three lines, the last three lines in
22 Section 5 -- the first paragraph of Section 5.1.1 that refer
23 to unstated restrictions and agreements in tariffs and
24 eliminating the footnote. It appears on several pages, but
25 it's the same text over and over again.

1 We're not asking you to reject the tariff
2 forever. We're asking you to reject the tariff in its
3 present form. With those items deleted, our concerns would
4 be eliminated. Now --

5 COMMISSIONER CLAYTON: So just focusing on the
6 implementation, before we get to the end, if commingling is
7 reversed, you'd want to delete the last three lines relating
8 to interconnection agreements?

9 MR. LUMLEY: And unidentified intrastate
10 tariffs, right. And as I indicated before in responding to
11 questions from Commissioner Murray, if the deletion of that
12 language causes Southwestern Bell to feel they need to
13 propose additional terms and conditions, we understand they
14 have the right to do that. We'd want to see what it says,
15 but we're not purporting to foreclose that opportunity.
16 We're just objecting to this particular language.

17 COMMISSIONER CLAYTON: Okay. Regarding the
18 footnote, I know that you are opposed to language also with
19 regard to the 30 days and the automatic unilateral triggers,
20 as you make reference to that.

21 Would your client be agreeable if the time
22 were expanded to a certain amount of time by keeping the
23 automatic trigger? For example, instead of 30 days, if we
24 were to move it to 60 days or 90 days or if we were -- if
25 the tariff included language for that extended time but

1 continued to have the automatic trigger, would that change
2 your position with regard to the footnote?

3 MR. LUMLEY: No, it wouldn't, because that's
4 not really what we're focused on, because we understand that
5 under normal tariff provisions you could take this away on
6 30 days notice. Our objection is that they get to decide to
7 send the notice of termination instead of filing a tariff
8 change with you and, secondly, they get to decide whether to
9 send that notice to everybody at the same time or just send
10 it to different people at different times.

11 COMMISSIONER CLAYTON: Is there a remedy -- if
12 you were to feel that the unilateral decision to do -- to
13 end that service, the commingling, would your client have a
14 remedy if this tariff were to go through at that point?

15 MR. LUMLEY: I believe we'd have a remedy, but
16 it would be the typical kind of legal remedy where you get
17 your answer but it hasn't really solved the problems you've
18 experienced up to the date of the answer. It may fix it
19 going forward, but you'll still -- if we're proven right and
20 they inappropriately terminated this, we'll have gone
21 through all the problems of switching back and forth between
22 things.

23 COMMISSIONER CLAYTON: Can you think of any
24 other example where you have a change in -- in federal law
25 or, I guess, state law, change anywhere in the law where

1 there's a mandate of one company to allow for certain
2 service to another company? Could you -- any similarity of
3 where -- another example of where this is done in the
4 industry, where there's -- where a change in federal law
5 mandates this commingling, and if it is undone, then there's
6 no mandatory right? Why should it continue on through the
7 normal tariff process? Shouldn't it end automatically where
8 there's no mandatory order to have it?

9 MR. LUMLEY: If it's an indisputable end, I
10 agree with it, but it gets back to the questions that the
11 Chairman was asking, what happens if an Order comes out that
12 they cling to some ambiguous language as being their
13 salvation and ending their obligation and we totally
14 disagree? We want you to decide who's right, instead of
15 them deciding who's right.

16 COMMISSIONER CLAYTON: How many provisions in
17 the TRO would make reference to commingling? Just many, a
18 few, a lot?

19 MR. LUMLEY: In terms of the paragraphs
20 discussion or the rules?

21 CHAIRMAN CLAYTON: That would affect -- that
22 would affect this automatic trigger.

23 MR. LUMLEY: As I sit here specifically, I
24 believe there's two rules. The most direct is 51.309, which
25 says they have to allow commingling, and then 51.318, which

1 contains the language they've duplicated in their proposed
2 tariff.

3 But if you're speaking of the full text of
4 the -- I mean, the decision is as thick as the binder Mr.
5 Lane held up earlier regarding the first half of the M2A,
6 and I think the parties have specifically identified the
7 most pertinent ones, but there are surrounding paragraphs
8 around 583 where they're engaged in the discussion of why
9 they are requiring commingling.

10 COMMISSIONER CLAYTON: Does anyone have
11 anything else? Anything to add? Mark, if you don't, that's
12 fine.

13 MR. COMLEY: I was -- one thought came to
14 mind, and I -- Mr. Lane has talked about how they would
15 prefer to have the flexibility of making the claim, and
16 they're worried about people coming back at the time they
17 file a discontinuance tariff and then trying to prolong it
18 and you saying you have authority under state law to
19 continue it.

20 The thought came to mind, why not have a
21 substitute clause in there that you would approve and it
22 would say that this tariff -- Southwestern Bell reserves the
23 right to withdraw this tariff upon a final and unappealable
24 decision that commingling is prohibited by law.

25 In that case, you have already preordained

1 that it could be withdrawn. It's just that at some point
2 you'd have to decide the date. That's one thing. I tend to
3 think there's a forge of a compromise perhaps at stake here.
4 I haven't talked with AT&T about that, but at least that's
5 one way of identifying language that could solve both
6 interests.

7 I can't think. I think Mr. Lumley has taken
8 care of a number of the concerns of your questions. I'm
9 grateful.

10 COMMISSIONER CLAYTON: Staff, do you-all have
11 anything to add?

12 MR. POSTON: No.

13 COMMISSIONER CLAYTON: Do you have anything to
14 add, Mr. Dandino?

15 MR. DANDINO: No, sir.

16 COMMISSIONER CLAYTON: No other questions.
17 Thank you.

18 JUDGE DIPPELL: Commissioner Murray, do you
19 have additional questions?

20 COMMISSIONER MURRAY: Just a little bit of
21 follow-up.

22 Mr. Comley, thank you for your suggestion just
23 now. That sounds like an interesting proposal there. And
24 I'd like to ask the other -- I know he just proposed it so
25 it's kind of hard to know a definitive answer, but

1 Mr. Lumley, what would you think of that?

2 MR. LUMLEY: Sitting here, I don't have an
3 objection to that concept because you would -- you would be
4 in control still as to whether the withdrawal was
5 appropriate and over what time.

6 But in terms of their concern about trying to
7 reimpose the obligation in another way, that's not what I'm
8 trying to accomplish. I'm just trying to make sure that the
9 right we just gained isn't withdrawn improperly.

10 I can understand if you-all felt comfortable
11 saying, MCI, if the tariff says this was based on federal
12 law, we're telling Southwestern Bell right now that if they
13 show us the federal law changed, we're going to let them
14 withdraw it, I can live with that. I can still come forward
15 with you then and make any new proposal I might have. I'm
16 not trying to gain that advantage.

17 JUDGE DIPPELL: Mr. Lane, do you have --

18 MR. LANE: I don't think that resolves our
19 concerns, Commissioner. First, I'm not sure the Commission
20 would be -- it sounds like Mr. Comley is suggesting that you
21 issue a decision now that would say that you will
22 automatically approve within X number of days a withdrawal
23 of the tariff if Event A happens. And I'm not sure that you
24 can lawfully make that decision, but maybe I misunderstood
25 him.

1 COMMISSIONER MURRAY: I can't speak for
2 Mr. Comley, but that wasn't what I understood. I understood
3 you had the right to withdrawal, but that you had to seek
4 approval for withdrawal.

5 MR. LANE: We always have the right to seek to
6 withdraw a tariff, and the concern is that it wouldn't be
7 approved, right?

8 COMMISSIONER MURRAY: Well, okay. I
9 understand then what you're saying.

10 MR. LANE: I don't think Mr. Comley's
11 suggestion resolves that.

12 MR. COMLEY: I did my best.

13 COMMISSIONER MURRAY: One more question, and
14 this would be for you again, Mr. Lane. The language that we
15 talked about earlier regarding 5.1.1, paragraph 1,
16 referencing the telephone company's interstate tariffs that
17 would change to -- if applicable, to the company's
18 collocation tariffs, would that be something that SBC would
19 think would be acceptable or would that -- would that change
20 what you're referencing here?

21 MR. LANE: I honestly am not sure about that.
22 The only one I can think of was the collocation tariff.
23 There may be other tariff provisions that apply that don't
24 come to mind immediately, but I don't -- from our
25 perspective it's not a necessary change, because those

1 tariffs are out there today.

2 COMMISSIONER MURRAY: Thank you. That's all,
3 Judge.

4 JUDGE DIPPELL: Chairman Gaw?

5 CHAIRMAN GAW: Just to follow up. Mr. Lane, I
6 understood that the issue -- the suggestion was made by
7 AT&T's counsel to suggest that they were decoupling or at
8 least that possibility would exist that there would not be
9 this other issue about whether or not the tariff should be
10 continued, based upon this state's refusal to go along with
11 what the federal determination had been, and that that was
12 decoupling or eliminating that portion of the issue from the
13 discussion at some future withdrawal, and that the only
14 review by the Commission under that circumstance, then, on
15 the withdrawal would have to do with whether or not, indeed,
16 that Order had become final or that determination had been
17 made, rather.

18 And I don't know if that has any impact at all
19 on your opinion or whether you interpreted it differently,
20 but I just throw it out there in case you have a comment.

21 MR. LANE: What we're asking is that you make
22 the decision now to approve the withdrawal of this upon the
23 happening of an event in the future. And if I'm following
24 what your question is, that sounds like that's kind of like
25 what AT&T is proposing, but there's no guarantee that the

1 proceeding would be limited to that, and I don't see how
2 that -- if that's -- if the concern really is or if the
3 offer really is, hey, we understand that if this goes away,
4 if the law changes, if this goes away, that's exactly what
5 our tariff does. And if somebody disagrees that the law
6 didn't change, you still have to do it because that law
7 didn't change. The TRO is still in effect. They can take
8 that to the FCC and they can take that to you.

9 So I think that what we've proposed is the
10 best way to handle what I think is a real non-issue. I
11 think it's highly speculative to claim that there might be
12 some dispute about whether a TRO really went away or not.

13 You either have a mandate from the court or
14 you have an FCC Order that says just that, and we can't act
15 until it does, and it's our liability and our risk if we're
16 somehow wrong.

17 CHAIRMAN GAW: I just -- since you had made
18 that argument earlier that that was one of the rationales
19 for why you wanted to do this, I wanted to check to see
20 whether that was the only reason, in the event the
21 Commission made a determination, that that would eliminate
22 that as a concern.

23 MR. LANE: I don't see -- you know, if the
24 Commission makes the decision today and approves the tariff,
25 if they can do that, but I don't know that this Commission

1 can bind a future Commission to assure us that they will --
2 the future Commission will permit the tariff to be withdrawn
3 upon the finding of that. I don't think you have that
4 ability to assure that, just like you're not bound to follow
5 all of the decisions that were made by past commissions and
6 you can have a different position going forward. Stare
7 decisis doesn't apply.

8 CHAIRMAN GAW: I understand. I understand.
9 Of course, the terms of the tariff, I suppose, would then
10 be -- could also be subject to interpretation about what was
11 intended also by some future Commission and -- at least
12 that's what you're suggesting?

13 MR. LANE: Yes.

14 CHAIRMAN GAW: All right. That's all I have.

15 JUDGE DIPPELL: Any other Commission
16 questions, Commissioner Murray? Commissioner Clayton?

17 (No response.)

18 JUDGE DIPPELL: I have just a few more. I
19 hope they're kind of housekeeping-type questions but,
20 Mr. Lane, in your opening remarks you said that the Order
21 doesn't require you to change your intrastate tariffs, but
22 that there's a requirement that you do so. Is that a
23 particular -- are you talking about a particular law or
24 order or is it just general --

25 MR. LANE: I'm not sure if I follow your

1 question, but let me say this --

2 JUDGE DIPPELL: What requires you to make this
3 filing, this tariff filing?

4 MR. LANE: I'm not sure that it's mandated by
5 the TRO. The TRO in Footnote 1803 or 1804, I forget which
6 one, mandated the filing of interstate tariff, I guess the
7 question is whether one would interpret that as requiring
8 comparable tariff changes on the intrastate side or not. I
9 suppose one could come to different views on that, but
10 obviously we felt it was appropriate to do so, given that
11 we've done so at the FCC pursuant to 1803 or 1804, whichever
12 one it is.

13 JUDGE DIPPELL: I just wondered if there was a
14 specific requirement that I had missed.

15 MR. LUMLEY: Our response to that would be
16 that the new rule which requires them to permit commingling
17 would require them to eliminate restrictions from their
18 intrastate tariff.

19 JUDGE DIPPELL: That was going to be my next
20 question, Mr. Lumley. Does the current tariff prohibit it?

21 MR. LUMLEY: That's my impression. I can't
22 say I validated that. That's my -- I could be wrong. I
23 haven't looked at it recently.

24 JUDGE DIPPELL: Mr. Lane?

25 MR. LANE: I don't have specific information

1 on that.

2 JUDGE DIPPELL: So this particular -- these
3 particular tariff pages aren't specifically replacing
4 provisions in the tariff that are prohibiting commingling?

5 MR. LANE: It's added text in that respect.
6 In our view, the tariff wouldn't permit it. If it doesn't
7 have an express prohibition, it still wouldn't be permitted
8 under the tariff because it imposes a different set of
9 rights and obligations than the tariff contemplates.

10 JUDGE DIPPELL: I understand. And is that
11 Staff's understanding of what the current -- the current
12 tariff is basically silent on this issue?

13 MR. POSTON: I'm not aware of what the current
14 tariff says about commingling.

15 JUDGE DIPPELL: I see some heads nodding.
16 Mr. Lumley, is that --

17 MR. LUMLEY: I'm agreeing with Mr. Lane that
18 whether prohibited or silent, we need to make the change to
19 comply with the rule.

20 JUDGE DIPPELL: Okay. And then, Mr. Lumley,
21 you talked about -- well, one time we were talking about the
22 terms and conditions. Do the terms and conditions of
23 providing commingling, does that include the price?

24 MR. LUMLEY: No.

25 JUDGE DIPPELL: Where are the prices found?

1 MR. LUMLEY: Prices for the access facilities
2 would still be in the access tariff, and the price for
3 unbundled elements would be in the interconnection
4 agreement, and the FCC actually rejected efforts to try and
5 blend those rates together.

6 JUDGE DIPPELL: Okay. So if the tariff de--
7 if the language is deleted, if the tariff reads just simply
8 it's available, where would you find the price? Would you
9 have to negotiate that or would you look to the access
10 tariff?

11 MR. LUMLEY: The price for the facility would
12 be in the access tariff and it's not changing.

13 JUDGE DIPPELL: Okay. This is showing my
14 ignorance of exactly what commingling is, about some very
15 basic things, but I want to get them clear.

16 And, Mr. Lane, just out of curiosity, what has
17 SBC done in its other states as regard to intrastate
18 tariffs? Are you filing this type of tariff language in all
19 of SBC's states?

20 MR. LANE: I don't have specific knowledge.
21 As far as I know, I'm assuming that that's the case, but I
22 don't have knowledge of what we've done in every other
23 state.

24 JUDGE DIPPELL: And does MCI or AT&T have any
25 knowledge of any other state proceedings?

1 MR. LUMLEY: Not specifically.

2 JUDGE DIPPELL: And, Mr. Lumley, are you aware
3 of -- are these arguments that are being made before the
4 Commission now, were those arguments made in the objections
5 to the FCC or were they different arguments?

6 MR. LUMLEY: The written arguments were
7 essentially the same and the same basic points were
8 presented. They certainly weren't aired to this extent with
9 this kind of interchange of ideas, but the same basic points
10 were raised.

11 JUDGE DIPPELL: And Mr. Comley?

12 MR. COMLEY: That's my understanding, yes.

13 JUDGE DIPPELL: And, Mr. Lumley, you cited to
14 the Commission's rule, and I just want to make sure that I'm
15 looking at the same place you are. In Chapter 3.545,
16 section 11(E)?

17 MR. LUMLEY: Right, and 12(L). Refer to
18 cross-references to other tariffs and require those to be
19 clear in understanding.

20 JUDGE DIPPELL: Show me in section 11(E)
21 where -- I'm trying to follow you on that.

22 MR. LUMLEY: 11(E) says when referring to
23 different schedules you're supposed to clearly identify what
24 schedule you're referring to, and then 12(L) has similar
25 language about clear reference.

1 JUDGE DIPPELL: Okay. And are you looking at
2 a version of the Code of State Regulations published on what
3 date?
4 MR. LUMLEY: March 31st of '03 is the date on
5 this page.
6 JUDGE DIPPELL: And just a question for Staff.
7 Other than the LP tariff that's the Local Plus tariff that
8 was referenced, is Staff aware of any other tariff where
9 there's been any kind of automatic change provision?
10 MR. POSTON: Not to our knowledge.
11 JUDGE DIPPELL: And, Mr. Lane, does SBC have
12 interconnection agreements out there that are silent as to
13 commingling? I understand the M2A agreements have a
14 prohibition currently. Are there other interconnection
15 agreements that SBC has that would be silent as to
16 commingling?
17 MR. LANE: I think that there may be, yes, but
18 I don't know that absolutely.
19 JUDGE DIPPELL: And, Mr. Comley, is AT&T's
20 agreement with SBC, is it an M2A agreement or is it --
21 MR. COMLEY: Yes, it's an M2A agreement and
22 commingling is prohibited.
23 JUDGE DIPPELL: And, Mr. Lumley, MCI's
24 agreement is also an M2A agreement?
25 MR. LUMLEY: It has arbitrated provisions but

1 that provision has M2A language.

2 JUDGE DIPPELL: Okay. I believe that is all
3 the questions I have. Is there anything further from any of
4 the Commissioners?

5 (No response.)

6 JUDGE DIPPELL: All right. I believe that
7 will conclude our oral arguments and basic question and
8 answer session. Thank you-all very much for your
9 participation. We can go off the record.

10 WHEREUPON, the oral arguments in this case
11 were concluded.

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