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IN THE  
**Supreme Court of Virginia**

RECORD NO. 002873

**DECIPHER, INC.,**

*Appellant,*

v.

**iTRiBE, INC.,**

*Appellee.*

**JOINT APPENDIX**

**John B. Farmer**  
**McCANDLISH KAINE, PC**  
1111 East Main Street, Suite 1500  
Post Office Box 796 (23218)  
Richmond, Virginia 23219  
(804) 775-3895

*Counsel for Appellant*

**Barry Dorans**  
**WOLCOTT, RIVERS, WHEARY,**  
**BASNIGHT & KELLY, P.C.**  
One Columbus Center, Suite 1100  
Virginia Beach, Virginia 23562-6765  
(757) 497-6633

*Counsel for Appellee*



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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

iTRiBE, Inc.

Plaintiff,

v.

AT LAW NO. **L99-1311**

DECIPHER, INC.

Please Serve: Anthony F. Vittone, Registered Agent  
1111 East Main St. Suite 1500  
Richmond, VA 23219

Defendant

**MOTION FOR JUDGMENT**

The Plaintiff, iTRiBE, Inc. by counsel, states as its motion for judgment  
against Decipher, Inc. as follows:

1. iTRiBE provides Internet connectivity for various entities as part of its business.
2. That Decipher, Inc. entered into a contract on or about February 24, 1997 whereby it agreed to purchase Internet connectivity for a period of five years at a monthly fee of \$3,200.00 per month. A true copy of that contract is attached hereto as Exhibit A.
3. That iTRiBE performed all its obligations under the contract.
4. That on or about December 1, 1998, Decipher terminated the contract.
5. The contract specifically provided that the discounted monthly fee was offered to the defendant due to the fact that the contract was five years.

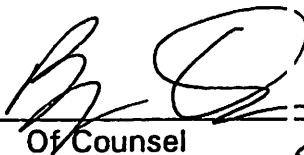
BY: \_\_\_\_\_  
CIRCUIT COURT OF THE CITY OF NORFOLK  
1999 JUN -3 PM 12:23  
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The contract further provided that should the service be terminated early, that the subscriber was required to pay fifty percent (50%) of the monthly recurring fee for the months remaining under the service, together with all outstanding fees for service actually accrued prior to the date of termination.

6. That based on the 38 months then remaining under the contract, as of the date of termination, Decipher is indebted to iTRiBE in the amount of \$60,800.00.

WHEREFORE, iTRiBE prays for judgment against Decipher, Inc. in the amount of \$60,800.00 plus interest and attorney's fees and court costs.

iTRiBE, Inc.

By   
Of Counsel

Barry Dorans, Esquire  
Wolcott, Rivers, Wheary  
Basnight & Kelly, P.C.  
One Columbus Center, Suite 1100  
Virginia Beach, VA 23562-6765  
(757) 497-6633  
Fax (757) 497-7267





1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
<http://www.itribe.net>

# iTRiBE Internet Connectivity Contract

Basic Information		Date: Monday, February 2, 1999
Organization:	Decipher, Inc	Purchase Order Information:
Name/Title:	Jim Bain	
Address:	253 Granby Street	P.O. #:
City / State / Zip	Norfolk, VA 23510	Contact:
Phone:	757.623.3600	Domain Name Requested:
Fax:	757.664.2141	First:
Administrative Contact:		Second:
Technical Contact:	Dale Maurice	Third:
iTRiBE Contract:	Rodney Howell	Email:

Please give us a brief description of your organization and how it is going to use the Internet:

Service Date and Length:	
Service start date:	
Length of service:	<input type="checkbox"/> 6 mos. <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input type="checkbox"/> 3 years <input checked="" type="checkbox"/> 5 years
Payment method:	
<input type="checkbox"/> Check / Money Order	<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service below:
<input type="checkbox"/> MasterCard / Visa	
<input type="checkbox"/> American Express	
<input type="checkbox"/> Discover	
Card number:	Exp. Date:

Initial and Monthly Recurring Costs	
Hardware, install and setup fees:	
Hardware (Router, CSU/DSU):	
Taxes:	
Carrier install fees:	
IP service setup fees:	
Total One Time Cost:	0.00
Monthly Recurring Service Fees:	
Bandwidth: 5MB	\$3200.00
Term discount:	
Carrier local loop:	795.00
Virtual mail server:	
News feed:	
Other:	
Total Monthly Recurring Service Fee:	\$3995.00
Comments / Service description:	
iTRiBE will install a DS3 for this.	
5 MB connection from COX Fibernet	
Discounted for five year contract.	



ORIGINAL

## Terms and Conditions

iTRiBE, Inc. (the "company") has established a communications network that facilitates the transmission of data to and from the Internet (the "service" or "services") subject to your compliance with the terms and conditions below (collectively, the "Terms and Conditions"). The subscriber (the "subscriber") refers to the person or entity signatory to this contract that wishes to access the Internet using the company's established network and services. Please completely read these terms and conditions before signing.

- 1) **Term.** The initial Term begins on the first day of the month following the company's installation of equipment or acceptance of previously installed equipment or facilities. This Agreement shall continue in effect for the period identified in Length of Service. Upon the expiration of the original term, and each renewal term, this contract will automatically renew for a successive term of ninety (90) days unless prior to the date of expiration, either party gives notice of an intent to terminate.
- 2) **Lawful Use.** Services provided to the subscriber by the company may only be used for lawful purposes. Transmission or storage of any information, data or material in violation of US Federal or state regulation or law is prohibited. This includes, but is not limited to material protected by copyright, trade secret, or any other statute, threatening material or obscene material. The subscriber agrees to indemnify and hold harmless the company from any claims resulting from the subscriber's use of the service which damages either the subscriber or another party or parties.
- 3) **Payment.** Payment of the monthly service fee is due on the first day of the month to be served. Payments not made by the 10<sup>th</sup> of the month are to be considered delinquent and may be subject to reasonable collection and legal fees as well as interest accrued at 1.5% per month, or the state legal limit, whichever is lower. Returned checks are subject to a charge of \$25.00. Credit card customers: The subscriber agrees to pay all billed amounts according to card issuer agreement until the subscriber cancels its service with the company or discontinues credit card billing.
- 4) The subscriber agrees that the company has the right to delete all data, files or other information that is stored regarding the subscriber's service if the subscriber's service with the company is terminated, for any reason, by either the company or the subscriber.
- 5) The company's services cannot be transferred or used by anyone other than the subscriber. Accounts which have been transferred to other parties, or show activity in violation of this paragraph, are subject to immediate cancellation.
- 6) Services provided by the company, can be canceled at any time by the company with written notice sent thereafter to the subscriber at the address listed in the company's records. It shall be the responsibility of the subscriber to keep the company informed as to a valid mailing address to which this notice can be sent.
- 7) **Termination.** Service may be terminated voluntarily by the subscriber with penalty, for non-payment or for other causes.
  - (a) **Voluntary.** Service may be terminated by the subscriber for any reason upon thirty (30) days prior written notice. In the event of early termination, subscriber will pay a lump sum equal to one hundred percent (100%) of the monthly recurring fee for each service terminated, plus fifty percent (50%) of the monthly recurring fee for each service terminated for each month remaining in the Length of Service. Subscriber will not be liable for termination charges if services of the same or greater monthly base price and length of service are ordered at the same time as the notice of termination is received.
  - (b) **For Non-Payment.** After sixty (60) days of non-payment from the due date, the company may disable the service. After ninety (90) days of non-payment from the due date, the company may terminate the service permanently.
  - (c) **For Other Causes.** Service may be terminated by the company upon any violation of paragraph 2 (unlawful uses) and paragraph 5 (resale) of these Terms and Conditions.

ORIGINAL



- 8) **Suspension of service.** The company shall have the right to suspend service to the subscriber at any time, and for any reason, without notice. The company will take reasonable steps to notify the subscriber in advance of the timing and reason for any service suspension. If no such prior notice has been given, then the subscriber will be promptly notified following suspension as to the reason. The company shall take all reasonable steps to restore service to the subscriber as soon as possible, except that the company will not be responsible for restoring service if (i) the suspension is related to use by the subscriber of equipment or software not provided by the company that is likely to cause hazard, interference or service obstruction and (ii) the subscriber has not complied with paragraph 12 of this agreement.
- 9) The subscriber shall in no way represent itself nor permit any party acting on its behalf to represent itself as a partner, joint venture, agent, employee or general representative of the company.
- 10) The subscriber recognizes that as part of the services provided hereunder, they are able to connect to the Internet. The subscriber understands and agrees that the company has no control over the Internet or the computers connected to the Internet. Accordingly, this subscriber agrees to indemnify and hold the company harmless from any claims or losses of any kind, whether sustained by the subscriber or any other, arising out of or in any way relating to the subscriber's connecting to the Internet.
- 11) The subscriber shall at its own expense provide all necessary preparations required to comply with the company's installation and maintenance specifications, shall be responsible for the costs of relocation of services provided by the company once installed by the company, and shall provide to the company and to suppliers of communications lines reasonable access to subscriber's premises to perform any acts required by this agreement.
- 12) The company shall not be responsible for the installation, operation or maintenance of equipment or software not provided by the company; nor shall the company be responsible for the transmission or reception of information by equipment or software not provided by the company. The subscriber shall be responsible for the use and compatibility of equipment or software not provided by the company. In the event that the subscriber uses equipment or software not provided by the company that impairs the subscriber's user of the company's services, the subscriber shall nonetheless be liable for payment of services provided by the company. Upon notice from the company that the equipment or software not provided by the company is causing or is likely to cause hazard, interference or service obstruction, the subscriber shall eliminate the likelihood of hazard, interference or obstruction. The subscriber shall if necessary pay the company to troubleshoot difficulties caused by equipment or software not provided by the company.
- 13) The company shall not be liable, either in contract or tort, for protection from unauthorized access of subscriber's transmission facilities or subscriber premise equipment; or for unauthorized access to or alteration, theft or destruction of subscriber's data files, programs, procedures or information through accident, fraudulent means or devices, or any other method, even should such access occur as a result of the company's negligence.
- 14) The pricing proposal is hereby incorporated by reference.
- 15) **LIMITED LIABILITY.** THE COMPANY HEREBY DISCLAIMS ANY AND ALL LIABILITIES FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER. ANY LIABILITY OF THE COMPANY, INCLUDING WITHOUT LIMITATION ANY LIABILITY FOR DAMAGES CAUSED OR ALLEGEDLY CAUSED BY ANY FAILURE OR PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMMUNICATIONS LINE FAILURE, THEFT, OR DESTRUCTION OF OR UNAUTHORIZED ACCESS TO, ALTERATION OF, OR USE OF RECORDS, WHETHER FOR BREACH OF CONTRACT, TORTIOUS BEHAVIOR, NEGLIGENCE, OR UNDER ANY OTHER CAUSE OF ACTION, SHALL BE STRICTLY LIMITED TO THE AMOUNT PAID BY OR ON BEHALF OF THE SUBSCRIBER TO THE COMPANY FOR THE TWO PRIOR MONTHS.
- 16) These Terms and Conditions supersede all previous representations, agreements or understandings and shall prevail notwithstanding any variance with terms and conditions of any order submitted.
- 17) Use of the company's services constitutes acceptance of these Terms and Conditions.

Signature: \_\_\_\_\_

*Dor R. Man*

Date: \_\_\_\_\_

*Feb 24, 1997*

**ORIGINAL**

Initial: *DEM*

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK**

**iTRiBE, Inc.,**

**Plaintiff and Counterclaim Defendant,**

**v.**

**At Law no. 99-1311**

**Decipher, Inc.**

**Defendant and Counterclaim Plaintiff.**

**GROUND S OF DEFENSE**

**AUG - 5**

Decipher, Inc. ("Decipher") states the following for its grounds of defense to the motion for judgment filed by iTRiBE, Inc. ("iTRiBE").

1. Admitted.
2. Decipher admits that a contract was entered into by it and iTRiBE (the "Contract"). A copy of the written portion of that Contract is attached hereto as Exhibit 1. Decipher submits this document for identification purposes only and does not contend in its grounds of defense that a contract exists or existed between it and iTRiBE.
3. Denied.
4. Denied. Decipher elected to terminate the Contract because of iTRiBE's substantial and material breaches of it.
5. The written portion of the Contract speaks for itself on these issues, and Decipher denies any allegation herein inconsistent with those written provisions.
6. Denied.



### **ADDITIONAL DEFENSES**

1. iTRiBE materially breached the Contract, and Decipher terminated because of that material breach.
2. iTRiBE induced Decipher to enter into the Contract by false representations as to the quality and nature of its Internet connection.
3. In no event is iTRiBE entitled to recover attorneys' fees, since it has not pled a contractual or statutory basis for recovering them.

Wherefore, Decipher requests that the Court dismiss this motion for judgment with prejudice, and that that the Court award Decipher its costs and expenses awarded herein.

### **COUNTERCLAIM**

Decipher, Inc. ("Decipher") states the following for its counterclaim against iTRiBE, Inc. ("iTRiBE"):

1. Decipher is a Virginia Corporation, and it is active and in good standing.
2. Decipher entered into a contract with iTRiBE on February 24, 1999. A copy of the written portion of this contract is attached hereto as Exhibit 1 (the "Contract").
3. Pursuant to the Contract, iTRiBE was to supply Decipher with an Internet connection of a minimum of 5 MB of bandwidth at all times.
4. Decipher failed to provide Internet service to Decipher that was consistently 5 MB of bandwidth. For substantial periods of time, the effective bandwidth supplied to Decipher was substantially less than 5 MB of bandwidth.

5. During the time that Decipher utilized iTRiBE for its Internet Connection, iTRiBE consistently failed to respond to Decipher's service calls in a timely fashion.

6. As a part of the Contract, iTRiBE represented that it was and would remain subscribed to a Tier 1 Internet provider.

7. iTRiBE subsequently switched to a Tier 2 Internet provider.

8. This switch was a material breach of the Contract.

9. This switch had a substantial negative effect it had on the quality of the Internet Connection provided by iTRiBE to Decipher.

10. Accordingly, for all of the above reasons, iTRiBE materially breached its contract with Decipher.

11. As a result of this breach, Decipher has suffered damages.

12. Among other damages, Decipher was forced to cover by obtaining satisfactory Internet services from Internet service provider at a cost to Decipher substantially higher than the price set in the Contract between Decipher and iTRiBE.

13. As a part of this transition to another Internet service provider, Decipher was forced to incur certain out-of-pocket equipment and labor costs.

14. In addition, because of iTRiBE's breach, Decipher lost the time value of its own personnel in responding to problems caused by iTRiBE's poor Internet connection quality and in working on Decipher's transition to another Internet service provider.


15. Because of iTRiBE's breach of contract, during the time that Decipher utilized iTRiBE for its Internet Connection, Decipher's Web site's performance was

significantly hampered, thereby damaging relationships with Decipher's present and prospective customers.

WHEREFORE, Decipher requests that the Court enter judgment against iTRiBE in the amount of \$250,000, plus prejudgment interest, plus postjudgment interest, plus its costs and fees expended herein.

**DECIPHER, INC.,**

By Counsel




John B. Farmer  
David J. Sensenig  
Mezzullo & McCandlish, P.C.  
1111 East Main Street, Suite 1500  
(Post Office Box 798, 23218)  
Richmond, Virginia 23219  
Telephone: (804) 775-3100  
Facsimile: (804) 775-3816  
Counsel for the Decipher, Inc.

# **CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of this pleading to be mailed on August 4,  
1999 to:

Barry Dorans, Esquire  
Wolcott, Rivers, Wheary, Basnight & Kelly, P.C.  
One Columbus Center  
Suite 1100  
Virginia Beach, Virginia 23562-6765.

  
\_\_\_\_\_  
John B. Farmer



1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
<http://www.itribe.net>

## iTRiBE Internet Connectivity Contract

Basic Information		Date: _____ Month: _____ Year: _____
Organization:	Decipher, Inc	Purchase Order Information:
Name/Title:	Jim Bain	P.O. #:
Address:	253 Granby Street	Contact:
City / State / Zip	Norfolk, VA 23510	Domain Name Requested:
Phone:	757.623.3600	First:
Fax:	757.664.2141	Second:
Administrative Contact:		Third:
Technical Contact:	Dale Maurice	Email:
iTRiBE Contract:	Rodney Howell	
Please give us a brief description of your organization and how it is going to use the Internet:		

Service Date and Length	
Service start date:	_____
Length of service:	<input type="checkbox"/> 6 mos. <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input type="checkbox"/> 3 years <input checked="" type="checkbox"/> 5 years
Payment Method:	
<input type="checkbox"/> Check / Money Order	<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service below:
<input type="checkbox"/> MasterCard / Visa	
<input type="checkbox"/> American Express	
<input type="checkbox"/> Discover	
Card number:	Exp. Date:

Initial and Monthly Recurring Costs	
Hardware (Router, CSU/DSU):	
Taxes:	
Carrier install fees:	
IP service setup fees:	
Total One Time Cost:	0.00
Monthly Recurring Service Fees	
Bandwidth: SMB	\$3200.00
Term discount:	
Carrier local loop:	795.00
Virtual mail server:	
News feed:	
Other:	
Total Monthly Recurring Service Fee:	\$3995.00
Comments / Service description:	
iTRiBE will install a DS3 for this.	
5 MB connection from COX Fibernet	
Discounted for five year contract.	

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Initial: DEM  
iTRiBE Internet Connectivity Contract (Rev 3.4) Page 1/3  
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EXHIBIT

1



## Terms and Conditions

iTRiBE, Inc. (the "company") has established a communications network that facilitates the transmission of data to and from the Internet (the "service" or "services") subject to your compliance with the terms and conditions below (collectively, the "Terms and Conditions"). The subscriber (the "subscriber") refers to the person or entity signatory to this contract that wishes to access the Internet using the company's established network and services. Please completely read these terms and conditions before signing.

- 1) **Term.** The initial Term begins on the first day of the month following the company's installation of equipment or acceptance of previously installed equipment or facilities. This Agreement shall continue in effect for the period identified in Length of Service. Upon the expiration of the original term, and each renewal term, this contract will automatically renew for a successive term of ninety (90) days unless prior to the date of expiration, either party gives notice of an intent to terminate.
- 2) **Lawful Use.** Services provided to the subscriber by the company may only be used for lawful purposes. Transmission or storage of any information, data or material in violation of US Federal or state regulation or law is prohibited. This includes, but is not limited to material protected by copyright, trade secret, or any other statute, threatening material or obscene material. The subscriber agrees to indemnify and hold harmless the company from any claims resulting from the subscriber's use of the service which damages either the subscriber or another party or parties.
- 3) **Payment.** Payment of the monthly service fee is due on the first day of the month to be served. Payments not made by the 10<sup>th</sup> of the month are to be considered delinquent and may be subject to reasonable collection and legal fees as well as interest accrued at 1.5% per month, or the state legal limit, whichever is lower. Returned checks are subject to a charge of \$25.00. Credit card customers: The subscriber agrees to pay all billed amounts according to card issuer agreement until the subscriber cancels its service with the company or discontinues credit card billing.
- 4) The subscriber agrees that the company has the right to delete all data, files or other information that is stored regarding the subscriber's service if the subscriber's service with the company is terminated, for any reason, by either the company or the subscriber.
- 5) The company's services cannot be transferred or used by anyone other than the subscriber. Accounts which have been transferred to other parties, or show activity in violation of this paragraph, are subject to immediate cancellation.
- 6) Services provided by the company, can be canceled at any time by the company with written notice sent thereafter to the subscriber at the address listed in the company's records. It shall be the responsibility of the subscriber to keep the company informed as to a valid mailing address to which this notice can be sent.
- 7) **Termination.** Service may be terminated voluntarily by the subscriber with penalty, for non-payment or for other causes.
  - (a) **Voluntary.** Service may be terminated by the subscriber for any reason upon thirty (30) days prior written notice. In the event of early termination, subscriber will pay a lump sum equal to one hundred percent (100%) of the monthly recurring fee for each service terminated, plus fifty percent (50%) of the monthly recurring fee for each service terminated for each month remaining in the Length of Service. Subscriber will not be liable for termination charges if services of the same or greater monthly base price and length of service are ordered at the same time as the notice of termination is received.
  - (b) **For Non-Payment.** After sixty (60) days of non-payment from the due date, the company may disable the service. After ninety (90) days of non-payment from the due date, the company may terminate the service permanently.
  - (c) **For Other Causes.** Service may be terminated by the company upon any violation of paragraph 2 (unlawful uses) and paragraph 5 (resale) of these Terms and Conditions.

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Initial: *DMA*  
iTRiBE Internet Connectivity Contract (Rev 3.4) Page 2/3  
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- 8) **Suspension of service.** The company shall have the right to suspend service to the subscriber at any time, and for any reason, without notice. The company will take reasonable steps to notify the subscriber in advance of the timing and reason for any service suspension. If no such prior notice has been given, then the subscriber will be promptly notified following suspension as to the reason. The company shall take all reasonable steps to restore service to the subscriber as soon as possible, except that the company will not be responsible for restoring service if (i) the suspension is related to use by the subscriber of equipment or software not provided by the company that is likely to cause hazard, interference or service obstruction and (ii) the subscriber has not complied with paragraph 12 of this agreement.
- 9) The subscriber shall in no way represent itself nor permit any party acting on its behalf to represent itself as a partner, joint venture, agent, employee or general representative of the company.
- 10) The subscriber recognizes that as part of the services provided hereunder, they are able to connect to the Internet. The subscriber understands and agrees that the company has no control over the Internet or the computers connected to the Internet. Accordingly, this subscriber agrees to indemnify and hold the company harmless from any claims or losses of any kind, whether sustained by the subscriber or any other, arising out of or in any way relating to the subscriber's connecting to the Internet.
- 11) The subscriber shall at its own expense provide all necessary preparations required to comply with the company's installation and maintenance specifications, shall be responsible for the costs of relocation of services provided by the company once installed by the company, and shall provide to the company and to suppliers of communications lines reasonable access to subscriber's premises to perform any acts required by this agreement.
- 12) The company shall not be responsible for the installation, operation or maintenance of equipment or software not provided by the company; nor shall the company be responsible for the transmission or reception of information by equipment or software not provided by the company. The subscriber shall be responsible for the use and compatibility of equipment or software not provided by the company. In the event that the subscriber uses equipment or software not provided by the company that impairs the subscriber's user of the company's services, the subscriber shall nonetheless be liable for payment of services provided by the company. Upon notice from the company that the equipment or software not provided by the company is causing or is likely to cause hazard, interference or service obstruction, the subscriber shall eliminate the likelihood of hazard, interference or obstruction. The subscriber shall if necessary pay the company to troubleshoot difficulties caused by equipment or software not provided by the company.
- 13) The company shall not be liable, either in contract or tort, for protection from unauthorized access of subscriber's transmission facilities or subscriber premise equipment; or for unauthorized access to or alteration, theft or destruction of subscriber's data files, programs, procedures or information through accident, fraudulent means or devices, or any other method, even should such access occur as a result of the company's negligence.
- 14) The pricing proposal is hereby incorporated by reference.
- 15) **LIMITED LIABILITY.** THE COMPANY HEREBY DISCLAIMS ANY AND ALL LIABILITIES FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER. ANY LIABILITY OF THE COMPANY, INCLUDING WITHOUT LIMITATION ANY LIABILITY FOR DAMAGES CAUSED OR ALLEGEDLY CAUSED BY ANY FAILURE OR PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMMUNICATIONS LINE FAILURE, THEFT, OR DESTRUCTION OF OR UNAUTHORIZED ACCESS TO, ALTERATION OF, OR USE OF RECORDS, WHETHER FOR BREACH OF CONTRACT, TORTIOUS BEHAVIOR, NEGLIGENCE, OR UNDER ANY OTHER CAUSE OF ACTION, SHALL BE STRICTLY LIMITED TO THE AMOUNT PAID BY OR ON BEHALF OF THE SUBSCRIBER TO THE COMPANY FOR THE TWO PRIOR MONTHS.
- 16) These Terms and Conditions supersede all previous representations, agreements or understandings and shall prevail notwithstanding any variance with terms and conditions of any order submitted.
- 17) Use of the company's services constitutes acceptance of these Terms and Conditions.

Signature: \_\_\_\_\_

*Doc R Man*

Date: \_\_\_\_\_

*Feb 24, 1997*

**ORIGINAL**

Initial: *DEM*  
ITRIBE Internet Connectivity Contract (Rev 3.4) Page 3/3  
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**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK**

**iTRiBE, Inc.,**

**Plaintiff and Counterclaim Defendant,**

**v.**

**At Law no. 99-1311**

**Decipher, Inc.**

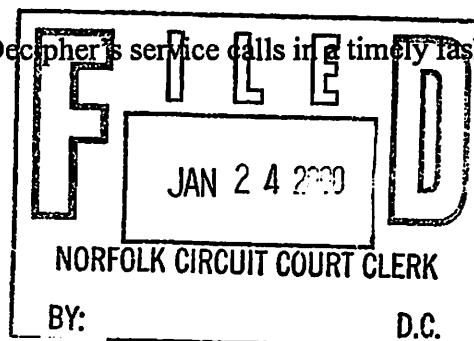
**Defendant and Counterclaim Plaintiff.**

**AMENDED COUNTERCLAIM**

Decipher, Inc. ("Decipher") states the following for its counterclaim against iTRiBE, Inc. ("iTRiBE"):

1. Decipher is a Virginia Corporation, and it is active and in good standing.
2. Decipher entered into a contract with iTRiBE on February 24, 1997. A copy of the written portion of this contract is attached hereto as Exhibit 1 (the "Contract").
3. Pursuant to the Contract, iTRiBE was to supply Decipher with an Internet connection of a minimum of 5 MB of bandwidth at all times.
4. Decipher failed to provide Internet service to Decipher that was consistently 5 MB of bandwidth. For substantial periods of time, the effective bandwidth supplied to Decipher was substantially less than 5 MB of bandwidth.
5. During the time that Decipher utilized iTRiBE for its Internet Connection, iTRiBE consistently failed to respond to Decipher's service calls in a timely fashion.

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6. As a part of the Contract, iTRiBE represented that it would switch to UUNET for iTRiBE's connection to the Internet.
7. iTRiBE subsequently switched to Digex for its connection to the Internet.
8. This switch was a material breach of the Contract.
9. This switch, and failure of iTRiBE to provide 5MB of bandwidth, had a substantial negative effect on the quality of the Internet Connection provided by iTRiBE to Decipher, such as causing unacceptably slow performance of its highly trafficked Web site for outside users. Among other harms, it caused damage to Decipher's relationship with present and prospective customers.
10. Accordingly, for all of the above reasons, iTRiBE materially breached its contract with Decipher.
11. As a result of this breach, Decipher has suffered damages.
12. Among other damages, Decipher incurred costs in attempting to identify the source of the poor Internet connection performance.
13. Once the iTRiBE Internet connection was identified as the source of the poor performance, Decipher was forced to cover by obtaining satisfactory Internet services from Internet service provider at a cost to Decipher substantially higher than the price set in the Contract between Decipher and iTRiBE.
14. As a part of this transition to another Internet service provider, Decipher was forced to incur certain out-of-pocket equipment and labor costs.
15. In addition, because of iTRiBE's breach, Decipher lost the time value of its own personnel in responding to problems caused by iTRiBE's poor Internet

connection quality and in working on Decipher's transition to another Internet service provider.

WHEREFORE, Decipher requests that the Court enter judgment against iTRiBE in the amount of \$150,000, plus prejudgment interest, plus postjudgment interest, plus its costs and fees expended herein.

**DECIPHER, INC.,**

By Counsel



---

John B. Farmer  
Terrell W. Mills  
Mezzullo & McCandlish, P.C.  
1111 East Main Street, Suite 1500  
(Post Office Box 798, 23218)  
Richmond, Virginia 23219  
Telephone: (804) 775-3100  
Facsimile: (804) 775-3816  
Counsel for Decipher, Inc.




# **CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of this pleading to be mailed, via First Class

Mail, postage prepaid, return receipt requested, on January 22, 2000 to:

Barry Dorans, Esquire  
Wolcott, Rivers, Wheary, Basnight & Kelly, P.C.  
One Columbus Center  
Suite 1100  
Virginia Beach, Virginia 23562-6765.



---

Terrell W. Mills

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

**iTRiBE, Inc.**

**Plaintiff,**

**v.**

**AT LAW NO. 99-1311**

**DECIPHER, INC.**

**Defendant**

**GROUND OF DEFENSE TO AMENDED COUNTERCLAIM**

iTRiBE, Inc., counterclaim defendant, by counsel, states as its grounds of defense to the amended counterclaim as follows:

1. Admitted.

2. It is admitted that Decipher entered into a contract with iTRiBE on February 24, 1997. No copy was attached to the Amended Counterclaim. It is admitted, however, that Exhibit 1 to the Counterclaim contains a true copy of that contract.

3. Denied.

4. Denied.

5. Denied.

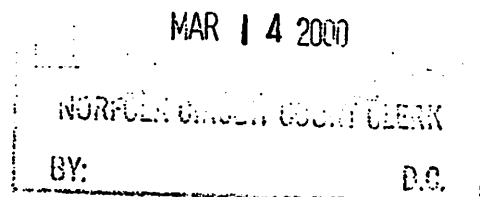
6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.



11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

#### **AFFIRMATIVE DEFENSES**

16. The claims of Decipher are barred by the parol evidence rule .

17. The claims of Decipher are barred by the statute of frauds.

18. The claims of Decipher for damages are for consequential damages and thus are not recoverable.

19. That the claims of Decipher are for cover are barred in that the cover they obtained was not the substantial equivalent of the services provided by iTRiBE.

20. The claims of Decipher are limited as provided for in the contract.

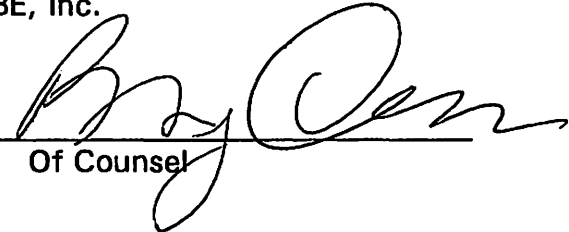
21. That iTRiBE fully complied with its obligations under the contract as written between the parties.

22. The contract specifically provides that iTRiBE is not responsible for the operation or maintenance of equipment or software not provided by it nor for the transmission or reception of information not provided by it.

23. The contract specifically allows iTRiBE to suspend service at any time for any reason without notice.

24. That as set forth in its motion for judgment, Decipher has committed the first breach of the agreement and thus is not entitled to recover any damages under it.

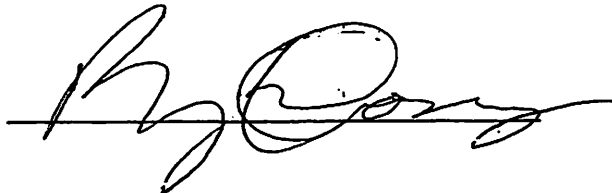
iTRiBE, Inc.

By   
Of Counsel

Barry Dorans, Esquire  
Wolcott, Rivers, Wheary  
Basnight & Kelly, P.C.  
One Columbus Center, Suite 1100  
Virginia Beach, VA 23562-6765  
(757) 497-6633  
Fax (757) 497-7267

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was mailed, postage prepaid to John B. Farmer, Esquire, Mezzullo & McCandlish, 1111 East Main Street, Suite 1500, Richmond, VA 23218, this 13 day of March 2000.



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V I R G I N I A

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

ORIGINAL

iTRiBE, Inc.,

Plaintiff/

Counterclaim Defendant,

VS.

Decipher, Inc.,

Defendant/  
Counterclaim Plaintiff

CL99001311

DEC 13 2000

RICHMOND, VIRGINIA

TRIAL

DATE: May 23, 2000

BEFORE: The Honorable Leonard B. Sachs

APPEARANCES:

WOLCOTT, RIVERS, WHEARY, BASNIGHT  
& KELLY, P.C.

One Columbus Center, Suite 1100  
Virginia Beach, Virginia 23462

Attorney for the Plaintiff

BY: BARRY DORANS, ESQUIRE  
Of Counsel

McCLANDISH, KAINE & GRANT  
1111 East Main Street, Suite 1500  
Richmond, Virginia 23218

Attorney for the Defendant

BY: JOHN B. FARMER, ESQUIRE  
TERRELL W. MILLS, ESQUIRE  
Of Counsel

NORFOLK CIRCUIT COURT CLERK

BY:

Diggs & Fleet, Ltd.  
(757) 269-0685



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\* \* \*

MICHAEL ADOLPHI

a Witness, having been first  
duly sworn was examined and  
testified as follows:

DIRECT EXAMINATION

BY MR. DORANS:

Q. Could you please state your name?

A. Mike Adolphi.

THE COURT: Spell that.

THE WITNESS: A-d-o-l-p-h-i.

BY MR. DORANS:

Q. Mr. Adolphi, prior to involvement with  
iTRiBE, where did you go to college?

A. Virginia Tech.

Q. What type of degree did you get?

A. Electrical engineer.

Q. What type of employment were you involved  
in before iTRiBE?

A. A company -- a partner and I started

1 ProSoft which is a government contracting firm.

2 Q. What type of business?

3 A. Government working.

4 Q. Okay. How did you get involved with  
5 iTRiBE?

6 A. One of the existing employees at ProSoft  
7 stated that we should get into the Internet side  
8 of the business. Before the Internet it was  
9 called the Defense Department Network and since  
10 we did so much of that, he tried to commercialize  
11 that. This was early 1995 and he introduced us  
12 to a company called IP Square down at the World  
13 Trade Center and we started talking to them and  
14 we got together and formed a company called  
15 iTRiBE.

16 Q. What type of services did iTRiBE provide  
17 back in 1998?

18 A. Back in 1996, '97, it was called hosting  
19 and web hosting. It's where you take a web site,  
20 a home page, electronic brochure and we put it on  
21 our servers. ITRiBE, we put it on. It's  
22 available to anybody who has the connection.

23 Q. What's web designs?

24 A. Web designs are the development of the  
25 sites.

1 Q. What do you mean by "development"?

2 A. Software development, coding, programming,  
3 graphics designs.

4 Q. And what's the dedicated connection that  
5 you talked about?

6 A. Dedicated connection was a point to point  
7 connection between us and our customer and it was  
8 always on. So what was considered dedicated  
9 servers, when you talk about dial up, the connect  
10 and disconnect this is always on.

11 Q. What type of the Internet providers were  
12 they in terms of tiers?

13 A. iTRiBE is Tier 2.

14 Q. At all times?

15 A. Yes.

16 Q. What's a Tier 2?

17 A. A Tier 2 buys services and resells it  
18 downstream to their customer base.

19 Q. What's a Tier 1?

20 A. A Tier 1 is somebody who has a nationwide  
21 backbone normally considered with large bandwidth  
22 pipes and multiple connections with other Tier 1  
23 providers. And those connections --

24 THE COURT: What defines a  
25 backbone?

1                   THE WITNESS: A backbone is -- you're  
2 familiar with a local area network that you may  
3 have in the area. Here a backbone is something  
4 that can stretch across the whole U.S. and of a  
5 wide area versus a local area.

6           Anyway, with the large backbone, there is  
7 several Tier 1 providers and they connect with  
8 the Internet providers.

9 BY MR. DORANS:

10 Q.       A Tier 1, would this be a very great  
11 graphic area to cover?

12 A.       The Tier 1 were nationwide backbone  
13 providers.

14 Q.       They would have lines throughout the  
15 nation?

16 A.       They would have lines throughout the  
17 nation.

18 Q.       What type of services did the Tier 1  
19 provide as opposed to the Tier 2?

20 A.       The Tier 1s then were mostly a wholesale.  
21 They would normally sell to a Tier 2 provider and  
22 Tier 2 providers would then sell to a customer  
23 base.

24 Q.       And what did Tier 2 do to sell it to the  
25 customer base?

1 A. The Tier 2 would go out and do the actual  
2 resell and between them and the customer and  
3 they'd have customer care and any type of  
4 services after that.

5 Q. And what type of control would a Tier 2  
6 have over the Tier 1 connections?

7 A. Well, they don't really have any control.  
8 We don't have access to their lines or routers to  
9 have any kind of control over.

10 Q. Okay. Let me show you a document and see  
11 if you recognize this.

12 A. This is a service application and contract  
13 between iTRiBE and Decipher dated April 3, 1996.

14 Q. Judge, this is not the contract at issue,  
15 but I want to enter it as Exhibit 1.

16 THE COURT: All right.

17 MR. FARMER: Was this in your exhibit  
18 book?

19 MR. DORANS: Yes, it was.

20 MR. FARMER: It's not the first  
21 exhibit. Could you help me out with that?

22 MR. DORANS: Judge, I will withdraw  
23 that exhibit.

24 THE COURT: Just for the record, the  
25 document which was offered, styled as service

1 application and contract of iTRiBE, which was  
2 being offered as an exhibit is now being  
3 withdrawn. It never was admitted.

4 MR. DORANS: Withdrawn.

5 BY MR. DORANS:

6 Q. Did you ever have a contract between iTRiBE  
7 and Decipher?

8 A. Yes.

9 Q. What was the original terms of the contract  
10 just in general?

11 A. In general, the initial contract was for  
12 T-1 services. And it was a one year contract  
13 that would automatically renew each year. I  
14 think there was a 30 day clause in there --

15 Q. I will go over the details. What do you  
16 mean to provide dedicated T1 services? What's T1  
17 services?

18 A. The T1 was a bandwidth of 1.5 megabits per  
19 second.

20 Q. Did there come a time that Decipher and  
21 iTRiBE discussed having a bigger bandwidth  
22 connection?

23 A. Yes.

24 Q. At that time, did iTRiBE have the ability  
25 to provide bigger bandwidth to Decipher?



1 A. Not at that time. We only had a couple of  
2 T1s, so we didn't have enough bandwidth at that  
3 time.

4 Q. And what was the discussion with Decipher?

5 A. There was discussion with Decipher to  
6 provide a higher bandwidth connection and if we  
7 got that higher bandwidth connection to them we  
8 would get a higher bandwidth connection out.

9 Q. I'm going to try again with Plaintiff's  
10 Exhibit 1. Do you recognize this document?

11 A. This is an iTRiBE Internet connectivity  
12 contract with Decipher. It was a five year  
13 contract for 5 MB of bandwidth.

14 Q. And that's the contract at issue today?

15 A. That's the contract at issue today.

16 MR. DORANS: Judge, I would like to  
17 enter that contract as Exhibit 1.

18 THE COURT: Document identified by  
19 the Plaintiff's witness which is labeled iTRiBE  
20 Internet connectivity contract between Decipher  
21 Inc. and iTRiBE dated --

22 MR. DORANS: I think the date is on  
23 the last page. February 24, 1999, Judge.

24 MR. FARMER: 1997.

25 THE COURT: February 24, 1997,

1 consisting of three pages is received and marked  
2 in evidence as Plaintiff's Exhibit 1.

3  
4 (Whereupon, the Contract was marked  
5 Plaintiff's Exhibit No. 1.)  
6

7 BY MR. DORANS:

8 Q. Now, at the time of this contract, did you  
9 have 5 megs upstream?

10 A. At the time that this contract was signed,  
11 we did not.

12 Q. Did you thereafter attempt to purchase any  
13 upstream?

14 A. Thereafter, once we got this contract  
15 signed, yeah, we went out and was able to  
16 purchase additional bandwidth upstream.

17 THE COURT: This was 5 meg.

18 THE WITNESS: This contract was for 5  
19 meg.

20 BY MR. DORANS:

21 Q. Do you recognize this document, sir?

22 A. This is a Digex agent service order form  
23 that iTRiBE signed for 10 MB for service from  
24 Digex back in April 1997.

25 MR. DORANS: Judge, I would like to

1 have that admitted as our next exhibit,  
2 Plaintiff's 2.

3 That is dated what?

4 THE WITNESS: April of 1997. I think  
5 it says April 30th.

6 THE COURT: Of what year?

7 THE WITNESS: '97.

8 THE COURT: April what date, I'm  
9 sorry?

10 THE WITNESS: April 30, 1997.

11 THE COURT: That document is  
12 received and marked as Plaintiff's Exhibit 2  
13 without judgement in evidence.

14  
15 (Whereupon, the Service Order Form  
16 was marked Plaintiff's Exhibit No. 2.)

17  
18 BY MR. DORANS:

19 Q. When did you actually begin providing  
20 services to Decipher under the contract entered  
21 into evidence?

22 A. Late of June 1997.

23 Q. Can I get you to turn to that contract on  
24 Exhibit 1 and look at paragraph 12 and I just  
25 want you to read the first part of the

\* \* \*

\*

x

x

A. Well, I talked to some of my network engineers at the time. First thing that I did was call for Kathy and set up an appointment.

Q. Who is Kathy?

A. Kathy Eddleman.

Q. She's the one who sent you the letter?

A. She's the one who sent the letter.

Q. And you had a meeting?

A. And I had a meeting.

Q. Tell me what happened at that meeting.

A. It was a pretty short meeting. I went over there and met with her and Rick and just asked them what the particular problems and things were.

And more or less they just told me, we've grown big and we need to go to a Tier 1 type provider and we needed bigger pipes and we want to be able to have diverse routes so that our services is extremely important to us now with all of the stuff we're doing on-line.

So I accepted what they had said at that time and I had a copy of the existing contract with me and I went over the termination clause and they seemed stunned or surprised about this

1 contract and the termination clause.

2 Because the contract that they had in their  
3 hand was a prior contract before this one. This  
4 one replaced it. That said it was just 30 days  
5 notice and that's what they thought they were  
6 giving me.

7 So at that time I said, hey, here is a copy  
8 of the contract, give me a call in a week or so  
9 once you've taken a look at it and let's talk  
10 about what we can do and I never heard back. I  
11 made several phone calls and they never called  
12 back.

13 Q. Did they make payments to you after  
14 December 1998?

15 A. After December '98, no.

16 Q. And you're seeking to have those payments  
17 plus interest as called for in the contract?

18 A. That's correct.

19 Q. Plus attorney fees which we reserved for  
20 later?

21 A. Correct.

22 Q. In June of '98 were there any other local  
23 companies that offered Tier 2 services similar to  
24 you?

25 A. Within Hampton Roads, of course. There

1 just for simplicity sake, to take him on cross  
2 and call him an as adverse witness on your  
3 counterclaim.

4 MR. FARMER: Your Honor, since he is  
5 the president of the company, we did not subpoena  
6 him to appear here. Will Mr. Adolphi be  
7 available for us to call later? Is he going to  
8 be in the building?

9 THE COURT: I can guarantee it.

10 MR. FARMER: Thank you very much for  
11 that.

12 THE COURT: That's not a problem.

13

14 CROSS-EXAMINATION

15

16 BY MR. FARMER:

17 Q. Mr. Adolphi, you are presently the  
18 president of iTRiBE, Inc.; is that correct?

19 A. On the legal documents, that's true.

20 Q. Are you presently the president of iTRiBE  
21 Inc.?

22 A. I am not performing the duties of president  
23 at iTRiBE, Inc. as of right now.

24 THE COURT: You are a corporate  
25 officer?

1 THE WITNESS: I'm a corporate officer.

2 THE COURT: At present?

3 THE WITNESS: At present.

4 THE COURT: Then that's the answer.

5 BY MR. FARMER:

6 Q. Just so I can figure out for my own sake,  
7 you are president or you are not president?

8 A. I am one of the corporate officers. And as  
9 one of the corporate officers, yes, I am the  
10 president of the company.

11 THE COURT: I'm going to clarify  
12 that because he's not going to dance with me.

13 You are on the papers that go to the state  
14 corporate commission listed as the president of  
15 iTRiBE?

16 THE WITNESS: That's correct.

17 THE COURT: That's all. Now, you  
18 can ask him why isn't he fulfilling the office,  
19 that's up to him.

20 BY MR. FARMER:

21 Q. Good idea. Why are you not fulfilling the  
22 office of president at iTRiBE, Inc.?

23 A. When iTRiBE back in late 1998 spun off one  
24 of the divisions to form another company called  
25 Picus for several other folks, I went along with

1     that merger, that was part of the deal. And we  
2     hired someone else to come in to perform the  
3     duties as president of iTRiBE, Inc.

4                 THE COURT:     Would you say that he's  
5     the chief executive officer?

6                 THE WITNESS: He was the chief  
7     executive officer at that time, that's correct.

8                 THE COURT:     That's not very  
9     complex.

10                MR. FARMER:    One of the issues that I  
11     was going to go into next, Your Honor, but Mr.  
12     Dorans will contend it's beyond the scope of his  
13     direct, is the relationship between iTRiBE, Inc.,  
14     and a number of other companies we discovered in  
15     discovery.

16                THE COURT:     I'm interested in that  
17     also.

18                MR. FARMER:    Should I go to that now,  
19     Your Honor?

20                THE COURT:     Anytime you want.  
21     That's right, it was never opened --

22                MR. DORANS:    It never was open, but  
23     it's a standing issue, that's fine. I don't want  
24     them to go into their defense because that's just  
25     too confusing.



1 THE COURT: Okay. You can explore  
2 that.

3 MR. FARMER: Thank you very much,  
4 Your Honor.

5 BY MR. FARMER:

6 Q. You said that you are on paper president of  
7 iTRiBE, Inc., correct?

8 A. Correct.

9 Q. Are you familiar with a company called  
10 iTRiBE.com, Inc.?

11 A. Yes.

12 Q. Okay. Is that an existing Virginia  
13 corporation to your knowledge?

14 A. It's an existing Virginia corporation to my  
15 knowledge, yes.

16 Q. Do you hold any position as officer or  
17 director of that company?

18 A. I will be -- I'm the director through the  
19 other company Ebirti that owns -- one of the  
20 owners that owns iTRiBE.com, Inc.

21 Q. So I can clarify that, there is another  
22 company out there called Ebirti?

23 A. There is another company called Ebirti,  
24 that's correct.

25 Q. Could you spell that, please?

\* \* \*

\* \* \*

(Whereupon, the Subscription & Contribution Agreement was marked Defendant's Exhibit No. 62.)

MR. FARMER: Not on that line of questioning. I do have more questions. I just want to enter this into my notebook so I don't lose track.

THE COURT: Okay.

MR. FARMER: In the notebook in front of you, Mr. Adolphi, would you please turn to Tab 18.

And just to explain, Your Honor, Tab 18 is actually I believe their first exhibit. It's the same document. It's the same contract with iTRiBE that is at issue in this case.

Are you on that page, Mr. Adolphi?

THE COURT: I'm on Tab 18. The Court recognizes that it's the first exhibit.

BY MR. FARMER:

Q. Mr. Adolphi, do you have that document in front of you?

A. Yes.

1 Q. Looking at that document, do you see in the  
2 bottom block where it says "bandwith"?

3 A. Yes.

4 Q. And next to that it says "5 MB," correct?

5 A. Yes.

6 Q. To make certain that we understand what  
7 that says, that means that there was to be 5 MB  
8 of bandwith provided from iTRiBE to -- excuse me,  
9 from Decipher to iTRiBE, correct?

10 A. That's correct.

11 Q. And it also means that iTRiBE was to have  
12 5 MB of bandwith between iTRiBE and the upstream  
13 provider which became Digex, correct?

14 A. That we were going to have -- I'm not sure  
15 what you are asking.

16 Q. I just want to figure out where Decipher  
17 was going to get the 5 MB. You already said --

18 A. That's correct.

19 Q. And does that not also mean that Decipher  
20 was going to get 5 MB between iTRiBE and Digex?

21 A. That's not really how a Tier 2 provider  
22 works. You get the 5 MB local loop into us which  
23 is what they got and we have a larger pipe  
24 heading out to the Tier 1 provider and that  
25 allows them to come up to whatever their local

1 loop speed goes up to.

2 Q. I'm not clear. Are you saying that  
3 Decipher was not contracted for 5 MB between you  
4 and Digex?

5 A. That's not what I'm saying. I'm trying to  
6 figure out what you meant by the second leg or  
7 the 5 meg.

8 Q. From iTRiBE?

9 A. If what you are talking about is Tier 2,  
10 you add up all the bandwidth and it's a 1 to 1  
11 ratio with the bandwidth and the upstream, that's  
12 not true.

13 Q. Okay. So is it a true or false statement  
14 that the Tier 2 provider that was providing  
15 services to Decipher, that iTRiBE guaranteed to  
16 Decipher that it would have 5 MB of bandwidth  
17 productivity available?

18 MR. DORANS: Objection. I believe we  
19 are going into parol evidence. Object to the  
20 parol evidence. There is a contract. He's  
21 asking if we guaranteed something. It's not  
22 stated in the contract. He's trying to add to  
23 the terms of the contract.

24 THE COURT: I'm going to overrule.  
25 I'm going to let him explore it. To me the

1 critical question is what is a local loop.

2 MR. DORANS: I agree it's a local  
3 loop. He's not asking about a local loop. He's  
4 asking about something else.

5 THE COURT: What I gathered, he was  
6 really trying to ask is what a local loop is.  
7 He's talking about up and down.

8 MR. FARMER: To try to clarify, what  
9 I'm now asking about is the line that says,  
10 Bandwith, 5 MB and 32 loops. And that it -- and  
11 I'm going to get to that on the bandwith 5 MB.

12 What I'm asking him, does that mean that it  
13 is to be 5 MB of connectivity between iTRiBE and  
14 Digex?

15 In other words, when Decipher goes into  
16 iTRiBE IT has the 5 MB in there. The idea is to  
17 go on the Internet and 5 MB of bandwidth from  
18 iTRiBE on to Digex, that was my question.  
19 Because, Your Honor, what I'm going to do --

20 THE COURT: What are you asking?  
21 Whether or not they give you 5  
22 MB -- say that again.

23 MR. FARMER: I'm sorry. To clarify  
24 the connection between ourselves and iTRiBE --  
25 actually, they don't provide, we get that from

1 the Cox fibernet and that is actually what the  
2 \$795 provides.

3 What I'm asking is, the 5 MB and bandwith,  
4 if this is between iTRiBE and Digex who else  
5 would it apply to any way?

6 THE COURT: Ask him to explain it.

7 BY MR. FARMER:

8 Q. Okay. Mr. Adolphi -- then I will tell,  
9 Your Honor, that I believe -- I'll withdraw  
10 that.

11 Please explain that.

12 A. Five megabits worth of bandwith is the  
13 bandwith provided into our network and provides  
14 service out of your network into a Tier 1  
15 provider into the Internet.

16 The way that your question was coming  
17 across and I was trying to answer before, I  
18 believe you are saying if I take all of the  
19 customers I got a 5 and 5 and 5. Does that mean  
20 I always have to have a 15 meg going out? That  
21 is not the way that you design and Internet works  
22 any way. A phone system or MCI or anyone else  
23 out there. It's not a 1 on 1. You base your  
24 network upon peaks and averages.

25 Q. You are saying that you believe that you

MICHAEL ADOLPHI - CROSS

1 were contractually able to sell more bandwidth  
2 than you got from Digex?

3 A. Why sure. That's the way Tier 2 providers  
4 and other phone systems work in the world. And  
5 what you do, you take a look at the peaks. If  
6 you are exceeding or getting up to 80 or 90  
7 percent of your pipe, then you get a bigger pipe  
8 and we were nowhere near that.

9 Q. Did you measure the level of bandwidth that  
10 your customers were using with your connection?

11 A. Did we?

12 Q. Yes.

13 A. We got the reports from Digex.

14 Q. What reports did you get from Digex?

15 A. I can't remember if they were weekly or  
16 biweekly or whatever. There were reports sent  
17 out to network engineers from the point of Digex  
18 and they would show us how much bandwidth -- I  
19 think it was on a work basis. They will show us  
20 our peaks and averages.

21 Q. In the discovery, have you produced the  
22 reports to us?

23 A. There should have been at least -- there  
24 was one I found there. That was all I found.

25 Q. So I won't have you testify beyond that

1 report if it comes up later.

2 Can you say that you have the authority to  
3 oversell your bandwidth and you can sell more than  
4 you get from Digex? If that's the case then,  
5 were you not guaranteeing to those folks who  
6 bought Internet access from you that at the least  
7 they would be able to get the bandwidth you  
8 contractually?

9 MR. DORANS: This is my objection. I  
10 don't think you can throw guarantee on a  
11 contract.

12 THE COURT: Sustained. Guarantee is  
13 a discreet legal issue.

14 BY MR. FARMER:

15 Q. Decipher was contracted for 5 MB  
16 connectivity with iTRiBE?

17 A. Correct.

18 Q. Decipher's contract received 5 MB  
19 connectivity with iTRiBE, correct?

20 A. They have a 5 meg, that's correct.

21 Q. Does that mean they were not entitled to be  
22 able to have 5 meg connectivity between iTRiBE  
23 and Digex?

24 A. Again, it goes back to my original  
25 statements that there is an aggagant of all of



1 those. So you don't have, when you are a Tier 2  
2 and aggraganting this all up it's not a 1 to 1  
3 relationship even the Tier 1 don't do it.

4 Q. I would like you to answer my question.  
5 Aggragant as you might, should Decipher be able  
6 to get the --

7 A. The bandwith was always available to them,  
8 yes.

9 Q. I'm going to place in front of you a copy  
10 of the deposition that we took where you  
11 testified as a corporate representative. In that  
12 deposition, you did testify as a corporate  
13 representative of iTRiBE, correct?

14 A. Yes.

15 Q. Do you recall that testimony?

16 A. Yes.

17 Q. And you were -- in the beginning of that  
18 testimony you were sworn to testify under oath,  
19 of course?

20 A. Right.

21 Q. I would like to you turn to page 9 of that  
22 deposition. Tell me when you get to page 9.

23 A. I'm there.

24 Q. Tell me if I read this correctly.

25 Question: "So you are saying they were

1 guaranteed 5 megs of bandwidth from Decipher to  
2 iTRiBE and from iTRiBE through to Digex and that  
3 guarantee stops to the point they got through to  
4 the backbone."

5 Answer: "That is correct."

6 MR. DORANS: Judge, I'm still  
7 objecting to the guarantee reference for the same  
8 reason we talked about earlier.

9 THE COURT: Sustained. But to  
10 clarify, although, the word guarantee takes us  
11 into a different legal realm, what you are saying  
12 that Decipher should have been 35 MB of  
13 connectivity between iTRiBE and Digex?

14 THE WITNESS: I think this says the  
15 same thing I did.

16 BY MR. FARMER:

17 Q. Just making sure?

18 A. Yes.

19 Q. I'm going on to the next. Now, I would  
20 like to ask you some questions about iTRiBE's  
21 upstream Internet provider which you testified  
22 became Digex in June of '97; is that correct?

23 A. That's correct.

24 Q. And that?

25 THE COURT: Let me ask you a

1 MR. FARMER: Well, did you --

2 THE COURT: What is the DS3? I  
3 don't want to hear a lot of did you install a  
4 DS3.

5 THE WITNESS: It was not a DS3. It  
6 was a 10 meg link using an Ethernet connection  
7 versus another connection. They are equivalent  
8 from a speed standpoint.

9 THE COURT: How about a megabyte?

10 THE WITNESS: You can look -- to give  
11 you some reference, Ethernet can come in  
12 different flavors. You can get 10 meg, 5 meg,  
13 100 meg, a DSP. You can start at 3 and go all  
14 the way up to a 45 meg.

15 THE COURT: So you didn't say that  
16 you installed a DS3, 5 meg or 6 meg?

17 THE WITNESS: No, it's a combination.

18 MR. FARMER: Let me ask. If you  
19 contracted a DS3 installed, meaning this a 5 meg  
20 bandwith, why didn't you install the DS3, it was  
21 less expensive?

22 THE WITNESS: It covered us to do a  
23 connection through a DS3 connection through Cox.

24 THE COURT: So you are saying that a  
25 DS3 is really a type of what?

1 MR. FARMER: It's not a measure.

2 THE WITNESS: It's a type of pipe. A  
3 type of pipe.

4 THE COURT: So within the DS3 there  
5 are specific capacities?

6 THE WITNESS: That's correct.

7 THE COURT: So to be then very  
8 precise, you might have said that you are going  
9 to install a DS3 with a 6 meg or 5 meg capacity?

10 THE WITNESS: That's correct.

11 THE COURT: So when you say DS3 you  
12 can put in a 3 meg?

13 THE WITNESS: Sure.

14 THE COURT: But would that have  
15 fulfilled your contractual obligation to furnish  
16 the 5 meg?

17 THE WITNESS: The 3 meg wouldn't have  
18 done it. We already had 3 meg at the time the  
19 reason we put that in there. At the time saying  
20 that we know you have a 2 meg, but we went with  
21 the 5 meg. You've got to increase it. You have  
22 to put something in there saying that you are  
23 going to increase it.

24 THE COURT: So you had a 2 meg  
25 capacity when you signed on with these people?

1                   THE WITNESS: When we signed these  
2 folks up to begin with we had a 3 meg. We went  
3 from 3 meg to 10 meg. Once we upped them from  
4 one and a half meg to a 5 meg connection.

5                   THE COURT: So what you are  
6 furnishing whether by DS3 or Ethernet was 10  
7 megs?

8                   THE WITNESS: It was 10 meg.

9                   THE COURT: And 10 megs is 10 megs  
10 whether it's done with a DS3 or Ethernet?

11                  THE WITNESS: It's several types.

12                  THE COURT: And do they furnish the  
13 capacity?

14                  THE WITNESS: They can furnish the  
15 same capacity.

16                  THE COURT: I didn't say can. Do  
17 they furnish the same capacity, DS3 with a 10  
18 meg?

19                  THE WITNESS: A DS3 would not.

20                  THE COURT: That's what I'm trying  
21 to get to.

22                  THE WITNESS: Yes.

23                  THE COURT: So the answer to this  
24 is, that you would not prescribe what magnitude  
25 of DS3 you would install?

1 THE WITNESS: That's correct.

2 MR. FARMER: I would like to pursue  
3 that line of questioning.

4 THE COURT: Go right ahead.

5 BY MR. FARMER:

6 Q. Mr. Adolphi, is it not true that a DS3 is a  
7 45 MB pipe?

8 A. Not necessarily, no. You can have a pipe  
9 with multiple capacities and you can tune it down  
10 and tune it up, so it's anywhere from a 3 to a 45  
11 meg.

12 Q. So the answer to my question is that you  
13 are saying no, a DS3 does not refer to a 45 meg  
14 pipe; that your testimony?

15 A. That's correct.

16 THE COURT: Now, let me ask you a  
17 question. Now, we're having some qualifications  
18 that have developed as we go along. Do you start  
19 out a DS3 with a 45 meg and as you say "tune it  
20 down".

21 THE WITNESS: Not necessarily.

22 THE COURT: Not necessarily. Do you  
23 start it out with a 45 and tune it down to get to  
24 your 10 or to your 9?

25 THE WITNESS: You don't have to, you

1 can. There is two ways to do that. A DS3 can be  
2 made up as a separate pipe and inside. So you  
3 can have multiple T1s inside of it. At 1.5 when  
4 you buy from Cox, they turn it up. This is two  
5 T1s at one time. Then they can turn it up. And  
6 if you have six or we can just turn the equipment  
7 down between each other which is your other  
8 question.

9 Can you start with a 45 meg pipe and then  
10 take the equipment at each end and turn it down?  
11 And the answer is also yes in both directions.

12 THE COURT: In the industry, what is  
13 understood when you say that you are going to  
14 furnish a DS3 to meet a customers needs?

15 THE WITNESS: It can mean lots of  
16 things. It can mean two T1s all the way up to a  
17 45 meg. There is no standard that I'm going to  
18 bring you a DS3 pipe.

19 THE COURT: There has to be a  
20 context. The context is what does your customer  
21 need?

22 THE WITNESS: Correct.

23 THE COURT: Okay.

24 BY MR. FARMER:

25 Q. Mr. Adolphi, is it not true that if you are

1 installing less than a full DS3 the that industry  
2 refers to it as a fractional DS3?

3 A. That's correct. On some contracts it's  
4 known as a frac DS3 or frac 3.

5 Q. Conversely, is it not true that a full 45  
6 meg pipe not broken down is referred to as a DS3?

7 A. Not necessarily.

8 Q. So you call part of the pipe, a fractional  
9 DS3, but you don't call the whole pipe a DS3; is  
10 that your testimony?

11 A. No, what I'm trying to say, it can be said  
12 either way. I can bring you a DS3 and it may be  
13 only two T1s or three T1s or whatever. It's  
14 called both in a sense.

15 Q. So you are saying that the DS3 has no fixed  
16 meaning. It could be a 6 meg, 9 meg, so forth  
17 and so on?

18 A. Sure in telephone communication and it's  
19 only equally referred to that because they want  
20 to be able to grow it.

21 Q. So you are saying in the contract without  
22 any evidence that can be referred to as a 3 MB  
23 connection?

24 A. Sure.

25 Q. Okay. I believe during your testimony.



1 Mr. Adolphi, you talked about how the contract  
2 between iTRiBE and Decipher came to exist and  
3 what I wanted to figure out is if you had any  
4 role in negotiating that contract?

5 A. It was a while ago. I know that most of it  
6 was with Rodney Howell. And he would come back  
7 to me and I would negotiate with him on the  
8 rates. And since they were signing a five year,  
9 I would give them a discount off of it.

10 Q. And your conversation was with Mr. Howell,  
11 correct?

12 A. I may have had some with Decipher, I don't  
13 remember which ones and when. Between the  
14 discussions when they had the T1 and DS3.

15 Q. I'm not clear, are you saying that you  
16 participated in the contract of negotiation?

17 A. What was the question? Did I negotiate  
18 directly with Decipher?

19 Q. Yes, at all?

20 A. No, I didn't.

21 Q. So all of the negotiation with this  
22 contract before the Court occurred with Rodney  
23 Howell, correct?

24 A. As far as I know. It was through Rodney,  
25 yes.

\* \* \*

1 looks like what we signed for, yes.

2 Q. Okay. Thank you.

3 THE COURT: Let me ask you this  
4 question. Whether they had installed a DS3 or  
5 Internet connect, they contracted with you for 5  
6 megs up and it appears here they furnished 10  
7 megs upstream; is that correct?

8 MR. FARMER: We contracted to get  
9 five and they went out and got ten, yes.

10 THE COURT: Okay. Thank you.

11 MR. FARMER: There is a question of  
12 what they did with the other five, with the  
13 connection as a whole.

14 THE COURT: Let me ask, wouldn't  
15 that be a floating point really depending on  
16 their customer load as they went along?

17 MR. FARMER: If they are allowed to  
18 get past the parol level.

19 THE COURT: Can they measure  
20 regularly whether they were getting 5 megs worth  
21 or not regardless of how many they got?

22 MR. FARMER: Are you saying can  
23 Decipher or iTRiBE measure?

24 THE COURT: Either or both.

25 MR. FARMER: Well, that was going to

1 be my next question whether iTRiBE measured the  
2 connectivity between iTRiBE and Digex.

3 THE COURT: On any given second of  
4 the day or average.

5 MR. FARMER: I don't know how they  
6 would measure.

7 THE COURT: It would give you a  
8 problem seems to me.

9 MR. FARMER: Where I was going to go  
10 with that, Your Honor, was see if they went about  
11 any monitoring of the bandwidth usage.

12 THE COURT: All right.

13 MR. FARMER: And Your Honor, before  
14 that, there could be a little bit of a parol  
15 evidence. They wanted to oversell their  
16 connectivity. If they only bought 20 MB, they  
17 are only entitled to sell two multiples of that.

18 THE COURT: Sort of like an airline,  
19 but not by two or three, but by a large multiple  
20 of Bandwith.

21 MR. FARMER: That's the connection  
22 between iTRiBE and Digex I was going to make a  
23 parol evidence objection that they not be able to  
24 introduce evidence of overselling of the  
25 permissibility of overselling.

1 THE COURT: You leave me behind from  
2 time to time.

3 BY MR. FARMER:

4 Q. Is it true Mr. Adolphi that iTRiBE did not  
5 do itself internal monitoring of the bandwidth  
6 usage?

7 A. Very, very infrequently. We did not have a  
8 piece of software that constantly monitored the  
9 bandwidth.

10 Q. You did it sometimes?

11 A. We internally did it sometimes, sure. If  
12 there was network problem through Cox or anybody  
13 else, we put monitors out there and watched the  
14 bandwidth, that's true.

15 Q. You didn't check the bandwidth of your  
16 customers on a regular basis?

17 A. No, the customers themselves, they could  
18 check their own bandwidth utilization.

19 Q. And plus, we also had -- I can't remember  
20 how often Digex did it. Every five minutes or  
21 so. They measured the bandwidth and they provided  
22 us with a weekly maybe biweekly --

23 MR. FARMER: To stop you right there,  
24 I would object if he's going to testify to  
25 Digex.

1 THE COURT: Overruled.

2 MR. FARMER: We don't know what the  
3 documents are going to say.

4 THE COURT: He said they furnished  
5 them, their monitoring.

6 MR. FARMER: Right, but where I  
7 wanted to stop him, if he's going to testify to  
8 what the monitoring said, I'm going to object on  
9 hearsay. They never produced such documents to  
10 us. He can say they provided monitoring.

11 MR. DORANS: Just for the record, we  
12 did produce a document.

13 THE COURT: Only one at the very  
14 beginning.

15 MR. FARMER: That one can come out.  
16 If he wants to testify, I'm going to make a  
17 hearsay objection to warn the Court where I'm  
18 going with that.

19 BY MR. FARMER:

20 Q. Going back to bandwidth usage, Mr. Adolphi,  
21 just to clarify where we are. You are saying  
22 that iTRiBE did not regularly on a regular basis  
23 monitor its bandwidth usage?

24 A. That's correct. But again, that was  
25 because Digex did it for us as far as the

1 upstream was concerned.

2 Q. I'm not going there.

3 THE COURT: Let me ask you a  
4 question, counselor. Did your client monitor to  
5 determine at any time that they weren't getting  
6 their 5 megs worth? Do you have any records to  
7 show that your company was not getting their 5  
8 megs?

9 MR. FARMER: Our evidence is  
10 circumstantial evidence.

11 THE COURT: Let me ask you about the  
12 circumstantial. Are there monitors where you can  
13 precisely monitor that?

14 THE WITNESS: I don't know if I know  
15 the answer to that question.

16 THE COURT: You just heard that  
17 Digex monitors it. They have monitors.

18 MR. FARMER: That's what he said.

19 THE COURT: Every five minutes  
20 and --

21 MR. FARMER: I don't know if he  
22 testified if it's five minutes every time all  
23 day.

24 THE COURT: He said every five  
25 minutes and he said they have the capacity to

1 monitor it. Is that what you said?

2 THE WITNESS: That's correct.

3 THE COURT: And did you say that  
4 your customers also monitor for their own  
5 account?

6 THE WITNESS: Certain customers can  
7 monitor for their own account. There are lots of  
8 different softwares out there to be able to  
9 monitor through a router.

10 MR. FARMER: You will hear evidence  
11 and at that time we'll describe to you what we  
12 saw and what it means and so forth and so on.  
13 That will come from another witness. And beyond  
14 that --

15 THE COURT: Let me jump ahead. Is  
16 it going to say that you weren't getting your 5  
17 megs worth?

18 MR. FARMER: What it's going to say,  
19 Your Honor, that it shows in 5 minute intervals a  
20 very high percentage of it. It's a average and  
21 you can peek out and it would show you the  
22 average. And it should show a very high number.  
23 And we'll have --

24 THE COURT: If it peeked over, the  
25 contract for bandwith would it or did it have an

1 adverse affect on your function?

2 MR. FARMER: I don't understand the  
3 Court's question.

4 THE COURT: Well, you say it may  
5 have peeked over the five minutes. "May have";  
6 is that correct?

7 MR. FARMER: I was describing  
8 hypothetically how the routing measures --

9 THE COURT: I'm not talking  
10 hypothetical, I'm talking about real life.  
11 Because all of this really goes to the relevance  
12 of this whole line of questioning to me. And  
13 hypotheticals are not very helpful to me right  
14 now because it's hard for me to believe as a  
15 layman and you have to bear in mind that I'm a  
16 layman, that there aren't ways to quantify  
17 whether or not you are accessing or whether you  
18 are exceeding 5 megs or having less than 5 megs  
19 because 5 megs is what you contracted for. And  
20 if you didn't get that 5 megs, then you may have  
21 a contractual claim or a defense to a contractual  
22 claim. If that.

23 Is the basic elements of your defense -- is  
24 that your basic element of your defense that you  
25 didn't have enough capacity?



1                   MR. FARMER: Yes, in our  
2 counterclaim.

3                   THE COURT: Is that also your  
4 defense and your counterclaim?

5                   MR. FARMER: Yes.

6                   THE COURT: Your counterclaim is we  
7 didn't get 5 megs; therefore, you owe us money?

8                   THE WITNESS: Right.

9                   THE COURT: So you have 5 megs as  
10 your shield and your sword; is that correct?

11                   MR. FARMER: One of our swords and  
12 one of our shields.

13                   THE COURT: Now, we'll get back to  
14 my question. My question is very much pointed  
15 and I'm not going to yield much ground on it, but  
16 I may let you for the purpose of making your  
17 record proceed, but you must be prepared to deal  
18 with me very precisely because this is a very  
19 precise kind of case. It deals with precise  
20 measurements which I suggest are capable of being  
21 pushed by you or anybody else in the business.

22                   Now, so all you have is a hypothetical  
23 example or potential for more than 5 megs drain  
24 on this pipe; is that correct?

25                   MR. FARMER: I don't know if that was

1 ever exceeding it. It could have been exceeding  
2 or not.

3 THE COURT: You did have some  
4 measurements through some of the routers, but  
5 they are on five minute segments.

6 MR. FARMER: And also, Your Honor, I  
7 don't know what happens for instance, and this is  
8 what other witnesses will testify to, if the  
9 traffic goes through the router and it can't get  
10 through the router because of the problem at  
11 iTRiBE --

12 THE COURT: So that would be  
13 conjectural.

14 MR. FARMER: I'm saying I don't know  
15 the answer, but we are going to be putting on  
16 witnesses who will be addressing those issues.

17 THE COURT: Have you spoken to the  
18 witnesses?

19 MR. FARMER: Some of them are in the  
20 court.

21 THE COURT: Who is your techie in  
22 this case? Your expert witness?

23 MR. FARMER: He's here. We'll get  
24 back to this.

25

\* \* \*

\* \* \*  
1 MR. FARMER: To get that on the  
2 record --

3 THE COURT: I believe it is. Your  
4 ruling is expecting me to enlarge it on the  
5 well-known premise that the contract must be  
6 construed against the person who drew it.

7 MR. FARMER: That's one principle  
8 that helps us in addition to what the parol  
9 evidence does or doesn't do.

10 And Your Honor, I point out, that if this  
11 merger clause is that ironclad they already lost  
12 the case because they didn't put in a DS3.

13 MR. DORANS: Did you want me to  
14 respond to that? They confused the terms of the  
15 contract with performance. While it's true we  
16 didn't put in a DS3, we put in a substitute.  
17 It's the same as a breech. We're willing to live  
18 by the terms of the contract.

19 THE COURT: I'm going to rule on the  
20 memo and I'm going to read the memo and opinion  
21 in the Mull case.

22 MR. FARMER: I would point out there  
23 has been parol evidence as to what 5 megs of  
24 bandwidth means and what's a DS3.

25 THE COURT: Five megabytes of  
\* \* \*

\* \* \*

DIRECT EXAMINATION

BY MR. DORANS:

Q. Could you please state your name for the record?

A. Michael Darden.

Q. And could you spell your last name?

A. D-a-r-d-e-n.

THE COURT: That's like asking him to spell Smith in Virginia, you know that. BY MR. DORANS:

Q. When did you first become working in the Internet or its predecessors?

A. In the year of 1985.

Q. What did you start doing then?

A. I was working for a government contractor at Wright Patterson Air Force Base, W-r-i-g-h-t, P-a-t-t-e-r-s-o-n.

Q. Okay.

A. With the defense data network the predecessor to the Internet.

Q. And what is the defense data network?

A. The defense data network was a series of links between military installations that eventually grew to include universities known as Arpanet.

\* \* \*

1 Q. Okay. \* \* \*

2 A. Each one of those pipes is 64K and if you

3 add them all together. It's 1.544 MB.

4 Q. That can move in what period of time?

5 A. It moves at the speed of light.

6 Q. Okay. And T1 is the width of the pipe?

7 A. Right, the amount of bandwidth contained

8 within that pipe.

9 Q. And time, is that similar to what I was

10 talking about earlier in the opening statements,

11 where the train is moving through the station at

12 a certain time intervals?

13 A. Right.

14 Q. Putting information on the train and off

15 the train?

16 A. Right.

17 Q. It pulses?

18 A. Exactly.

19 Q. What's the next step up from T1?

20 A. The next step up from T1 is a DS3 or a T3.

21 Q. DS3 and T3 are synonymous?

22 A. They're the same thing.

23 Q. Can you tell me what that is?

24 A. That is a series of channels that contain

25 T1s to make an aggregate bandwidth from as low as 3

1 MB up to 45 MB.

2 Q. Okay. Again, we are talking about a wider  
3 than pipe?

4 A. Right.

5 Q. What's an Ethernet connection?

6 A. An Ethernet connection is an architectural  
7 network that will allow from 10 MB to 100 MB and  
8 the standard is being worked out for 1,000 MB for  
9 a gigabit.

10 Q. And what's the difference physically  
11 between an Ethernet and a DS3? Regardless of  
12 pipe size, is it different looking physically?

13 A. Yes, DS3 is co-axle cables.

14 Q. Like I would use for my TV set?

15 A. Similar, not the same. Or it can be  
16 delivered on fiber-optics.

17 Q. What about Ethernet?

18 A. It could be delivered either by  
19 fiber-optics or typically an RJ-45 connector for  
20 a base T version of a connector.

21 Q. What is a RJ-45?

22 A. It's similar to a phone line connection,  
23 but it has conductors in a certain category of  
24 cable.

25 Q. What difference would there be in

1 Decipher's ability to use the Internet under the  
2 contract admitted into evidence as Exhibit 1  
3 rather iTRiBE purchased a DS3 or an Ethernet  
4 connection to Decipher?

5 A. If both connections were the same speed  
6 there would be no difference. They're the same  
7 bandwidth.

8 Q. Are they the same bandwidth?

9 A. You can configure a DS3 to equal out either  
10 9 or 12 MB where the Ethernet is 10 MB.

11 Q. So if the DS3 were at 12 MB what effect  
12 would it have on Decipher's connection to iTRiBE?

13 A. Unless the link was at 100 percent  
14 utilization, it would not have any effect.

15 Q. Would it make any difference to Decipher if  
16 we had a DS3 in a 25 meg or a 12 meg if they were  
17 only supposed to get a 5 meg?

18 A. If the link was not at 100 utilization  
19 there would be no difference.

20 Q. Of which link?

21 A. The DS3 link if you've got 45 meg. If it  
22 was at 44-1/2 MB and their 5 MB was a portion of  
23 that, there would be no difference to them.

24 Q. Is there any difference in terms of  
25 installation of the two?

\* \* \*

\* \* \*  
DIRECT EXAMINATION

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BY MR. FARMER:

Q. Start off with a little background please.  
Can you please state your name for the record?

A. Yes, my name is Rick Eddleman.

Q. Mr. Eddleman, can you spell your last name?

A. Yes, E-d-d-l-e-m-a-n.

Q. Thank you. What is your position, if any,  
with Decipher, Inc.?

A. My present position is Vice-president of  
Finance and Information Systems.

Q. Did you hold those positions during 1997  
and 1998?

A. Yes, I did.

Q. Okay. Would you briefly describe the  
nature of Decipher's business?

A. Decipher is a game company. Games being  
differentiated from non-electronic or paper based  
games.

Q. Okay. Where is Decipher physically  
located?

A. Granby Street in Norfolk.

Q. Approximately, how many employees does it  
have?



1 A. Approximately, 80.

2 Q. Approximately, how many employees did it  
3 have in 1997, 1998?

4 A. I'd say half that, 40, 45.

5 Q. Would you please briefly tell me about  
6 Decipher's most popular products.

7 A. The most popular products for Decipher from  
8 about 1994 forward have been a collectible  
9 playing card game. We call that a CCG in the  
10 industry.

11 Q. What does "CCG" mean?

12 A. Customizable collectible card game.

13 Q. Thank you.

14 A. And they are based on licenses with Star  
15 Wars and Viacom's Star Trek: The Next  
16 Generation.

17 Q. For those two games, can you just give me a  
18 brief overview of how they work?

19 A. Well, they are a universe of cards that are  
20 added to over time. Each new release of  
21 product. For example, the Star Wars product  
22 starts with a universe of approximately 360 cards  
23 and random sorted packs of 60 cards per pack.

24 Now, each one of those packs contain a  
25 mixture of rares, common and uncommon cards. You

1 kind of think of this as a rock, paper, scissors  
2 relationship in terms of power and the way those  
3 cards interreact with other cards within the  
4 universe of cards. Those are called starter  
5 decks.

6 In addition to that, we produce over time  
7 expansion packs which are approximately 126 to  
8 130 cards per set. Those are packaged in  
9 individual pillow packs of approximately 9, 11 or  
10 15 cards. We've had iterations of all three.

11 Now, those serve to expand the universe of  
12 the cards. Each of these cards over time have a  
13 collectible quality to them. And they have game  
14 play associated with them. The game play entices  
15 tournaments. Not unlike chess. Then we use  
16 these cards and continually expands those cards  
17 and feed the marketplace vis-a-vis allow these  
18 tournaments to be played, invite players and what  
19 have you.

20 Q. Where geographically in the world are the  
21 tournaments played?

22 A. All over the world.

23 Q. Including Europe?

24 A. Absolutely.

25 Q. And including Japan?

1 A. Australia.

2 Q. Regarding your card game product, are you  
3 familiar with your business with the nature of  
4 your typical customer?

5 A. Yes, I am.

6 Q. Could you please describe that for the Star  
7 Trek and Star Wars games and if they are  
8 different?

9 A. Well, they are slightly different in the  
10 sense that the demographics of those two  
11 properties Star Trek and Star Wars are slightly  
12 different.

13 By that, I mean the Star Trek is a much  
14 older property obviously, than Star Wars and all  
15 of us have either met with or talked with Trekkies  
16 in our time. So the average demographic of a  
17 Star Trek player is probably in the 35 to 38 age  
18 arena.

19 Contrast that with Star Wars, and we found  
20 that Star Wars is as much a newer property and we  
21 find that the demographic of that stems downward  
22 to ages as young as nine and ten years old. So  
23 the average demographic for that is slightly  
24 younger. Probably to 20 to 24 years.

25 Q. Through your experience and working with

1 Decipher, do you have any knowledge about the  
2 general Internet sophistication of your  
3 customers?

4 A. Well, a good portion of our player base and  
5 registered players through the web site come from  
6 universities. So they are very sophisticated,  
7 they are very highly intellectual players and  
8 they are demanding in terms of the products we  
9 produce and frequently will report to us --

10 MR. DORANS: Objection, Judge, in  
11 testifying to what they report to. Hearsay.

12 THE COURT: What do they report?

13 THE WITNESS: What they basically tell  
14 us is if we made any errors in terms of printing  
15 or what have you --

16 THE COURT: Overruled.

17 THE WITNESS: So it's a fairly  
18 knowledgeable and sophisticated player base.

19 BY MR. FARMER:

20 Q. Without telling us specifically what may  
21 have been said to you, do you have any knowledge  
22 as to their desires or demands of Decipher as of  
23 the speed of its web Internet connection?

24 A. Well, again, these are people that are  
25 dying to get to the next piece of information and

1 will look at the next jonure of cards about to be  
2 released from Decipher. In a growing universe of  
3 cards also, we carry the responsibility of having  
4 to communicate to them any changes in the way  
5 that the rules of the game have to morph, if you  
6 will, to accommodate each new expansion.

7 It's like adding new chess pieces to a  
8 chess board. If you start changing the dynamics  
9 of the number of pieces, you obviously have some  
10 impact on the players, on the way those pieces  
11 are played. Unless you affect the strategy, the  
12 whole strategy of how to play the game. So the  
13 card game is very much like that. These card  
14 games are very much like that.

15 Our web site services provide sort of a  
16 central repository not only of the graphic  
17 imagery of the cards, but frequently asked  
18 questions of service are there, rules play, deck  
19 design and there is a whole host of content that  
20 is serving that player base in that community.

21 Q. Sure, I'll get to that content in a little  
22 bit. I wanted to finish up the description of  
23 what these folks are like and the demands are.

24 Do you have any knowledge as to what their  
25 demands or preferences are from Decipher as of

1 the speed in which the web sites function for  
2 them?

3 A. Obviously, the faster the better.

4 Q. What do you base that on?

5 A. Just that we are a very graphically  
6 intensive site. There is an awful lot of content  
7 on the site, and to deliver that we need to offer  
8 the most bandwidth and speed we can get.

9 Q. Have there been times that your customers  
10 have complained to you?

11 MR. DORANS: Objection, Judge, that's  
12 not relevant.

13 THE COURT: I've been waiting for  
14 you. Sustained.

15 BY MR. FARMER:

16 Q. I would like to now get into a description  
17 of what your web site contained and what I would  
18 like you to do is to describe the elements of  
19 your web sites that did exist in 1997, 1998 and  
20 take me through it element by element and I may  
21 have you break each one of those down.

22 A. Typically, we have message boards or  
23 bulletin boards the two terms are used  
24 synonymously. And that basically provides a  
25 forum for players to interact with one another to

1 pose questions and receive replies from one  
2 another. It basically provides sort of a forum  
3 for discussion.

4 Q. Don't leave bulletin boards. You can  
5 finish your answer if you are still talking about  
6 bulletin boards.

7 A. Basically, almost from inception we have  
8 almost eight or nine of those boards.

9 Q. With the bulletin board, if someone posts a  
10 message on it, who can see that message?

11 A. Anyone that happens to be following that  
12 board at the same time.

13 Q. Can the individuals reply to the message on  
14 the board?

15 A. Yes, they can.

16 Q. Is that for others to see?

17 A. Yes, it is.

18 Q. What is another thing that is on Decipher's  
19 web site at that time?

20 A. We have a presentation of most if not all  
21 of the cards that fill the universe of cards for  
22 each one of those properties. So the actual  
23 players that may not have had access to some of  
24 the older cards, the earlier cards that were  
25 produced can look at those cards and determine

1 where their collections may fall with them having  
2 a complete universe of cards.

3 Q. Are those graphical files?

4 A. They are graphical images, yes.

5 Q. I understand. Does Decipher have an art  
6 show on-line?

7 A. We have several areas that I guess you can  
8 consider to be an art show or arena. One, we had  
9 a virtual showroom tour in New York. We have a  
10 fairly careful execution or layout of how our  
11 cards are actually developed so that the end user  
12 can follow along how we come together with a  
13 concept, how we add the art to that card and  
14 actually construct the game play around those  
15 cards.

16 We have a hall of cards so that we can  
17 provide again sort of a virtual tour so that you  
18 can literally traverse down a pathway. Looking  
19 left and right at the various expansion packs and  
20 releases of various properties that we have  
21 supporting the property in the universe.

22 Q. I understand. Can you please go on to  
23 another attribute of Decipher's web site?

24 A. We offer on-line sales of proprietary  
25 property or products I should say. We have



1 produced early some collections of cards that  
2 fell and feed into the Star Trek universe of  
3 cards. These all allow and feed into the game  
4 play as well. They're only purchased through  
5 Decipher and we use the Internet for those sales.

6 Q. I understand. Is there any information on  
7 your web sites related to tournaments. Can you  
8 describe that component of your web site?

9 A. Well, tournaments are really the heart and  
10 soul of the market that we provide to support  
11 these products. We found that nothing succeeds  
12 more appropriately or successfully than the grass  
13 roots level of making tournaments available. We  
14 use the tournaments throughout the retail shops  
15 and other locations throughout the world almost  
16 as an extension of Decipher. They've become our  
17 virtual clubhouses throughout the world.

18 In those locations we have a support base  
19 of -- and the numbers are approximate, I would  
20 say last count about 200 volunteer members  
21 throughout the world who are so attached to the  
22 license. Be that Star Trek or Star Wars and so  
23 enjoy the game that they on their own with little  
24 support from Decipher will arrange for  
25 tournaments. They will go to these retail

1 locations and they will have someone at those  
2 retail locations sign up and become what we call  
3 an authorized tournament director. An authorized  
4 tournament director is required to run  
5 tournaments, to capture the results of the  
6 tournaments and feed those back to Decipher.

7 In addition, they post those tournaments  
8 and the dates of those tournaments so the players  
9 can find out where in their immediate area where  
10 these tournaments might be going on.

11 THE COURT: What's the relevance of  
12 all of this?

13 MR. FARMER: I'm just establishing --

14 THE COURT: Consider it  
15 established.

16 MR. FARMER: So no need to talk  
17 further about their need for a good web site.  
18 We'll move on to the next point then, Your  
19 Honor. I covered that in the opening statement  
20 any way.

21 BY MR. FARMER:

22 Q. What I would like to move on to next, Mr.  
23 Eddleman, is the process that led to a contract  
24 that is presently before the Court. Just to  
25 factually set the table.



1 BY MR. FARMER: \* \* \*

2 Q. In that case, let's go back to the question  
3 that I had before you before. And that was the  
4 experience of Decipher's internal web users.

5 A. The experience is clearly reported to  
6 myself and my information systems manager if  
7 there were slow downs or if there were problems  
8 connecting to the outside world. And we would  
9 frequently get those, experience those if there  
10 was slowness or inability to make those  
11 connections to the outside world. And we did  
12 experience a fair amount of that in that time  
13 period.

14 Q. What is a release date?

15 A. The release date if you are referring to  
16 this document --

17 Q. Aside from the exhibit, we won't worry  
18 about the exhibit right now.

19 A. The release date is directly tied to the  
20 next release of an expansion of a new card game.  
21 So for example, if we come out with the next  
22 expansion in this series we would carefully stage  
23 the distribution of that such that we have a  
24 specified release date. The whole point being  
25 that no retailers be disadvantaged by it being

1 distributed earlier to some and later to others,  
2 so we specify a release date.

3 Q. Do you do anything on your web site in  
4 regards to a web site?

5 A. Absolutely. We certainly announce that  
6 release date so that user community knows when to  
7 expect to go to the retail community. And also,  
8 we'll put up cards so that those users have  
9 access to looking at some of the cards that will  
10 be in that set that's going to be released.

11 Q. To your knowledge, do users use Decipher's  
12 web site for finding out that information?

13 A. They are using that for that and a host of  
14 other services there. We were doing close to  
15 million hits a day.

16 Q. Do you have any knowledge as to whether  
17 Decipher experienced any problems with its web  
18 connection on a release day?

19 A. Well, yes.

20 Q. Can you please describe that?

21 A. It was a time we were making the conversion  
22 from Digex to MCI. We were about to make that  
23 conversion.

24 THE COURT: Conversion from what to  
25 what?

1 THE WITNESS: From Digex or from  
2 iTRiBE to MCI. When we were going direct to MCI.

3 THE COURT: This is after you  
4 repudiated the contract?

5 THE WITNESS: That's correct.

6 BY MR. FARMER:

7 Q. At this time, did you still have operation  
8 or your link with iTRiBE?

9 A. Yes.

10 Q. Please describe to me what you were about  
11 to say about what occurred on the release dates.

12 A. Basically, it had technical issues that had  
13 to have happened through that period. And the  
14 Marketing Department let us be careful that that  
15 not interfere with the release so that their  
16 announcements went out.

17 Q. Was there a problem on the release date  
18 while iTRiBE was still providing Internet  
19 connectivity to Decipher?

20 MR. DORANS: Objection as to  
21 relevance, Judge. I think that the witness  
22 already indicated that he made the decision to go  
23 somewhere else, he was just waiting for the other  
24 person to get on-line. How could that have  
25 anything to do with this?

1                   THE COURT:    If you will, why don't  
2   you move the microphone, it's highly  
3   directional.  I'm having trouble following you.  
4   If you would lift it up and aim your words right  
5   at it.

6                   THE WITNESS: Very good.

7                   THE COURT:    That will be good.

8                   MR. DORANS:   So the objection was  
9   relevance.  He said they already made the  
10   decision to change and they were in the process  
11   of switching over, so he's already made the  
12   decision.

13                  THE COURT:    Why did you want to make  
14   a decision to change?

15                  THE WITNESS: Because the service that  
16   we were receiving was not meeting our needs.

17                  THE COURT:    That's a generality,  
18   give me some specifics.

19                  THE WITNESS: Basically, the server  
20   was down.  It was not available.  We were not  
21   able to access the web outside of the Decipher.

22                  THE COURT:    Why was it down?

23                  THE WITNESS: For a multitude of  
24   reasons.  I don't know specifics.

25                  THE COURT:    Was it upstream?

1 THE WITNESS: It appeared to be  
2 upstream.

3 THE COURT: Upstream from?

4 THE WITNESS: From Decipher.

5 THE COURT: Not upstream from  
6 iTRiBE?

7 THE WITNESS: I can't answer that  
8 question, I don't know.

9 THE COURT: Okay.

10 MR. FARMER: The question that I was  
11 going to ask though is, was there a time when you  
12 lost your Internet connectivity with iTRiBE on a  
13 release date.

14 THE COURT: What's a release date?

15 MR. FARMER: What I believe he stated  
16 earlier, Your Honor a release date is a date when  
17 they were releasing a product to the marketplace,  
18 and they put it out on their web site so it's  
19 important for the folks to come see about it on  
20 the web site.

21 MR. DORANS: Again, the objection is  
22 relevance. He already admitted he made the  
23 decision to switch.

24 MR. FARMER: They still had iTRiBE  
25 service, Your Honor. They hadn't terminated the

1 contract.

2 THE COURT: Overruled.

3 BY MR. FARMER:

4 Q. Please answer the question.

5 A. Yes, there was.

6 Q. Okay. Thank you.

7 THE COURT: Did you question iTRiBE  
8 to see what the problem was?

9 THE WITNESS: Yes, we tried to  
10 routinely contact iTRiBE and advise them of the  
11 problems.

12 BY MR. FARMER:

13 Q. And what happened?

14 A. We almost never got a call back. Only on  
15 one occasion out of the five or six attempts did  
16 we get a call back and it was left in the voice  
17 mail.

18 Q. What I would like to do now is move forward  
19 and look at what efforts that Decipher went  
20 through to try to understand what, if anything,  
21 was happening with the connection in 1997, 1998  
22 and what Decipher did about it.

23 If you could start with the beginning of  
24 that process and tell me what your knowledge was  
25 of what Decipher did.

\* \* \*



1 A. Yes, I do. \* \* \*

2 Q. What is it?

3 A. This appears to be four services from Bell  
4 Atlantic Network Integration to come in and help  
5 us look at or troubleshoot any issues that might  
6 be occurring on our network.

7 Q. Okay. Did Decipher pay this bill?

8 A. Yes, we did.

9 Q. How much did Decipher pay?

10 A. \$1,450.

11 MR. FARMER: I move the entrance of  
12 this exhibit, Your Honor, as number 4.

13 THE COURT: Any objection?

14 MR. DORANS: No, Judge.

15 THE COURT: Without objection marked  
16 and received as Defendant's Exhibit 4.

17

18 (Whereupon, the BANI Invoice was  
19 marked Defendant's Exhibit No. 4)

20

21 BY MR. FARMER:

22 Q. If you would now please turn to Tab 6 in  
23 the notebook, please. And I will ask you Mr.  
24 Eddleman, do you recognize document number 6?

25 A. Yes, I do.

1 Q. What is document number 6?

2 A. This is related to equipment necessary to  
3 place the web servers outside of the fire wall.

4 Q. Okay. Did Decipher pay this bill?

5 A. Yes, we did.

6 Q. Okay. How much did Decipher pay?

7 A. \$34,427.22.

8 MR. FARMER: Okay. Turning to the --  
9 well, before I do that, I move into evidence  
10 Exhibit Number 6.

11 THE COURT: Any objection?

12 MR. DORANS: No objection.

13 THE COURT: Without objection  
14 Defendant's Exhibit 6 admitted.

15

16 (Whereupon, the BANI Invoice was  
17 marked Defendant's Exhibit No. 6)

18

19 BY MR. FARMER:

20 Q. Staying on Exhibit 6, turn to the second  
21 page, Mr. Eddleman.

22 A. (Witness complied.)

23 Q. Do you see a line there near the bottom  
24 that says maintenance and then maintenance terms  
25 and conditions total amount \$3,726?

1 A. Yes, I do.

2 Q. Is Decipher claiming that as part of the  
3 damages in this case?

4 A. No, we're not.

5 Q. And is it claiming a proportional amount of  
6 the tax, if any, related to that in this bill?

7 A. No, we are not.

8 Q. And now turning to Exhibit 7, please.

9 A. (Witness complied.)

10 THE COURT: Let me ask one  
11 question. What was the reason to move it outside  
12 of the fire wall?

13 THE WITNESS: To separate that from  
14 internal traffic. So that all of the internal  
15 traffic and external traffic were not colliding.

16 MR. FARMER: Was the purpose of that  
17 to try to figure out if that would solve --

18 MR. DORANS: Objection to the  
19 leading, Judge.

20 MR. FARMER: Was there a purpose for  
21 that that related to --

22 THE COURT: I understand. You don't  
23 have to whip up on it. Were you getting  
24 feedback?

25 MR. FARMER: I was going to ask what

1 the purpose of that was relative to their trying  
2 to figure out if their interconnection was --

3 THE WITNESS: It was just another way  
4 to we deemed to be a quicker way to isolate and  
5 try to figure out the type of traffic. Internal  
6 versus external.

7 MR. FARMER: Was there a way to try  
8 to figure out if the Internet connection was a  
9 problem?

10 THE COURT: I don't hear that, so  
11 let's move on.

12 BY MR. FARMER:

13 Q. Yes, sir, Your Honor.

14 I'll now turn to Exhibit 7.

15 A. (Witness complied.)

16 Q. Do you recognize Exhibit 7, Mr. Eddleman?

17 A. Yes, I do.

18 Q. What is it?

19 A. Again, it's additional equipment.

20 Q. Okay. Equipment related to?

21 A. The external network.

22 Q. And was -- did Decipher pay this bill?

23 A. Yes, we did.

24 Q. How much did Decipher pay?

25 A. \$12,161.33.

1 MR. FARMER: Okay. And I move the  
2 admission of Exhibit 7, Your Honor.

3 THE COURT: Any objection?

4 MR. DORANS: No objection.

5 THE COURT: Without objection,  
6 Defendant's Exhibit 7.

7

8 (Whereupon, the BANI Quote was marked  
9 Defendant's Exhibit No. 7)

10

11 BY MR. FARMER:

12 Q. Now, we'll turn to Tab 8, please.

13 A. (Witness complied.)

14 Q. Do you recognize Exhibit 8, Mr. Eddleman?

15 A. Yes, I do.

16 Q. What is it?

17 A. Again, this represents four serial ports.

18 Q. What were the serial ports? What did they  
19 have to do?

20 A. The external connectivity.

21 Q. As far as that is concerned, does this have  
22 anything to do with the setting up your  
23 connection with MCI?

24 A. Yes.

25 Q. Okay. This is the connection that placed

1 your connection with iTRiBE eventually?

2 A. Eventually.

3 Q. Did Decipher pay this bill?

4 A. Yes, we did.

5 Q. How much did Decipher pay?

6 A. This bill was for \$5,911.60.

7 MR. FARMER: I move the admission of  
8 Exhibit 8, Your Honor.

9 THE COURT: Any objection?

10 MR. DORANS: No objection.

11

12 (Whereupon, the BANI Quote was marked  
13 Defendant's Exhibit No. 8)

14

15 BY MR. FARMER:

16 Q. Staying on Exhibit 8, Mr. Eddleman, near  
17 the bottom it says maintenance for attached terms  
18 and conditions \$2,016.96?

19 A. Yes.

20 Q. Does Decipher claim that was part of the  
21 damages in the case?

22 A. No.

23 Q. And now, would you turn to Exhibit 9.

24 A. (Witness complied.)

25 Q. Do you recognize Exhibit 9?

1 A. I do.

2 Q. What is Exhibit 9?

3 A. This is support for our network cut over.

4 Q. Cut over from what to what?

5 A. From iTRiBE to MCI.

6 Q. And did Decipher pay this bill?

7 A. Yes, we did.

8 Q. How much did Decipher pay?

9 A. \$1,200.

10 MR. FARMER: I move the admission of  
11 Exhibit 9, Your Honor.

12 MR. DORANS: No objection, Judge.

13 THE COURT: Marked and received.

14 Let me say for the record, every offer that  
15 is made without objection will be considered  
16 received into evidence and marked accordingly.

17

18 (Whereupon, the BANI Premises Work  
19 Invoice was marked Defendant's Exhibit No. 9)

20

21 MR. FARMER: Thank you, Your Honor.

22 BY MR. FARMER:

23 Q. Did there come a time when Decipher decided  
24 to terminate the contract with iTRiBE being the  
25 contract that's at issue in this case?

1 A. Yes.

2 Q. Approximately, when did that decision  
3 occur?

4 A. Approximately, June of 1998.

5 Q. And what were the reasons for that  
6 decision?

7 A. Because we did not feel that we were  
8 receiving the bandwidth or the speed that we had  
9 negotiated for the contract.

10 Q. Were there any other reasons?

11 A. We had no customer service and no support  
12 through that period of time trying to isolate  
13 these problems.

14 THE COURT: Stop right there while I  
15 write down that was the substance of it. Would  
16 you repeat that each by each.

17 THE WITNESS: Yes, sir.

18 THE COURT: Why did you change  
19 them?

20 THE WITNESS: The first part was that  
21 we were not receiving the 5 MB bandwidth we  
22 anticipated --

23 THE COURT: Hold on there.

24 THE WITNESS: Okay.

25 THE COURT: Okay. Next?



1 THE WITNESS: We were not experiencing  
2 the speed expected.

3 THE COURT: You mean, the speed  
4 on-line or the net?

5 THE WITNESS: Internal or external.  
6 Going out to the Internet or coming in.

7 THE COURT: Hold on. You were not  
8 getting the speed expected?

9 THE WITNESS: Correct.

10 THE COURT: Next?

11 THE WITNESS: We did not feel that we  
12 were receiving customer service or technical  
13 support sufficient to resolve these problems.

14 THE COURT: Anything else?

15 THE WITNESS: No, sir.

16 THE COURT: All right.

17 BY MR. FARMER:

18 Q. You say that in June of 1998 was when the  
19 decision was made to terminate iTRiBE, correct?

20 A. Correct.

21 Q. Okay. When did that termination actually  
22 occur to your knowledge?

23 A. To my knowledge, in or about that time.

24 Q. When did you actually notify iTRiBE of  
25 that?

\*

\*

\*

1 A. In addition to my own experience I also  
2 used the Internet.

3 Q. Your own experience. Isn't it true that  
4 your own experience didn't tell you one way or  
5 the other if you had 5 meg?

6 A. My experience told me that the performance  
7 that I was given at that point in time was  
8 inferior to what I received at the time when I  
9 was just using a T1.

10 Q. Isn't it fair to say, sir, that you as a  
11 user had a great deal of determining what's  
12 causing slowness or difficulty in page loadings  
13 as a user?

14 A. As a user, my reference is my experience.

15 Q. But as a user wouldn't you agree that if  
16 you went out today and said I want to go check on  
17 this page the page may not load; isn't that  
18 correct?

19 A. It could be.

20 Q. And that could be because the computer or  
21 whatever you are trying to get a hold of is not  
22 working; is that correct?

23 A. There are a multitude number of reasons.

24 Q. And I'm going to go through them one by  
25 one. And there also could be a number of people

1 your existing systems?

2 A. We had made the decision to move to MCI.

3 Q. In December of '97?

4 A. Not in '97.

5 Q. In December of '97 through June  
6 of '98, you said you've gone through these --

7 A. We were going through the reiterations of  
8 the transition to MCI.

9 Q. When did you make the decision to move to  
10 MCI? I don't want to mislead you. I think  
11 earlier you said in June of '98?

12 A. I think that's right.

13 Q. So in December of '97 you started  
14 upgrading?

15 A. That's correct.

16 Q. The purpose of that was that Dale Maurice  
17 was leaving and you wanted to get some of your  
18 network issues straightened out; isn't that true?

19 A. That's not at all true.

20 Q. That's not at all true. It had nothing to  
21 do with that?

22 A. That's correct, it did not.

23 Q. Okay. So you didn't make any decisions by  
24 upgrading when you knew that you would be losing  
25 Dale?

1 A. Pardon me?

2 Q. You didn't make any decisions about  
3 upgrading --

4 A. The two events were not tied together in  
5 any shape or form.

6 Q. In any shape or form. Okay.

7 THE COURT: I have a few questions.

8 MR. DORANS: I need to stay on that  
9 point.

10 THE COURT: I thought that meant  
11 "okay."

12 MR. DORANS: No, it meant "okay" just  
13 the opposite way.

14 The deposition of Rick Eddleman, page 41.  
15 Do you remember having your deposition taken,  
16 sir?

17 THE WITNESS: Yes, I do.

18 BY MR. DORANS:

19 Q. Do you remember being under oath at that  
20 time?

21 A. I do.

22 Q. Let me get you to turn to page 41.

23 A. (Witness complied.)

24 Q. Do you remember the question being asked,  
25 "Did you make any other changes when you

1 switched over to MCI? Internal configurations,  
2 hardware, anything like that."

3 And your answer being, "Previous to making  
4 the decision to change, we made the decision to  
5 upgrade, look around and try to optimize our  
6 existing systems. That was primarily as a result  
7 of an expectation that we would be losing Dale at  
8 some point in time as well."

9 Do you remember that question being asked?

10 A. I do.

11 Q. And that being your answer?

12 A. I do.

13 Q. And at that time your answer was true?

14 A. This is a different context.

15 Q. "Optimizing your existing systems and  
16 upgrading."

17 A. You asked me why we made the decision to go  
18 to MCI.

19 Q. No, sir, I asked you before that, before  
20 MCI. The upgrading, all the bills that you put  
21 into evidence in part that was because Dale was  
22 leaving and you wanted to upgrade and optimize  
23 your system?

24 A. No. No, sir, it was not. And that's not  
25 what this question refers to. That work was done

1 to try to isolate and define why we were  
2 concerning the lack of ban with and the slowness  
3 that we had.

4 Our experiences were, we were not getting  
5 the service that we were looking for. And to  
6 answer that question effectively, we had to start  
7 at one end of the scale and work outward.

8 THE COURT: Stop, stop, stop. Madam  
9 court reporter, go back and find that question.

10 (The Reporter readback as requested.)

11 THE COURT: There was too many cut  
12 offs back and forth and I don't have it.

13 MR. DORANS: Okay.

14 THE COURT: I would like to read the  
15 deposition and his answer. There is a different  
16 text because I have to compare them myself, I'm  
17 having trouble tracking them in my brain so I  
18 want to look at it. So if you will make me a  
19 copy of this so that tomorrow morning I know  
20 we'll be here tomorrow again, I can see that.

21 MR. DORANS: I'm not so sure about  
22 that, but we might be. That's what happens.

23 THE COURT: If we're not, that's  
24 okay. I won't be angry. But if we are here --

25 MR. DORANS: I understand, Judge.

1 THE COURT: It's just there were too  
2 many cutoffs back and forth and I just don't have  
3 the context of it.

4 BY MR. DORANS:

5 Q. The decision to go to MCI was made in June  
6 of '98; is that correct?

7 A. Yes.

8 Q. And in fact, it was made June 4, 1998.  
9 I'll show you this document and see if you  
10 recognize it.

11 A. Yes, I do.

12 Q. I'll move to have that admitted for the  
13 record as redirect to the backbone dated 6/4/98  
14 from Warren Holland, Chairman and CEO of Decipher  
15 to Kathy Eddleman, Rick Eddleman and Carol  
16 Wisely?

17 THE COURT: This will be 6?

18 MR. DORANS: Yes, Plaintiff's Exhibit  
19 6.

20  
21 (Whereupon, the Fax was marked  
22 Plaintiff's Exhibit No. 6)

23  
24 THE COURT: Let me read it.

25  
\* \* \*

1 you saw as far as their performance in their end  
2 of the contract?

3 A. Certainly. It was to discuss our  
4 experience in service, bandwidth, the whole thing.

5 Q. When you say discuss service and bandwidth,  
6 what is it that you would say to them? What is  
7 it that you were referring to?

8 A. We were not -- we did not feel we were  
9 getting the service and support or the bandwidth  
10 that we were contracted to receive.

11 Q. Another quick question. What is a DS3?

12 THE COURT: A what?

13 BY MR. FARMER:

14 Q. What is a DS3?

15 A. A DS3 is a 45 megabit connection.

16 Q. What is a fractional DS3?

17 A. It is a portion of that 45 megabit  
18 connection.

19 MR. FARMER: Thank you. No more  
20 questions.

21 THE COURT: Question. How much  
22 bandwidth did you buy from MCI?

23 THE WITNESS: Six MB.

24 THE COURT: Did you ever in your  
25 wildest dreams think you would need 45 megs?



1 THE WITNESS: No, sir.

2 THE COURT: Thank you.

3 MR. FARMER: I'm sorry, I didn't hear  
4 the question, sir.

5 MR. DORANS: I can tell you. "Did  
6 you ever in your wildest dreams think you would  
7 need 45 megs"?

8 THE COURT: That was the question.  
9 The answer was, "No."

10 MR. FARMER: Thank you, Your Honor,  
11 I'm sorry, I didn't hear it.

12 I have no further questions.

13 THE COURT: Step down. Next  
14 witness?

15 MR. MILLS: I would like to recall  
16 Michael Darden.

17 THE COURT: I take it that you are  
18 calling this gentleman as an adverse witness?

19 MR. MILLS: Yes, sir. Yes, sir, we  
20 are.

21 THE COURT: On your counterclaim?

22 MR. MILLS: Yes, sir.

23

24 RECROSS-EXAMINATION

25

1 BY MR. MILLS:

2 Q. Mr. Darden, you started for iTRiBE in March  
3 of 1999, correct?

4 A. That's correct.

5 Q. You had previously testified in a  
6 deposition as a corporate representative, didn't  
7 you?

8 A. Yes, sir.

9 Q. And that deposition was taken under oath,  
10 correct?

11 A. Yes.

12 Q. You had stated at that deposition that you  
13 stopped working for iTRiBE March 2, of 2000; is  
14 that correct?

15 A. That's what I understood, yes.

16 Q. And you stated that you now work for  
17 iTRiBE.com, Inc.; is that correct?

18 A. That's correct.

19 Q. It is your understanding that the contract  
20 in question in this case was terminated on  
21 December 1, 1998, correct?

22 A. Yes.

23 Q. So at no point during your employment with  
24 iTRiBE was this contract actively being used by  
25 Decipher, correct?

\* \* \*

1 connection to iTRiBE?

2 A. I did.

3 Q. So it was in place when you got there  
4 whenever that was in March of '99?

5 A. The connection was still into our switch,  
6 yes.

7 Q. And you physically disconnected it?

8 A. I physically disconnected it, yes.

9 MR. DORANS: I have nothing further  
10 for this witness.

11 MR. FARMER: We call Dale Maurice,  
12 Your Honor.

13

14 DALE ROSS MAURICE  
15 a Witness, having been first  
16 duly sworn was examined and  
17 testified as follows:

18

19 DIRECT EXAMINATION

20

21 BY MR. FARMER:

22 Q. Would you please state your name for the  
23 record?

24 A. Dale Ross Maurice.

25 Q. Thank you, Mr. Maurice.

1 Have you been employed by Decipher in the  
2 past?

3 A. Yes.

4 Q. And when were you employed by Decipher?

5 A. From March of '96 to May of '98.

6 Q. To May of 1998?

7 A. Yes, I believe so.

8 Q. At that time, did you resign from Decipher  
9 or were you fired?

10 A. I resigned.

11 Q. Since that time, have you continued to work  
12 with Decipher?

13 A. Yes, I have.

14 Q. At what capacity?

15 A. Doing web programming as an independent  
16 consultant.

17 Q. I would like to go into your educational  
18 background.

19 A. Yes.

20 Q. And where did you attend college?

21 A. Old Dominion University.

22 Q. You'll have to speak up a little bit.

23 A. I went to Old Dominion University.

24 Q. And what was your degree in at Old Dominion  
25 University?

\*

\*

\*

1 A. Yes, I did.

2 Q. And did you negotiate this contract on  
3 behalf of Decipher?

4 A. Yes.

5 Q. Who did you meet with at iTRiBE in the  
6 process of negotiating this contract?

7 A. The salesperson at the time as well as Mike  
8 Adolphi and Rick Eddleman was there and I don't  
9 recall who else was there.

10 Q. Where did this meeting occur?

11 A. We met there at iTRiBE's offices.

12 Q. Okay. Was this a time when you were taking  
13 a tour of iTRiBE's offices?

14 A. Yes.

15 Q. Was the contract actually negotiated that  
16 day?

17 A. No, it wasn't.

18 Q. Was that a preliminary meeting?

19 A. Yes, kind of a preliminary feeling just to  
20 get a better feel of who they were and where the  
21 offices were and what they would be capable of  
22 provides us.

23 Q. I now would like you to look at the  
24 contract and help us understand it if you would.  
25 Looking at the contract, first, I would like to

1 start on the line that says, "Carry local loop  
2 \$75 and 5 MB connection from Cox fibernet." What  
3 does that refer to?

4 A. It refers from the Decipher's connection to  
5 us from Cox's fiber-optic.

6 Q. Was that a connection that iTRiBE was  
7 providing?

8 A. No, Cox provided that particular  
9 connection.

10 Q. Next I would like to refer you to the line  
11 that says bandwith 5 MB and it says \$3200. I  
12 won't get to the iTRiBE, we'll get to that in a  
13 second.

14 What does that line refer to, "Bandwith 5  
15 MB, \$3200"?

16 A. It refers to the amount of total bandwith  
17 available to us.

18 Q. Available from you all to where?

19 A. Out to the Internet proffer and backbone as  
20 I saw it.

21 Q. Okay. So that refers to the amount of  
22 connectivity that you would also have available  
23 to you between iTRiBE and their upstream  
24 provider?

25 A. Yes.

\*

\*

\*

1 was there any extra for this service?

2 A. No.

3 Q. And you understood it to be a 24 hour a day  
4 service?

5 A. Yes.

6 Q. And you understood it to be 7 days a week?

7 A. Yes.

8 Q. And I would now like to look at the part of  
9 the contract where it says iTRiBE will install a  
10 DS3 with that. What does that line refer to, to  
11 your knowledge?

12 A. My understanding was it was a 45 MB  
13 connection from them to the upstream provider.

14 Q. What is a DS3? And you may feel that  
15 you've answered question, what is your  
16 understanding?

17 A. Provide 45 MB bandwidth. I'm sorry, data  
18 coverage. We would only have 5 MB of that. And  
19 all of their other client's would also have a  
20 part of that 45 MB, but we shouldn't ever become  
21 saturated I would not expect it.

22 Q. If you were to be provided a DS3 line, but  
23 it only has 3 MB or 6 MB or 9 MB of connectivity  
24 to it, would what you call it?

25 A. I wouldn't call it DS3. Maybe a fractional

1 DS3. I wouldn't call it DS3.

2 Q. You would not call that a DS3?

3 A. No.

4 Q. Why is that?

5 A. DS3 as I understand it is a 45 MB  
6 connection.

7 Q. Thank you very much. And that's what you  
8 understood that iTRiBE was to be installing  
9 between itself and its upstream service provider  
10 pursuant to this contract?

11 A. Definitely.

12 Q. Okay. And in negotiation of the contract  
13 was there any discussion of who would be iTRiBE's  
14 upstream Internet service provider?

15 MR. DORANS: Judge, same objection.

16 THE COURT: Overruled.

17 BY MR. FARMER:

18 Q. Was there any discussion regarding who  
19 would be iTRiBE's upstream service provider?

20 A. Yes, I was told that it was going to be  
21 UUNET.

22 Q. Who told you that?

23 A. I believe it was Rodney.

24 Q. Rodney Howell?

25 A. Yes.

\* \* \*



1 A. Yeah.

2 Q. Decipher's computers?

3 A. Yeah.

4 Q. Did you ever make any adjustments to the  
5 bandwidth on that route?

6 A. No, I don't think so.

7 Q. What's the capacity of that router, to your  
8 knowledge?

9 A. The type of connection going out was a  
10 Ethernet 10 MB connection.

11 Q. So it's a 10 MB capacity?

12 A. Yes.

13 Q. Thank you. Thinking about the contract  
14 again, you can put it back in front you if you  
15 need to, what were your expectations from the  
16 performance of that connection?

17 A. I expected to have at least 5 MB, that's  
18 what we contracted for available to us as far as  
19 connectivity out on the Internet.

20 Q. Did you have any expectations regarding how  
21 iTRiBE would handle any difficulties with their  
22 upstream Internet provider?

23 MR. DORANS: Objection. Again, we  
24 are going to parol.

25 THE COURT: Overruled let's say for

\* \* \*  
1 e-mail would be out to all of the other users on  
2 that mailing list.

3 Q. So this means that a lot of e-mails were  
4 being set out for Decipher?

5 A. Thousands of them, yes.

6 Q. Was there anything regarding that e-mail  
7 going out or not going out in times that would  
8 indicate to you about Decipher bandwidth?

9 A. Very often we would get e-mail back ups,  
10 yes.

11 Q. What did that indicate to you?

12 A. It would usually indicate some kind of  
13 blockage in one form or another.

14 Q. Okay. And you testified earlier about your  
15 attempt to get a hold of folks or a person in  
16 particular at iTRiBE for service and support.  
17 Were there any times when that person didn't call  
18 you back or call you back right away?

19 A. Not call me back right away, yes. There  
20 were several occasions of that.

21 Q. Did you do anything at times when you  
22 didn't get a quick enough response from that  
23 person?

24 A. I would, you know, if it wasn't a direct  
25 problem, if we didn't have a hard down or we just

1 had some problems outside usually out on Digex, I  
2 would very often send e-mail and carbon copy  
3 several different people. Including the  
4 salesperson Rodney and I think probably carbon  
5 copied Mike Adolphi on several occasions.

6 Q. And did those folks proceed to take care of  
7 the problem?

8 A. Not that I'm aware of, no.

9 Q. Okay. Did a time ever occur when someone  
10 at iTRiBE told you that there weren't any  
11 problems on iTRiBE or Digex in your Internet  
12 connectivity?

13 A. I don't recall anybody specifically telling  
14 me that, no.

15 Q. I would like to show you something in your  
16 deposition that may refresh your recollection. I  
17 would like to refer you to your deposition. And  
18 what I would like to do is read you a question  
19 and answer --

20 MR. DORANS: I don't think that's the  
21 appropriate way to refresh unless he's trying to  
22 impeach his own witness, I could understand, but  
23 I don't think trying to impeach his own witness.

24 MR. FARMER: Well, in that case, I'll  
25 just have him read his question and answer, Your

\* \* \*

1 A. That he didn't see any particular problems  
2 at the time that I called.

3 Q. Okay. That's fine. At any time, I'm  
4 finished with that, I can take that away.

5 At any time did Decipher receive any  
6 bandwidth usage reported with iTRiBE?

7 A. No.

8 Q. Did Decipher have the ability to monitor  
9 internally its own bandwidth Internet  
10 connectivity?

11 A. No, we didn't have the ability.

12 Q. You mentioned earlier that Decipher has a  
13 router?

14 A. Yes.

15 Q. On that router, does that router have the  
16 ability to measure connectivity in any way?

17 A. It can measure statistics. I'm not sure  
18 what the full capabilities are. As I recall the  
19 statistics being, it would only reflect the last  
20 five minutes of usage.

21 Q. You say last five minutes, it covered a  
22 five minute period of time?

23 A. Yes.

24 Q. Was it a graph of that five minute time or  
25 was it an average?

1 A. No, it wasn't a graph. It was just a bunch  
2 of numbers that come out and say you are using  
3 this many or megabits are coming or outgoing of  
4 the interface you're looking at.

5 Q. So that would measure the bandwidth in a  
6 five minute average going through Decipher's  
7 router?

8 A. Yes.

9 Q. Would that measure anything about whether  
10 that bandwidth was successfully making its way  
11 downstream through iTRiBE?

12 A. No.

13 Q. Would it measure at all whether that  
14 bandwidth was successfully going through Digex at  
15 the same level?

16 A. No.

17 Q. Okay. When you say a five minute average,  
18 did that mean that if there was a time during  
19 there where it was 0, then it would lower the  
20 overall average even though there was a higher  
21 point?

22 A. Absolutely.

23 Q. And finally, I would like to go over a  
24 couple of these and I'll check with my  
25 co-counsel.



1 THE COURT: He did not want to go to  
2 a Tier 1?

3 BY MR. DORANS:

4 Q. Dale Maurice did not want to go to the Tier  
5 1?

6 A. No, I did not.

7 Q. Because you thought it would be more work  
8 for you?

9 A. Right, I thought iTRiBE would be able to  
10 provide us better support than going up higher.

11 Q. Because they have local people?

12 A. Right.

13 Q. Whereas the Tier 1 people might have people  
14 in Richmond or DC or whatever?

15 A. Right.

16 Q. The person who complained to you most often  
17 at Decipher about some sort of connectivity issue  
18 was Warren, wasn't it, the CEO?

19 A. Yes.

20 Q. And most frequent his complaint was he  
21 couldn't reach a particular site; isn't that  
22 true?

23 A. Yes.

24 Q. And the majority time you looked into it,  
25 that problem was unrelated to iTRiBE or Decipher,

1 correct? Or excuse me, Digex?

2 A. A great part of the time, yes.

3 Q. Majority of the time?

4 A. I don't know about majority.

5 THE COURT: He said, "Great part of  
6 the time."

7 MR. DORANS: Well, he said majority  
8 in his deposition.

9 THE COURT: You said "majority" and  
10 he said "great."

11 MR. DORANS: I got him to saying  
12 majority before and I'll go back to that.

13 THE COURT: I think that's the same  
14 thing.

15 BY MR. DORANS:

16 Q. And what that meant was that Warren, for  
17 example, let's just pick a site, wanted to look  
18 at E-bay and he couldn't get E-bay on his screen  
19 and he would call and say what's going on?

20 A. Right.

21 Q. And the problem could have been that  
22 Decipher had more users than their 5 meg. That  
23 could have been one problem?

24 A. Possibly, yes.

25 Q. Possibly. It could have been that the pipe

1 from iTRiBE to Digex was overloaded?

2 A. Yeah, that's possible.

3 Q. Or it could have been any of the routers  
4 going all the way up from the backbone all the  
5 way to the servers at the other end that goes to  
6 E-bay, correct?

7 A. Yes.

8 Q. And when we state the greater or majority  
9 of the time you found out it was actually some  
10 server way down the road unrelated to Digex or  
11 unrelated iTRiBE or some router on Digex?

12 A. I will say that the majority of the time  
13 yes. When you have complaints say 100 times a  
14 week, a majority, a lot of the times you can't  
15 explain it.

16 Q. Sometimes you just couldn't tell what it  
17 was?

18 A. Right.

19 Q. One of the things that you could do though,  
20 you could run a traceroute and that could give  
21 you some type of help in determining where the  
22 problem was, correct?

23 A. Some, yes.

24 Q. And that's where you receive some sort of a  
25 nominal problem with the router several hops down



1 the road you said?

2 A. Yes.

3 Q. And several hops would be past iTRiBE on  
4 Digex or either somewhere else, correct?

5 A. Yes.

6 Q. You still work at Decipher as a consultant?

7 A. Yes, I do.

8 Q. And you've worked for them after they  
9 stopped using iTRiBE?

10 A. Yes.

11 Q. And as a consultant you now run some  
12 traceroutes at Decipher?

13 A. Yes, I have.

14 Q. And you've seen some of the same problems  
15 that you saw before they switched from iTRiBE?

16 A. Yes, it's very typical of the Internet.

17 Q. The Internet has down times?

18 A. Sure.

19 Q. That's the problem with the Internet.  
20 Routers fail from time to time; is that correct?

21 A. Yes.

22 Q. You knew within a couple of days of the 5  
23 MB pipe being turned on that iTRiBE was using  
24 Digex, didn't you?

25 A. Yes.

\*

\*

\*

1 MR. FARMER: Can you refer me to  
2 where you were referring to.

3 BY MR. DORANS:

4 Q. Sure.

5 And that's what your recollection was in  
6 April of this year?

7 A. As I understood the question then, yes, I  
8 guess.

9 Q. Has the question changed?

10 A. No, the question hasn't changed.

11 Q. Just your answer?

12 A. Yes.

13 Q. There was some discussion about what iTRiBE  
14 said during the negotiations that you testified  
15 to under direct. What did they tell you about  
16 the DS3?

17 A. In regards to what?

18 Q. About whether or not they were going to put  
19 it on or hook it up?

20 A. My understanding was they needed to get  
21 commitments from a certain number of customers  
22 before they would go to the expense of installing  
23 a DS3 and they weren't going to provide us with  
24 the connectivity unless they could do that.

25 Q. And they never told you that they got

1 commitments from that certain number of  
2 customers, correct?

3 A. I assumed they had.

4 Q. Again, if you would just answer the  
5 question, please.

6 They never told you they got commitments  
7 from enough customers to justify the DS3?

8 A. I don't recall that specifically being  
9 said, no.

10 Q. Thank you. You knew that Tier 2 providers  
11 oversell more bandwidth than they had?

12 THE COURT: I'm sorry?

13 BY MR. DORANS:

14 Q. That Tier 2 providers oversell bandwidth?

15 A. Yeah.

16 Q. You knew that. You just expected most of  
17 time you would get your 5 MB?

18 A. Absolutely, yeah.

19 Q. Minor point. You knew that Decipher bought  
20 some Farallon cards for the art department?

21 A. Yes.

22 Q. That had nothing to do with the Internet,  
23 did it?

24 A. For those people that were on those  
25 machines that had the Farallon cards, yeah, that



\* \* \*  
1 Q. You are not aware of any test that ever  
2 showed that iTRiBE ever failed to provide 5 megs  
3 of bandwidth to Decipher?

4 A. I never did any testing.

5 Q. But you're not even aware of any?

6 A. No.

7 THE COURT: Read back that  
8 question.

9

10 (Court Reporter readback requested testimony.)

11

12 BY MR. DORANS:

13 Q. The only testing anybody is aware of with  
14 regards to Decipher is that router testing that  
15 you had run?

16 A. Traceroute.

17 Q. Excuse me, that 5 minute thing that we  
18 talked about.

19 A. Right. I was just trying to give you a  
20 rough idea of what was going on.

21 Q. That tells you over the last five minutes  
22 here's how much traffic went through the router?

23 A. Yes.

24 Q. And you said that was around 80 percent  
25 that you remember seeing?

1 A. I remember seeing that at one point, yes.

2 Q. You ran that test as least ten times?

3 A. Probably.

4 Q. How long does it take to run that test?

5 A. Just a few seconds.

6 Q. Prior to this contract, under the prior  
7 contract with the T1 had there been problems  
8 raised about the connectivity issues or  
9 complaints, put it that way?

10 MR. FARMER: Your Honor, I want to  
11 know what the relevance is.

12 THE COURT: Overruled. I see the  
13 relevance. Because you are talking about 5 and a  
14 half megs against 5 and you're only talking about  
15 the six month split going to five. That's when  
16 the problems developed according to the  
17 Defendant.

18 MR. FARMER: But I believe there was  
19 a different provider than the T1 provider.

20 MR. DORANS: Actually, I'm going to  
21 go both ways, Judge. Their statement was  
22 everything was hunky dory and I think there were  
23 complaints with the prior provider.

24 BY MR. DORANS:

25 Q. Didn't some people at Decipher have

\*

\*

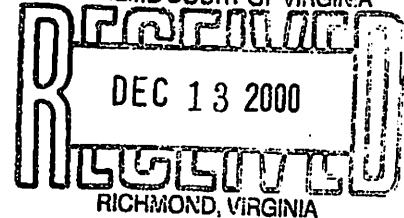
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V I R G I N I A

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

ORIGINAL

CLERK  
SUPREME COURT OF VIRGINIA



iTRiBE, Inc.,

Plaintiff/

Counterclaim Defendant,

VS.

Decipher, Inc.,

Defendant/

Counterclaim Plaintiff

CL99001311

TRIAL

DATE: May 24, 2000

BEFORE: The Honorable Leonard B. Sachs

APPEARANCES:

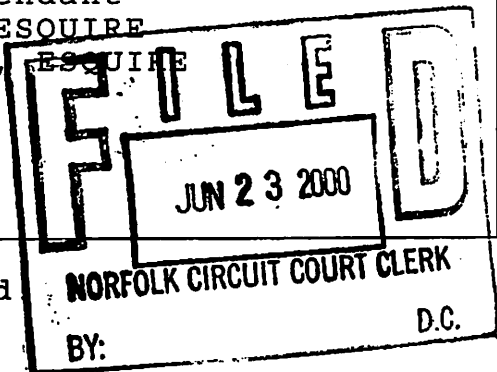
WOLCOTT, RIVERS, WHEARY, BASNIGHT  
& KELLY, P.C.

One Columbus Center, Suite 1100  
Virginia Beach, Virginia 23462  
Attorney for the Plaintiff

BY: BARRY DORANS, ESQUIRE  
Of Counsel

McCLANDISH, KAINE & GRANT  
1111 East Main Street, Suite 1500  
Richmond, Virginia 23218  
Attorney for the Defendant

BY: JOHN B. FARMER, ESQUIRE  
TERRELL W. MILLS, ESQUIRE  
Of Counsel



Biggs & Fleet, Ltd  
(757) 625-6695

BY:

D.C.

1 recorded it as 5/24. Okay. All right.

2 MR. FARMER: Your Honor, regarding  
3 exhibits, I think Mr. Dorans and I agreed that  
4 we'll bring in some other exhibits by agreement  
5 that will save the Court some time.

6 THE COURT: I don't mind that.

7 MR. FARMER: It's 47 through 60 in  
8 our notebook. Its corporate records of iTRiBE.  
9 And I understand Mr. Dorans, he doesn't have any  
10 problems without having to put Mr. Adolphi on the  
11 stand to do that; is that correct?

12 MR. DORANS: That is entirely  
13 correct.

14 THE COURT: Forty-seven through  
15 what?

16 MR. FARMER: Through 60. Actually  
17 61.

18 MR. MILLS: Yes, 60.

19 MR. FARMER: Okay. It's 60.

20 MR. DORANS: And for the purpose of  
21 the record, these are various contracts that  
22 iTRiBE had for Internet connectivity.

23 THE COURT: To be marked as?

24 MR. DORANS: For web hosting.

25 MR. FARMER: These were web hosting.

1 THE COURT: That's all right. They  
2 are in evidence.

3 MR. FARMER: Your Honor, you wanted  
4 us to prepare statements of what we thought the  
5 issues were. Would you like this now?

6 THE COURT: Yes. If I understand  
7 correctly, these were introduced by agreement  
8 without evidence by a witness?

9 MR. FARMER: Right, by agreement.  
10 They're corporate records.

11 THE COURT: To identify.

12 MR. FARMER: And we have each taken  
13 our attempt to do what Your Honor asked us to do  
14 yesterday. I think we came sort of close the way  
15 each other did it. And hopefully, that will be  
16 close to what the Court wants.

17 THE COURT: There is no such thing  
18 as perfection.

19 All right. Now, where are we?

20 MR. MILLS: I believe we would like  
21 to call Jamie Bowden to the stand.



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JAIME BOWDEN

a Witness, having been first  
duly sworn was examined and  
testified as follows:

DIRECT EXAMINATION

BY MR. MILLS:

Q. Can I get you to state your name for the  
record, please?

A. Jaime Bowden.

THE COURT: You can lift up that  
mike. Lift up the cable a little bit. That's  
good.

BY MR. MILLS:

Q. Mr. Bowden, many of the issues that we are  
going to discuss today are going to involve a lot  
of technical terms. For the benefit of the court  
reporter, when you encounter a one of those terms  
if it's not obvious how to spell it the way it's  
pronounced, would please take the time to spell  
it so she can make a good record?

A. Yes.

Q. Mr. Bowden, do you remember when you worked  
for iTRiBE?

1 A. From May of '97, through January of '99.

2 Q. Prior to starting with iTRiBE, where were  
3 you working?

4 A. At a company called Drebo Internet in  
5 Gloucester, Virginia.

6 Q. What was your responsibilities at Drebo?

7 A. Network administration --

8 THE COURT: You have to speak up a  
9 little bit and a little slower.

10 THE WITNESS: I did systems and  
11 network administration and I worked hardware.

12 BY MR. MILLS:

13 Q. What's involved in being a systems  
14 administrator generally?

15 A. Maintaining existing machines, building new  
16 machines, adding services as they are requested.  
17 Maintenance issues, upgrades.

18 Q. Is this part of the whole networking  
19 process as well?

20 A. Yes, sir.

21 Q. When you started with iTRiBE, what address  
22 did you live at?

23 A. 420-D Kingsly Lane, Norfolk, Virginia.

24 Q. And where did you move after that?

25 THE COURT: Four what?

1 THE WITNESS: 420-D. Or it was 440D.  
2 One was my phone number and one was my street  
3 address.

4 BY MR. MILLS:

5 Q. But you were on Kingsly Road?

6 A. Yes, Kingsly Road in Norfolk.

7 Q. When did you move to that address?

8 A. August of '97.

9 Q. And what address did you move to?

10 A. 513 Crossing, Chesapeake, Virginia.

11 Q. And from there have you moved?

12 THE COURT: What's the relevance?

13 MR. MILLS: Your Honor, through the  
14 discovery process they failed to provide us with  
15 all of the contact information that they had, so  
16 I'm trying to establish the evidence so that you  
17 can rule on is sanctions.

18 BY MR. MILLS:

19 Q. Subsequent to living at Track Crossing,  
20 where did you move?

21 A. I went to Alexandria, Virginia.

22 Q. Do you remember approximately when that  
23 occurred?

24 A. September.

25 Q. Of?

1 A. '99.

2 Q. Did you receive a W2 from iTRiBE for 1999?

3 A. Yes, I did.

4 Q. Do you recall what address it was mailed  
5 to?

6 A. 513 Track Crossing, Chesapeake.

7 Q. So that was sent to the Track Crossing not  
8 the Alexandria address, but not sent to the  
9 Kingsly address either?

10 A. That's correct.

11 Q. Since leaving iTRiBE, where do you work  
12 now?

13 A. I worked at NASA for the while at Hampton  
14 and NASA lark. And I currently work for a  
15 defense contractor in Northern Virginia doing  
16 research.

17 Q. What was your job responsibilities at NASA?

18 A. Systems administration.

19 THE COURT: You're dropping your  
20 voice. That's not to say that I don't have some  
21 hearing impairment which I do, but please, bare  
22 that in mind.

23 THE WITNESS: Okay. At NASA I did  
24 systems administration for them, working on their  
25 suns and SGIs.

\* \* \*

1 Q. And that three con switch was physically  
2 located where?

3 A. In the Cox St. Pauls CO.

4 Q. Okay. And the "CO" does that mean  
5 "co-location"?

6 A. That's means central office. That's where  
7 we co-located our equipment.

8 MR. MILLS: Your Honor, I do have a  
9 demonstrative exhibit that I would like to  
10 witness use. Would that be acceptable to the  
11 Court?

12 THE COURT: Yes, that probably will  
13 be helpful.

14 MR. FARMER: It's also in the exhibit  
15 book as well for reference.

16 MR. MILLS: We have a small copy in  
17 the exhibit behind tab 45 if you would like.

18 THE COURT: I just want to make sure  
19 there is no difference between what I saw before.

20 MR. MILLS: No, Your Honor, this is  
21 the same one.

22 BY MR. MILLS:

23 Q. Mr. Bowden, have you seen this diagram  
24 before?

25 A. Yes, I have.

1 Q. Is it a fair and accurate representation of  
2 the network at the time that you were connected  
3 to Digex originally?

4 A. As I remember it, yes.

5 Q. If I could get you to help us with the  
6 Court, it might be easier for you to step out and  
7 trace through the connections and explain who is  
8 who and where these connections are going.

9 A. Where do you want me to start?

10 Q. Why don't you start here and carry us from  
11 here back. (Indicating.)

12 A. In the top right, we have Digex which is  
13 our upstream Internet provider. Who we got the  
14 Internet connection from. Then they carried off  
15 their 7513 we had the 10 MB fiber on top of the  
16 2514 --

17 THE COURT: Wait. The court  
18 reporter snapped her head around. You're going a  
19 little fast and you are moving along like you're  
20 talking to another techie. Slow down and talk to  
21 the court reporter.

22 THE WITNESS: And from the Cicso 2514  
23 we went into the three con link switch 500.

24 Hanging off of that, we had the Cicso 501

25 BY MR. MILLS:

1 Q. Just so I understand, this is Digex. This  
2 is your iTRiBE router and then that connects to a  
3 switch where other people connect in?

4 (Indicating.)

5 A. Yes.

6 Q. And one of those people are connected to  
7 another router called a 2501?

8 A. That's correct.

9 Q. And that has a T1?

10 A. Yes.

11 Q. What is a T1?

12 A. It's stands for trunk one. It's 24 Digex  
13 channels carries 1.5 megabits throughout the  
14 router.

15 Q. So it's a 1.5 meg connection roughly?

16 A. Yes.

17 THE COURT: Megabits or megabytes?

18 THE WITNESS: Megabits. We had our  
19 dial up customers at the time which was not a  
20 huge amount was the three ascends.

21 BY MR. MILLS:

22 Q. So that the Court understands, are these  
23 modems?

24 A. Yeah, those are modem banks.

25 Q. And how many different modem connections

1 can be maintained in these?

2 A. It depends on the model number.

3 Q. For 4004?

4 A. The 4004 was 96 and the 4002 was 98.

5 Q. And what about the 4048?

6 A. The 4048 was I believe 48, but it could  
7 have been 96. I would have to check the megs.

8 Q. So we have one customer coming in here and  
9 we have all our dial up customers coming in here?

10 A. That's correct.

11 Q. And they're all connecting into the link  
12 switch?

13 A. Correct.

14 Q. And the line from the 2514 what type of  
15 line is that?

16 A. That a 10 MB Ethernet.

17 Q. And the line from the T1 customer?

18 A. It's 10 MB, it has to be. Everything into  
19 the switch 10 MB. It has a 10 meg switch.

20 Q. Okay. So every line that connects to the  
21 switch is able to transfer 10 meg if there is an  
22 ability to generate that on the Internet?

23 A. Correct.

24 Q. So that explains what's going on and so I  
25 understand the label here says, "St. Pauls



1 Co-location." What is the co-location?

2 A. That's where we keep our equipment at Cox's  
3 physical location. That's their property. We  
4 have our location in their building. Our  
5 equipment in their building.

6 Q. Now, if I could get you to start here and  
7 explain what the connection is between this box  
8 and the switch.

9 A. First of all, Virginia Beach had 10 MB  
10 carried by Cox Fibernet through a hub that we had  
11 over there. They had a 2514 that connected to  
12 ProSoft local network to our local network.

13 Q. Their local network is that referring to  
14 their office?

15 A. Yes.

16 Q. So all of their people that were internal  
17 had access to Digex for the Internet --

18 A. Through there.

19 Q. So come in here and they're down here and  
20 back out?

21 A. That's correct. And then we had two pipe  
22 line 50s. One I believe was Steel Masters I  
23 don't remember who the other one was.

24 Q. That's fine.

25 A. First of all, the Newport News office had

1 roughly the same set up. It was 10 MB carried by  
2 Cox to a hub which is another 2514 which give  
3 their local office connectivity.

4 Q. So they had another office in Newport News  
5 and had their internal user accessing the web?

6 A. That's correct. Here we have Decipher that  
7 is carried by Cox. My understanding was that  
8 Dale had limit to 5 megs, but Cox verified --

9

10 (Telephone interruption.)

11

12 THE COURT: Time. You have to cut  
13 off your phones. We don't take calls.

14 BY MR. MILLS:

15 Q. So this was a 5 meg link?

16 A. Yeah. I was not aware of that at the  
17 time. Cox stated that it is a 5 meg link that  
18 they carry for us.

19 Q. Okay. All right. So for clarity, I know  
20 this is a bit confusing, Your Honor, but if you  
21 will give me a little latitude here, these  
22 connections between these two types of symbols,  
23 that's all part of the Cox Fibernet?

24 A. That is part of the Cox Fibernet.

25 Q. So the post off Virginia Beach office is

1 coming out this side with a 10 meg line into the  
2 office across the 10 meg line back into this  
3 switch for the 10 meg line?

4 A. Yes.

5 Q. So that the extent they were putting that  
6 kind of demand in they had passed through 10 meg  
7 at this point?

8 A. Correct.

9 Q. Same is with coast off Newport News?

10 A. That's correct.

11 Q. Now with Decipher, they have a maximum  
12 demand of 5 meg?

13 A. That's correct.

14 Q. Now, let's go down here. What is the World  
15 Trade Center?

16 A. The World Trade Center is where iTRiBE at  
17 the time had their office where a lot of the  
18 employees were and a lot of our equipment was  
19 there. That's where I worked. It was 10 megs  
20 Cox Fibernet carried between St. Pauls and the  
21 World Trade Center between the two with a three  
22 con switch.

23 Q. So we have a 10 meg connection coming down  
24 picking up Cox fiber across to your building and  
25 that line went into a three con superstack 1,000

1 switch?

2 A. Yes.

3 Q. All right. And that is -- what kind of  
4 switch is that?

5 A. That was a 10-100 switch.

6 Q. What is a 10-100 switch?

7 A. It would do 10 MB to 100 MB, depending.

8 Q. So everything plugged in it had to be  
9 either 10 meg or 100 meg?

10 A. That's correct.

11 Q. If I could get you briefly to walk around  
12 this box and explain what these connectivities  
13 are?

14 A. The GFX, which is G-F-X, firewall that was  
15 the gateway to our local network where the  
16 internal user was.

17 Q. So to make sure I'm clear, behind this we  
18 don't have it on the diagram behind this would be  
19 all of the iTRiBE employees that worked at the  
20 World Trade Center?

21 A. Yes.

22 Q. If they wanted access to the Internet they  
23 could get at it through these means as well?

24 A. Yes. The 10-100 was not here initially it  
25 was added later.

1 Q. Do you recall when it was brought in?

2 A. I don't remember the exact dates.

3 Q. Was it before December of '98?

4 A. I believe so, but I don't know for sure.

5 Q. That's fine. Okay. Keep going. If you  
6 will.

7 A. There was another 2514 up here that was  
8 used for a T1 customer. Actually, no, I don't  
9 believe they were using the interface. I think  
10 we were just using a serial board. We have  
11 another 2501 which carried the relay customers  
12 which then we had one, two, three, four, five,  
13 six SGIs. Although this one was added a little  
14 later.

15 Q. Can you explain what a SGI is for the  
16 Court?

17 A. A SGI is a silicone graphics work station.  
18 And the "I" stands for incorporated. It's a high  
19 performance Unix work station.

20 Q. And what were you doing on it? What was  
21 going on with these?

22 A. Athos carried our user --

23 Q. Athos, can you spell that for the record?

24 A. Athos as in the three Musketeers carried  
25 our Usenet feed which is Internet news. It's

1 discussions groups. The opinion was also on the  
2 outside all it did was back up. It had a tape  
3 robot on it and it gave us our fault in case we  
4 lost our drive. Porthos was --

5 THE COURT: What was that?

6 THE WITNESS: Porthos.

7 THE COURT: Spell it.

8 THE WITNESS: P-o-r-t-h-o-s.

9 THE COURT: What is a porthos?

10 THE WITNESS: Porthos is the name of  
11 the machine.

12 THE COURT: Manufacturer?

13 THE WITNESS: No, every machine on the  
14 Internet has a name of some sort. A human  
15 readable name versus a number.

16 MR. MILLS: To clarify, that is a  
17 name that you or whoever setting up the machine  
18 chooses to give it.

19 THE WITNESS: Yes.

20 THE COURT: Is that Greek  
21 mythology?

22 THE WITNESS: Actually, these are the  
23 Three Muskateers.

24 And it was our web server, our web sites we  
25 developed in house for our clients.

1 BY MR. MILLS:

2 Q. So some of your web hosting was going on  
3 here?

4 A. Aramis also known as virtual handles web  
5 sites for clients who designed their own. We had  
6 it separated. It also handled virtual e-mail and  
7 virtual FPH.

8 Q. What is virtual e-mail?

9 A. Just they have a web site and they want  
10 mail attached to their web site. They could get  
11 it there instead of using ours.

12 S2K was in with the dial ups clients. We  
13 did the World Wide Web for them and FTP --

14 THE COURT: Talk to the court  
15 reporter. Let me get counsel move to the  
16 backside of that so you can talk to both of them  
17 at one time.

18 THE WITNESS: All of our dial up  
19 clients, this is the service that we provided for  
20 them went through there.

21 MR. MILLS: Your Honor, are you able  
22 to hear everything?

23 THE COURT: So far.

24 THE WITNESS: This machine --

25 THE COURT: I understand perfectly.

1 THE WITNESS: This machine Gabriel was  
2 built for the Navy this came in later. This was  
3 not there initially we added it at some point.  
4 It was another SGI entity. It did web service  
5 for them and mail. It was built specifically for  
6 them to handle them. We had another hub down  
7 here which we hung our ISDN users off of  
8 primarily. They wanted S2K customers.

9 BY MR. MILLS:

10 Q. Do you remember how many of those customers  
11 you had?

12 A. It varied on our account anywhere between  
13 six and ten and usually averaged about eight.

14 Q. Okay.

15 A. And Global connect actually came through  
16 one of the Cicso routers and the EFW was  
17 downstairs initially. They were just pulled into  
18 our land through a copper line. They came from  
19 downstairs to upstairs and eventually they moved  
20 upstairs and went to a 2513.

21 Q. So that I understand, the various  
22 activities that are going on in the World Trade  
23 Center you had Usenet, can you explain a little  
24 bit about what Usenet is?

25 A. It's discussions groups. Anybody can



1 subscribe to a group. Which basically gives them  
2 a listing of all of the people posting within a  
3 pre-defined time range. At the time there were  
4 roughly 30,000 of them. Traffic varied to no  
5 traffic on a given day to a couple hundred  
6 messages on a given day.

7 Q. And then web hosting. Can explain exactly  
8 what web hosting is?

9 A. Web hosting you design a web page, we put  
10 it on our machines for you. Your World Wide Web  
11 name and your site are there, but it doesn't look  
12 like an iTRiBE site even though it's sitting on  
13 our server.

14 Q. So these were so basically -- if I didn't  
15 want to maintain it myself, I could have you do  
16 it and you can do it on your machine?

17 A. That's correct. Again, there was the  
18 machine, Virtual, if you wanted to maintain it  
19 yourself or have the money or the technical  
20 inclination to put it in your location, we put it  
21 in your machine where you can do that.

22 Q. How is the connectivity at the World Trade  
23 Center that's is going into that superstack  
24 1,000?

25 A. Yes. And that model number that I gave you

1 is for memory that may be incorrect, I don't  
2 know.

3 Q. Okay. And from that switch into the switch  
4 at St. Pauls there is a 10 meg connection?

5 A. That's correct.

6 Q. So that means that the World Trade Center  
7 with all of the activities going in there, be it  
8 web hosting, be it dial up customers, be it  
9 Internet connectivity customers that are  
10 dedicated, could it get up to 10 meg connection  
11 into St. Pauls?

12 A. Yes.

13 Q. Okay. So if we look at this switch here,  
14 we have Decipher at 5, we have a potential of 10  
15 from Newport News ProSoft, a potential of 10 from  
16 Virginia Beach, a potential of 10 from the World  
17 Trade Center. That's 10, 20, 30, 35 then plus  
18 whatever demanded that these dial up customers on  
19 the ascends are. And that's going to be limited  
20 to the amount that those modems can push through?

21 A. That's correct.

22 Q. But they are not going to go over 10  
23 because of the line?

24 A. That's correct.

25 Q. That's another 30 potential if the modems

1 can support it?

2 A. If the modem can support it.

3 Q. And then we have another T1 customer that  
4 had at least a 1.5 connection coming in?

5 A. Yes.

6 Q. So potential of another 10, 20, 30 plus the  
7 35, of course the 65. Plus the 1.5 is 66.5  
8 theoretical maximum?

9 A. Theoretical maximum.

10 Q. Now, are you aware of any problems that  
11 were existing within this network connecting out  
12 to the Internet?

13 A. We had occasional problems between us and  
14 Digex. You're always going to suffer from  
15 downtime somewhere. It happens. There's no  
16 guarantee.

17 Q. Were there any limitations because of the  
18 equipment?

19 MR. DORANS: Objection. He's calling  
20 for a technical answer expert and I don't think  
21 he was offered as an expert.

22 Now he's going to ask him about the  
23 technical abilities of the equipment of certain  
24 services. I believe they have an expert on it  
25 and we have an expert.

\* \* \*

1 MR. MILLS: No, I'm not.

2 BY MR. MILLS:

3 Q. Did you experience problems trying to get  
4 connectivity through this network?

5 A. In a general fashion?

6 Q. Specifically.

7 A. As I said before, we did have occasional  
8 downtime. We rearranged equipment on occasion.  
9 It would have been -- every now and then we had  
10 glitches. Everybody has glitches. I can't give  
11 you specifics, I don't remember specifics.

12 Q. That's fine. Did you experience congestion  
13 with this connectivity?

14 A. I believe we did, yes.

15 Q. Where did you experience the congestion?

16 MR. DORANS: Judge, again, I think  
17 he's asking for an opinion.

18 MR. MILLS: Your Honor, if he  
19 factually knows where it occurred, he knows.

20 THE COURT: I think that's fair. If  
21 he knows. Not what he thinks, but what he  
22 knows.

23 THE WITNESS: I would say here because  
24 we had tested all of the Cox fibers. We know  
25 that Cox carried the circuit. This piece of

1 equipment was more than capable of handling this  
2 problem. This is the buffer.

3 Q. What is this? Can you point to it?

4 A. The 2514 router on our border.

5 Q. Did you do any other testing around or try  
6 to verify this?

7 A. I called Cisco.

8 THE COURT: You what?

9 THE WITNESS: I called the  
10 manufacturer.

11 THE COURT: Hey Cicso.

12 BY MR. MILLS:

13 Q. Did you do any kind of a file testing on  
14 your own to see if could pinpoint it?

15 A. I did some between us and Digex's services  
16 that connects us that we had access to verify it.

17 Q. What did that reveal to you?

18 A. That we weren't going to be able to push 10  
19 MB through.

20 Q. So that revealed you could not push 10 MB  
21 through the 2514. Did it give you a sense of how  
22 much you could put through there?

23 A. Roughly four to six depending on traffic  
24 congestion, other technical issues that would  
25 cause the bandwidth -- if we had traffic moving

1 both ways, I couldn't take things off line to do  
2 the test, I can't do that. Everybody's down.

3 Q. So because you couldn't take the network  
4 down, you had to do what test you could and there  
5 was some limitations to that test?

6 A. Yes.

7 Q. Are you aware of any congestion coming from  
8 the World Trade Center into St. Pauls?

9 A. We had some problems with the fiber  
10 network.

11 THE COURT: Had some troubles what?

12 THE WITNESS: With the fiber network.

13 BY MR. MILLS:

14 Q. Where did the majority of the bandwidth  
15 demand to the Internet come from?

16 A. I would say in the World Trade Center and  
17 then the dial up lines as we added more they  
18 were --

19 THE COURT: World Trade and where?

20 THE WITNESS: The dial up customers,  
21 the modem banks. We had more modems as the  
22 bandwidth went up.

23 BY MR. MILLS:

24 Q. Did you ever measure the bandwidth demanded  
25 to these folks?

1 A. Not specifically, we didn't have the  
2 software to do it.

3 Q. So are you aware of anybody at iTRiBE that  
4 did that?

5 A. Not that I'm aware of, no.

6 Q. So no one at iTRiBE that you are aware of  
7 had any measurements of the actual bandwidth being  
8 demanded?

9 A. No.

10 Q. But you did see congestion, heavy use  
11 through the World Trade Center --

12 A. Yes.

13 Q. -- through the dials ups?

14 THE COURT: You said they don't have  
15 the software for that?

16 THE WITNESS: We didn't have the  
17 software to do actual measurements.

18 THE COURT: Is there such software?

19 THE WITNESS: Yes, there is. There is  
20 software designed specifically to handle, to do  
21 specifically that.

22 THE COURT: Are there contractors  
23 who can provide that service?

24 THE WITNESS: HP makes a product that  
25 is willing to do that. There are a few others.

1 BY MR. MILLS:

2 Q. But did you did not have any such products?

3 A. Not that I'm aware of.

4 Q. You had mentioned that these two boxes down  
5 here Global Connect and the EFW are improperly  
6 shown in this diagram?

7 A. EFW originally --

8 Q. Let me back up. What is EFW, do you know?

9 A. It was Ed Winworth. It was a guy. He had  
10 his own service that he co-located.

11 Q. So he was doing some of his own with an  
12 ISP --

13 A. Yes.

14 Q. And he was selling your bandwidth in  
15 essence?

16 A. Yes, that's correct.

17 Q. And where was that actually then if it  
18 wasn't here?

19 A. This was the first floor of the World Trade  
20 Center. It was in World Trade Center. And  
21 originally it did plug up into our network via a  
22 hub which was basically on our network. And  
23 eventually, he moved behind the 2514 on our  
24 network still in the World Trade Center and  
25 eventually he moved out, I believe, but that was



1 after I left so.

2 Q. How about Global Connect?

3 A. Global Connect came in --

4 Q. What was Global Connect first?

5 A. Global Connect was another ISP.

6 Q. So you were co-locating yet another ISP?

7 A. They were not co-located, they were a T1  
8 customer.

9 Q. And so did they not come into the 10 meg?

10 A. They came in through a router.

11 Q. Which router?

12 A. One of the 2500s. I don't remember exactly  
13 which router we had five or six of them.

14 Q. You said they had T1 line?

15 A. Yes.

16 Q. What was that?

17 A. 1.5 MB.

18 Q. Okay. Can you tell me how this router was  
19 configured? I mean, physically connected?

20 A. This router had two 10 MB Ethernet ports.  
21 Actually, they were 10 MB AUI ports. We had AUI  
22 TO 10 base T connectors on this. Which once  
23 again, had a piece of category five cable and  
24 went back to this switch. And this one had a  
25 category five switch that went back to Cox's

1 equipment.

2 Q. Okay. So you had two Ethernet ports. One  
3 coming in from the switch and one going out to  
4 Digex?

5 A. That's correct.

6 Q. Physically it actually went to whatever  
7 this piece of equipment is?

8 A. Yes, that was a Racal, r-a-c-a-l. That was  
9 a piece of Cox equipment.

10 Q. What did it plug into at the Racal?

11 A. That was where the fibernet was.

12 Q. What kind of port did it plug into?

13 A. It was an AUI port with a AUI 10 base T.

14 THE COURT: AUI port with a what.

15 THE WITNESS: With a 10 base T.

16 That's a 10 megabit receiver.

17 BY MR. MILLS:

18 Q. To help the Court, this just converts the  
19 media from being basically a copper wire to a  
20 fiber?

21 A. That's correct.

22 Q. Mr. Bowden, you saw this to be a bottleneck  
23 in your process at some point. Did iTRiBE  
24 eventually do something about that?

25 A. This was replaced with a switch from Bay

1 Networks. It was a Bay Accelar 400.

2 Q. I think I'm done with the exhibit, you can  
3 sit back down. I still have some additional  
4 questions.

5 A. (Witness complied.)

6 Q. Backing up one moment. At the point -- do  
7 you recall when it was that you discovered that  
8 the router was a bottleneck? How soon after the  
9 connection went up?

10 A. I honestly don't remember.

11 Q. Was it shortly thereafter, was it a year  
12 after?

13 MR. DORANS: Judge, I think it was  
14 asked and answer. He doesn't remember.

15 BY MR. MILLS:

16 Q. At the time that you discovered that it was  
17 a problem, who did you tell?

18 A. I consulted with Rodney and Mike.

19 Q. Mike is?

20 A. Adolphi.

21 Q. And Rodney?

22 A. Rodney Howell.

23 Q. This was sometime before you went and got  
24 the Bay Accelar switch?

25 A. That would be correct.

1 Q. Why did you go get the Bay Accelar switch?

2 A. We were having trouble with our network  
3 switch in Newport News.

4 THE COURT: All right. How do you  
5 spell Bay Accelar?

6 MR. MILLS: Bay Accelar, b-a-y  
7 space, a-c-c-e-l-l-a-r.

8 THE WITNESS: I think there might only  
9 be on "L."

10 BY MR. MILLS:

11 Q. At the time that you originally were  
12 constructing this network with Digex, did you  
13 ever contemplate using something other than the  
14 2514 router?

15 A. We had just recently discovered the Bay  
16 Accelar and we were offered a one time price to  
17 buy any router of our choice or any Cicso product  
18 of our choosing for half off. And we had priced  
19 out a 7206 and it's still in that slot.

20 Q. What is a 7206?

21 A. It's another router. It's a 7,000 series  
22 router.

23 Q. How is it different from the 2514?

24 A. It's a much large router. It carries a  
25 much higher capacity. It has a lot more

1 flexibility than the 2514 configuration. It's  
2 not a fixed configuration.

3 Q. But you did not choose to buy it?

4 A. We did not choose to buy it.

5 Q. Okay. Do you recall when you actually  
6 obtained the Bay Accelar switch?

7 A. In my deposition, I had said I thought it  
8 was around March or April of '98. It turns out  
9 after talking with Anicon that that was  
10 incorrect. We acquired it originally in June.

11 Q. Of '98?

12 A. Of '98.

13 Q. Did you actually put it into service at  
14 that time?

15 A. No, there were some technical issues where  
16 the Bay engineer came out and help us find and it  
17 had to be repaired first.

18 Q. At what point did you actually put it into  
19 service?

20 A. I would have to say August based on my  
21 original approximately three months time when we  
22 got it and it all actual went into service.  
23 Roughly in that three, three and a half month  
24 period.

25 Q. So you obtain it sometime in June --

\*

\*

\*

1       them if it was downstream to them specifically,  
2       yes.

3       BY MR. MILLS:

4       Q.       Who besides you served as the technical  
5       support for Decipher?

6       A.       I was pretty much it. I mean, there  
7       were -- I guess they could have called the phone  
8       support for the dial up if I weren't there.

9       Q.       Could they have actually solved any  
10      problems though?

11      A.       I seriously doubt they'd been able to help  
12      them in any way.

13      Q.       How was Decipher able to get in touch with  
14      you?

15      A.       They had my desk number as well as my pager  
16      number.

17      Q.       So you were on call 24/7?

18      A.       Yes, I work 24 hours a day.

19               THE COURT:    You say that you were  
20      available 24 hours a day?

21               THE WITNESS: Yes.

22               THE COURT:    But you didn't work  
23      necessarily?

24               THE WITNESS: No.

25               THE COURT:    You were available 24

1 to you how that should have been done?

2 A. No, I knew how to do that based on my own  
3 knowledge.

4 Q. Did you disconnect the network?

5 A. I couldn't do that. I stated we couldn't  
6 take the network down to do this.

7 Q. So you saw six, the other four could have  
8 been used by other users?

9 A. It is possible.

10 Q. Okay. And it's also possible that on the  
11 other end there was a problem with the server; is  
12 that correct?

13 A. That is another definite possibility.

14 Q. So that test really doesn't tell you  
15 anything concretely, just gives you some  
16 indication?

17 A. That is what I stated. It could not  
18 without taking the whole network down, which I  
19 could not do.

20 Q. If you disconnected, you could have run it  
21 through a simple test?

22 A. If I was going to take down a whole  
23 network, I would have put the piece of hardware  
24 down on either side and done the test.

25 Q. When you talked about the software, that

1 hours a day?

2 THE WITNESS: Yes.

3 THE COURT: All right.

4 MR. MILLS: Had iTRiBE given you a  
5 stated policy as to how quickly you were to  
6 respond?

7 MR. DORANS: Objection as to  
8 relevance, Judge.

9 MR. MILLS: Your Honor, one of the  
10 issues --

11 THE COURT: Overruled.

12 THE WITNESS: I don't believe there  
13 was a stated policy. Just as soon as possible.

14 BY MR. MILLS:

15 Q. Can you tell me what a hard down is?

16 A. I assume that it would be a hardware  
17 problem. I'm not familiar with that specific  
18 term.

19 Q. Okay. What is a DS3?

20 A. A DS3 is a digital line capable of carrying  
21 roughly 45 MB of traffic.

22 Q. It can be broken down to fractionalized?

23 A. Yeah, it could be channelized. You use "X"  
24 number of channels.

25 Q. But it starts at 45 and then you turned it

\* \* \*



1 would be consumed by everyone of their customers,  
2 correct?

3 A. Yes.

4 Q. That's a specific piece of equipment to  
5 measure?

6 A. It's a piece of software that you can use  
7 to access certain protocols. How much, what  
8 traffic is going, how much is moving, this  
9 direction is light flowing. You can get very  
10 detailed information.

11 Q. Did you as part of your -- strike that.  
12 Was one of your jobs making sure that the  
13 upstream provider was on-line?

14 A. Yes.

15 Q. Is it fair to say if I called you and said  
16 the network is down, you can run simple tests to  
17 see if it upstream or not?

18 A. I had a test that would tell me instantly  
19 if they were there.

20 Q. Was your job to make sure that we had  
21 enough pipe going upstream?

22 A. To the extent that I could deliver it, yes.

23 Q. Did you get regular support from the  
24 upstream provider to give you help in doing that  
25 job?

1 A. Yes, Digex reports.

2 Q. On the amount of bandwidth upstream?

3 A. On the amount of bandwidth going up to them.

4 Q. Based on those reports, did you ever  
5 recommend that iTRiBE get more of a pipe?

6 A. No, I didn't get anymore records from Digex  
7 after they stopped coming.

8 Q. September of '98?

9 A. I believe so. I believe they were  
10 addressed to someone after they stopped sending  
11 them to me.

12 Q. Prior to that you had gotten some?

13 A. I had gotten some, yes.

14 THE COURT: What was it that you had  
15 gotten?

16 THE WITNESS: E-mail from them.

17 THE COURT: From who?

18 THE WITNESS: From the upstream  
19 provider.

20 THE COURT: Digex?

21 THE WITNESS: Digex.

22 THE COURT: What did they tell you?

23 MR. FARMER: I'm going object this  
24 the exhibit. This is not a document that Mr.  
25 Dorans identified. It is a change to the exhibit

1 list.

2 Furthermore, this a document they didn't  
3 produce to us until last Wednesday of last week  
4 pursuant to the order to compel.

5 MR. DORANS: Judge, we put on  
6 evidence that shows that this document was not  
7 found because nobody knew it existed until after  
8 the deposition of Mr. Imbriaco. Somebody else  
9 went back and looked for an e-mail and discovered  
10 this one report. It relates to this very matter.

11 THE COURT: I'll take it on a  
12 condition. Were you furnished it before trial?

13 MR. FARMER: I was furnished it on  
14 Wednesday of last week.

15 MR. DORANS: Can you look at it and  
16 tell me is that such a report?

17 THE WITNESS: That is such a report.

18 MR. DORANS: Judge, I would like to  
19 move to admit that as the next Plaintiff's  
20 exhibit.

21 THE COURT: I'm going to mark it for  
22 identification until somebody gets on the stand  
23 and supports what you've told me.

24 MR. DORANS: Thank you, Judge. For  
25 identification it will be A.

1 MR. DORANS: And Judge, I have an  
2 extra copy for the witness to follow along with.

3 BY MR. DORANS:

4 Q. Is this the type of report that you would  
5 receive on a regular basis?

6 A. This was the type of report.

7 Q. Okay. Let's go to the second page. And it  
8 says, "How to Read Your Usage Statistics." And  
9 what does that tell him, that first chart of  
10 dates and numbers?

11 A. That tells him on any given day what the  
12 maximum made, what they measured.

13 THE COURT: Tells him what?

14 THE WITNESS: On the day it's  
15 indicated, by the date with the max amount of  
16 usage on their side of the link is.

17 BY MR. DORANS:

18 Q. Minimum, maximum average?

19 A. Correct.

20 Q. So let's take 6/29/97, for example. They  
21 said the minimum amount they ever saw going  
22 through on our line --

23 THE COURT: Where is that?

24 MR. DORANS: Sorry, right in the  
25 middle, page 2.

1 THE COURT: Oh, page 2.

2 BY MR. DORANS:

3 Q. Page 2, 6/29/97, the minimum 1.65. Was  
4 that in meg?

5 A. That would be megabits. Well, they  
6 actually said that's percentage.

7 Q. It's percentage?

8 A. But being this is a 10 meg link, that's  
9 going to roughly be megabits.

10 Q. Because it's 1.65 max?

11 A. Right.

12 Q. And then the average was 4.45?

13 A. Mm-hmm.

14 Q. And the max was what?

15 A. The max they're showing is 801. That's  
16 from them to us. That's how much we were sucking  
17 down from them.

18 Q. The stream coming down?

19 A. That's the streams coming down.

20 Q. And how many megabytes is that, that .8?

21 THE COURT: No, he said 801.

22 THE WITNESS: When you take the  
23 percentages that would be roughly .8, yeah.

24 BY MR. DORANS:

25 Q. So less than 1 MB coming back?

1 A. Megabit.

2 Q. And that was the maximum coming on that  
3 day?

4 A. On that day.

5 Q. In a five of minute increment; is that  
6 correct?

7 A. Yes, in a five minute increment.

8 Q. And if we continue on, now it says from  
9 iTRiBE to Digex, now you are looking at stuff  
10 going out; is that correct?

11 A. That's correct.

12 Q. And then you have a 1.4, 7.9 and the  
13 highest your have 17.63?

14 A. That's correct.

15 Q. And rather than doing all of the math back  
16 and forth, what they were saying is the maximum  
17 percentage --

18 THE COURT: Where are you reading?

19 MR. DORANS: Sorry, across the same  
20 line.

21 BY MR. DORANS:

22 Q. The maximum amount of information that was  
23 going out was consuming 17.63 percent of that  
24 line?

25 A. That's correct.

1 Q. And I think you indicated that you add the  
2 two numbers together, the 8 and the 17?

3 A. That would give you a rough estimation,  
4 yes. That's, of course, not knowing when the  
5 samples were taken. You can't say that they  
6 happened at the same time.

7 Q. That's a good point, but that will tell you  
8 the most absolute under any condition during any  
9 five minute period that was in that pipe?

10 A. That's correct.

11 Q. Okay. And then if you go down there and  
12 I'll try to find -- if you go down to 7/5/97 --

13 THE COURT: Would this be measured  
14 with the software?

15 THE WITNESS: This was with Digex  
16 measuring theirs. I don't know what kind of  
17 software they used.

18 BY MR. DORANS:

19 Q. And again, this doesn't break it down by  
20 customers of iTRiBE this overall?

21 A. That's all they can measure is how much on  
22 their side of the link. How much traffic is  
23 going.

24 Q. Back and forth. So at 7/5/97 the maximum  
25 five increments for the entire day we used 10.59

1 percent of the pipe coming into us?

2 A. That's correct.

3 Q. So if there were users trying to access  
4 Decipher, for example, plus all the other users  
5 would have consumed only 10.59 percent?

6 A. Actually, any bandwidth from Decipher to the  
7 customer will be outgoing.

8 Q. Sorry, I mean, from a customer looking at  
9 Decipher, looking at their web page?

10 A. Right, their web page and Decipher would be  
11 coming out, not coming in.

12 Q. So if somebody at Decipher wanted to see a  
13 web site for example?

14 A. Correct.

15 Q. All of that together, the maximum it ever  
16 was 10 percent of that capacity?

17 A. The maximum they measured, that's correct.

18 Q. At five minute increments. And then coming  
19 the other way, the maximum they ever measured was  
20 12.71?

21 A. Yes.

22 Q. And then later on it breaks it into  
23 intervals and I think as you mentioned that would  
24 be the way for us to figure out if we had 10  
25 percent at 10:00 in the morning and 20 percent



1 coming in at 3:00, we would be able to figure out  
2 what exactly is the maximum at any point in time?

3 A. Right.

4 Q. We can of line up the times with those  
5 numbers?

6 A. Yes.

7 Q. And these were things you regularly got  
8 through September of '98.

9 A. These were until Mark left. They were sent  
10 to him. I changed it with Digex and they never  
11 updated theirs and I have never received them  
12 after this.

13 Q. But you think it was in September of '98?

14 A. I believe that's when he left. I don't  
15 remember exactly when he left. It might have  
16 been October.

17 Q. And through that date, none of these  
18 reports indicated to you that iTRiBE had 5 MB?

19 MR. MILLS: Objection. Your Honor,  
20 he already said he didn't receive these reports.  
21 It would have to come through a third party.

22 MR. DORANS: Did you indicate that  
23 you got these on a regular basis?

24 THE WITNESS: They were forwarded to  
25 me by Mark before he left.

1 THE COURT: He received them in a  
2 regular course of business.

3 MR. MILLS: But it's still hearsay,  
4 Your Honor.

5 THE COURT: These are regular course  
6 of business under the exception rule. I'll  
7 overrule the objection.

8 BY MR. DORANS:

9 Q. So you normally got these documents in and  
10 reviewed them in your regular course of business?

11 A. Yes.

12 Q. And you never saw fit to ask for a bigger  
13 pipe?

14 A. Not based on these up to the time in which  
15 I received them.

16 Q. And you could have if they said for example  
17 you were using what percentage?

18 A. If we were regularly using 50 percent, we  
19 were looking at a serious upgrade.

20 Q. But it takes some time to get that on-line,  
21 correct?

22 A. Yes.

23 THE COURT: Now, how are you going  
24 to prove this came to light?

25 MR. DORANS: Well, I have another

1 witness, Judge.

2 THE COURT: All right. And when I  
3 say "this," I mean this document.

4 MR. DORANS: Yes, Judge. One second,  
5 Your Honor.

6 Thank you very much, Judge.  
7

8 REDIRECT EXAMINATION  
9

10 BY MR. MILLS:

11 Q. Jamie, Mr. Dorans asked you some questions  
12 about the test that you had done and you  
13 indicated that you didn't take down the network  
14 to do this test?

15 A. No.

16 Q. Why didn't you take down the network?

17 A. Because all of our clients would have been  
18 off line. It was not practical to do so.

19 Q. So you would have shut down the entire  
20 business to actually do the test?

21 A. In order to do it to my satisfaction, I  
22 would have.

23 Q. So in order to get a general sense of what  
24 was going, you did what you could while keeping  
25 the business running?

1 A. Keeping the business running and using low  
2 traffic times.

3 Q. So to the extent that you were using low  
4 traffic times, you are saying those were times  
5 you had the least demanded put on your system?

6 A. As best I could tell, yes.

7 Q. Okay. The document that Mr. Dorans has  
8 shown you and it's labeled Exhibit A at this  
9 point, what is the date on that document?

10 A. July 6 of '97.

11 Q. Is that the last day or is the first day --  
12 I'm sorry, that's the date of the e-mail?

13 A. That's the date it was sent to us from  
14 Digex.

15 Q. And it covers information from what period?

16 A. It indicates from 6/29 through 7/5.

17 Q. How soon after hooking into the Digex  
18 connection is this report?

19 A. This is within a week or two.

20 Q. You had earlier stated that you were still  
21 phasing in, so the entire network wasn't over at  
22 this point?

23 A. That's correct.

24 Q. Do you know how much the network was  
25 actually over at this point?

1 A. I couldn't say with any certainty what  
2 percentage at this point.

3 Q. To the extent that the 2514 router was  
4 limiting you to 4 to 6, what is maximum that you  
5 would ever see on this report?

6 A. Not more than 60 percent.

7 Q. It's up to them to do that?

8 A. According to the technical specifications  
9 for the document --

10 MR. DORANS: Judge, for the what?

11 MR. MILLS: Technical specifications  
12 for the document.

13 MR. DORANS: For Cicso or for the  
14 what?

15 MR. MILLS: From Cicso for the 2514.

16 MR. DORANS: Yes, and that's where  
17 I'm objecting, Judge.

18 MR. MILLS: If he read the document  
19 he can tell you what it said, Your Honor.

20 THE COURT: You can report what the  
21 manual said.

22 THE WITNESS: My understanding from  
23 manual was that you could do burstible traffic  
24 between two 10 MB sustained. It would not do 10  
25 MB sustained meaning continuous.

1 BY MR. MILLS:

2 Q. So that means on random occasions you might  
3 able to get 10 through, but generally you're only  
4 going to get 4 to 6?

5 A. Generally, you're not going to see that.  
6 The equipment was not built to do that.

7 Q. So it's not surprising to you that you  
8 don't see large numbers on this report given that  
9 limitation?

10 A. That's correct.

11 THE COURT: Large numbers, you mean  
12 that's the usage?

13 MR. MILLS: The percentage usage.  
14 He wouldn't expect -- I believe he said he would  
15 never expect it to go over 60 or maybe not even  
16 40 depending on where the limit actually comes.

17 MR. DORANS: Objection. Well,  
18 whatever. We'll bring it up.

19 THE COURT: Anything further of this  
20 witness?

21 MR. DORANS: I would like to clarify  
22 that point.

23

24

25

## 1 RECROSS-EXAMINATION

2

3 BY MR. DORANS:

4 Q. What you said was --

5 MR. FARMER: Your Honor, he's our  
6 witness. I think we would be normally  
7 questioning him --8 MR. DORANS: I'm bringing up the  
9 point.

10 THE COURT: He's on recross.

11 MR. FARMER: Thank you, Your Honor.

12 BY MR. DORANS:

13 Q. You indicated, didn't you, that if there  
14 was a problem with the router you would have seen  
15 numbers in the 60 percent range?

16 A. Maximum.

17 Q. Right. Which means when you were there you  
18 never saw any in the 50s, correct?

19 A. According to this document, no.

20 Q. According to your own testimony because if  
21 you saw 50s you would have somebody up and said  
22 let's start getting more bandwidth.23 A. That's correct. I also stated after Mark  
24 left, I no longer saw these documents. My  
25 updating with Digex I never seen them anymore.

1 Q. Whenever that was?

2 A. That's correct, whenever he left.

3 Q. But up until the time he left, you didn't

4 even see numbers in the 50s?

5 A. That's correct.

6 Q. And if there was a limitation of the

7 router, you would expect that was kicking in, you

8 would have seen numbers in the 60s?

9 A. You would have to go and look at the

10 technical specs to see where that limit exactly

11 is, yes.

12 Q. The technical specs that you were talked

13 about, do you remember what that was? Was the

14 product announcement?

15 A. No, I went to Cicso's web page and pulled

16 up the technical specs for the document.

17 Q. Let me show you this document and see if

18 you recognize this.

19 A. It's a Cisco web page.

20 Q. Is that the thing that you went to look at?

21 A. I'm assuming this is a more recent update,

22 but it's close.

23 Q. Copyright 1995 on the bottom?

24 A. The original copyright date does not

25 indicate that it has been revised, but yes.

\* \* \*



1 Q. And the Ethernet that's what it references;  
2 is that correct?

3 A. That's correct.

4 Q. When the switch over occurred to the 10 meg  
5 pipe, what did you do with your existing  
6 customers? Did they all switch over?

7 A. Yes. They got bandwidth from us. We moved  
8 from MCI to Digex and we got bandwidth from  
9 Digex. We couldn't supply them with MCI, we  
10 didn't have it anymore.

11 Q. So would they all be on-line once your  
12 circuit came up?

13 A. No.

14 Q. Why not?

15 A. Because the MCI circuit did not go down  
16 until I believe August.

17 Q. Are you sure of that?

18 A. I would have to check. It was not one day  
19 Digex and one day MCI, there was some time.

20 Q. Are you sure when other people started to  
21 go live could that have been as early as May  
22 of '97?

23 A. No, because we didn't have the Digex  
24 connection.

25 Q. Are you positive of that date?

1 A. I would have to look at the documentation.

2 Q. The question is, are you are you positive  
3 of that date and your answer is no, you are not  
4 positive of that date?

5 A. No, but I didn't start until the end of May  
6 at iTRiBE and we had MCI when I got there.

7 Q. So you think it would around June, you  
8 think?

9 A. Yes.

10 Q. It may have been early May or later, you're  
11 not sure?

12 A. That's correct.

13 Q. And how long did it take to transition the  
14 people over?

15 A. I'd say roughly six weeks to two months.

16 Q. And why did it take so long?

17 A. You've got to coordinate them, they have to  
18 renumber their IP spaces, we had to have our  
19 stuff ready for them. When we made the change  
20 over we had to make changes to routers it was a  
21 coordinated process between several different  
22 people for each site. It wasn't move everybody  
23 and then you are down.

24 Q. What about the dialups, did they move over  
25 right away?

1 A. They were moved over in the first week. We  
2 moved them over fairly quickly.

3 MR. DORANS: I have no further  
4 questions of this witness.

5 THE COURT: This has got to end  
6 sometime. What are you going to do now?

7 MR. MILLS: I just have two more.

8

9 FURTHER REDIRECT EXAMINATION

10

11 BY MR. MILLS:

12 Q. He was referring you back to the serial  
13 port connection in that document that you're  
14 looking at. This was not used in serial port  
15 connection though, was it?

16 A. No, it was not.

17 Q. It was Ethernet to Ethernet, so the  
18 limitation to the serial port are irrelevant for  
19 the point of this discussion?

20 THE COURT: You are leading.

21 BY MR. MILLS:

22 Q. Sorry.

23 A. Yes.

24 Q. One other point to clarify on that report,  
25 that doesn't show actual peak at any moment, it's

1 a five minute average, right?

2 A. That is taken every five minutes and  
3 whatever that snapshot is of the port every five  
4 minutes.

5 MR. MILLS: Thank you.

6 THE COURT: You made an issue of him  
7 being your witness. I thought we'd be  
8 consistent.

9 THE COURT: I almost never ever  
10 break in if lawyer doesn't.

11 MR. DORANS: Thanks for the help. I  
12 felt we would move along a lot quicker if we just  
13 got through those two points.

14 THE COURT: Who's next?

15 MR. FARMER: Dave Maple.

16 THE COURT: Let's take a break.

17

18 (Break)

19

20

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REDIRECT EXAMINATION

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3 BY MR. MILLS:

4 Q. Are you currently studying for Cicso  
5 certificates?

6 A. Currently for the CCNA.

7 Q. And what is the CCNA?

8 A. Cicso Certified Network Administrator.

9 MR. MILLS: Thank you.

10 THE COURT: Thank you.

11 MR. FARMER: David Hogg.

12

13 DAVID HOGG

14 a Witness, having been first

15 duly sworn was examined and

16 testified as follows:

17

18 DIRECT EXAMINATION

19

20 BY MR. FARMER:

21 Q. Would you please state your complete name  
22 for the record.

23 A. David Claude Hogg.

24 Q. Mr. Hogg, where are you employed?

25 A. Cox Fibernet.

1 Q. And what is your position with Cox  
2 Fibernet?

3 A. I'm a large business and account manager.  
4 I handle accounts for Cox in Hampton Roads.

5 Q. Okay. Do you handle Decipher's account?

6 A. Yes, I do.

7 Q. How long have you handled Decipher's  
8 account?

9 A. Since December of '97.

10 Q. And do you still handle that account today?

11 A. Yes, I do.

12 Q. Did you handle it consistently since  
13 September of '97?

14 A. Yes.

15 Q. As a part of handling that account, is it  
16 part of your job to watch out for problems?

17 A. That's correct, that's part of my job.

18 Q. Okay. And do you have any knowledge as to  
19 whether any problems have occurred with  
20 Decipher's connection from its facility to the  
21 Cox Fibernet from your time in working at Cox?

22 A. We had no reported trouble on that circuit.

23 Q. How does reported trouble work?

24 A. Well, I contacted the customer, Decipher,  
25 Kathy Eddleman she would call in trouble and say

1 such and such has happened and we would dispatch  
2 technicians out to get the problem resolved.

3 Q. And you have reports that state that?

4 A. Yes.

5 THE COURT: Say that again.

6 THE WITNESS: About the trouble?

7 THE COURT: You called Kathy  
8 Eddleman.

9 THE WITNESS: Kathy Eddleman would  
10 call us to report the trouble.

11 THE COURT: And then what?

12 THE WITNESS: Then we would fill out a  
13 trouble ticket and dispatch the technician to do  
14 the research on the circuit to find out the  
15 problem on that circuit.

16 THE COURT: Was there?

17 THE WITNESS: We never had trouble on  
18 that circuit.

19 THE COURT: What circuit are you  
20 talking about?

21 THE WITNESS: It's a circuit that goes  
22 from the premises of Decipher on Granby Street to  
23 a Cox facility which is called St. Pauls where  
24 iTRiBE's equipment is co-located.

25 THE COURT: So you are saying that

1 you never found she complained by phone about the  
2 system not performing and she called you and you  
3 figured out it wasn't your problem. Is that what  
4 you are telling me?

5 THE WITNESS: She has never called us  
6 to report a problem.

7 THE COURT: Why did you call her?

8 THE WITNESS: I didn't call her.

9 MR. FARMER: The reason why he's  
10 testifying, he has not received any trouble calls  
11 from Decipher regarding Decipher's connection on  
12 the Cox Fibernet. I'm calling him to show that  
13 the Cox Fibernet was not the cause of the  
14 problems, Your Honor.

15 THE COURT: Well, Decipher -- I'm  
16 obviously missing something, but the only thing I  
17 was aware of that Cox did was feed into their  
18 ISP.

19 MR. FARMER: Cox does two things.  
20 Cox takes Decipher's traffic from Decipher to  
21 iTRiBE.

22 THE COURT: Right.

23 MR. FARMER: And then iTRiBE does it  
24 thing and there is one little place where Cox  
25 transports iTRiBE from one place to another so



1     they could get to Digex. And what I'm doing is,  
2     I'm just trying to demonstrate there was no  
3     problem in those two places.

4                   THE COURT: All right.

5     BY MR. FARMER:

6     Q. Do you also work for a company called  
7     iTRiBE?

8     A. Yes, I do.

9     Q. How long have you worked with iTRiBE as a  
10    customer?

11    A. The same, the summer of '97.

12    Q. Do you have any records of any service  
13    calls from iTRiBE?

14    A. Yes, we do.

15    Q. Please tell me about those.

16    A. We have -- we serve iTRiBE for two  
17    different types of services. We serve them for  
18    private line 10 meg which goes from our  
19    co-location facility at St. Pauls back to our pop  
20    for Digex at the 4585 Village Avenue, so that's  
21    one piece of it and that's the piece that was  
22    reserved for Decipher.

23    Q. Right. For that piece do you have any  
24    service calls?

25    A. We, did. We had a call in August of '98.

1 Q. Okay. Do you have records of any other  
2 service calls from the beginning of June 1997  
3 through the end of 1998?

4 A. For that circuit?

5 Q. Yes.

6 A. We have nothing else documented for that  
7 circuit.

8 Q. Are you familiar with what a DS3 line is?

9 A. Yes, I am.

10 Q. What is a DS3 line?

11 A. DS3 is considered large bandwidth.  
12 Approximately, 45 MB.

13 Q. Do you have any understanding as to whether  
14 that is the way it is defined in the trade?

15 A. Yes, it is.

16 Q. And is that the way it is understood in the  
17 trade?

18 A. Yes. Daily, yes.

19 Q. If someone has a DS3 line to which they  
20 only establish a 3 MB connection or a 6 MB  
21 connection, what is that called?

22 A. It's called a 6 meg or a 3 meg.

23 Q. If they were calling it a DS3 line, what  
24 would they call it?

25 A. A DS3.

1 Q. But if it's a line, but it only has a 3 meg  
2 or a 6 meg line set up for it and it is a DS3,  
3 does that have a term?

4 A. It's a fractional DS3. Frac DS3.

5 Q. Is that the term used in the industry?

6 A. Frac, yes.

7 Q. And would you describe what a frac is?

8 A. A frac is you describe what fraction it  
9 is.

10 MR. FARMER: No further questions.

11

12 CROSS-EXAMINATION

13

14 BY MR. DORANS:

15 Q. Staying with that, the first time when he  
16 asked you about the DS3, you said that was also  
17 called a DS3.

18 A. No, that's not called a DS3, it's called a  
19 fractional DS3. And then you would go on to  
20 say --

21 THE COURT: I heard him. Go ahead.

22 BY MR. DORANS:

23 Q. Decipher had an account directly with Cox,  
24 correct?

25 A. Yes.

1 Q. Now, was that a 10 meg line or do you know?

2 A. It's a 5 meg.

3 Q. It's a 5 meg. And then Cox would bill  
4 Decipher directly?

5 A. That's correct.

6 Q. The line, what's at the end of each line?  
7 Is it some kind of card or chastity or something?

8 A. It's a box called a Racal.

9 THE COURT: Spell that.

10 THE WITNESS: R-a-c-a-l.

11 THE COURT: R-a-c-a-l. Is that a  
12 common name?

13 THE WITNESS: Yes, it's a name of a  
14 box, like Cicso.

15 THE COURT: A trade name?

16 THE WITNESS: Correct.

17 THE COURT: Capital R?

18 THE WITNESS: Yes, they're a  
19 manufacturer.

20 BY MR. DORANS:

21 Q. Do those cards or chastity boxes from time  
22 to time go bad?

23 A. The cards can, yes.

24 Q. And then they are replaced?

25 A. Correct.

1 Q. And when they are replaced there is usually  
2 an outage of a couple of minutes to ten minutes;  
3 is that correct?

4 A. That's correct.

5 Q. In fact, any time that you do upgrading to  
6 a 5 meg link, generally, there is going to be  
7 some associated downtime?

8 A. Right, that's called a scheduled  
9 maintenance.

10 Q. And you do scheduled maintenance from time  
11 to time?

12 A. Almost daily, yes.

13 Q. And you are certainly not testifying here  
14 that 100 percent of the time that 5 meg line  
15 between iTRiBE was inactive?

16 A. I can't say it was and I can't say it was  
17 not. It was not down that we're aware of for any  
18 kind of problems on our network.

19 Q. For a trouble ticket?

20 A. Correct.

21 Q. But for an upgrade you wouldn't necessarily  
22 keep track of every hookup for that one either?

23 A. When we do a maintenance or an upgrade of  
24 the network, it's not the same customer  
25 everytime. We are doing parts of our network all

1 over Hampton Roads for our customers daily. So  
2 we probably have a record of maintenance or who  
3 could have been affected.

4 Q. You think you do or you are not sure?

5 A. I'm not positive.

6 Q. Did you even look to see if you have those  
7 records?

8 A. For the maintenance.

9 Q. For the circuit?

10 A. I checked for any trouble on the circuit.

11 Q. Did you look for maintenance on the  
12 circuit?

13 A. Not on maintenance.

14 Q. So you don't know if you kept records and  
15 we didn't look for any?

16 A. For maintenance?

17 Q. For maintenance?

18 A. I would imagine we kept the records, but I  
19 didn't check for them.

20 Q. Now, from iTRiBE to the Digex's box, the  
21 same thing is true. Did you look for maintenance  
22 records?

23 A. No, I did not.

24 Q. So there could be some associated downtime  
25 with that; is that correct?

1 A. Right, that's scheduled.

2 Q. And there would be an outage, whatever it  
3 took to pull out that piece of equipment?

4 A. Yes.

5 Q. Do they always fill out a trouble ticket  
6 everytime they do something to fix the circuit?

7 A. Personally, I do. I always do a trouble  
8 ticket. But if they called someone else other  
9 than their account person, it's hard to say.

10 Q. In other words, they can call the service  
11 person if there were problems. And the service  
12 person could say okay I can reset it or whatever?

13 A. Well, the proper way to do it would be to  
14 call the operation center and they always fill  
15 out a trouble ticket. So if they did that, then  
16 they would have documentation. Then call the  
17 account person which they often not do in a  
18 relationship, which would be me, then I filled  
19 out one. But if they spoke with someone other  
20 than myself, I can't say.

21 Q. You are not actually the account rep for  
22 the iTRiBE line, are you?

23 A. Yes.

24 Q. Between iTRiBE and Digex?

25 A. Yes.

1 Q. Are you sure of that?

2 A. Oh, yeah.

3 Q. Who is Jerry Griser?

4 A. He was my supervisor.

5 Q. So if they called Jerry Griser, you are not  
6 sure what he would have done?

7 A. That's correct.

8 Q. Okay. Do you ever have problems with power  
9 outages or flooding that interrupt this circuit,  
10 fiber circuit?

11 A. Not that I'm aware of. In a power outage  
12 there is back up battery supply, so if that ran  
13 out, you could. It's hard to say. I'm not aware  
14 of that causing problems.

15 Q. Flooding, you are not sure about that?

16 A. I'm not aware of that. I know that  
17 Decipher had a problem with flooding on our  
18 original installation which they fixed it right  
19 away.

20 Q. Okay. And are your records very good to go  
21 back to that time frame of '97?

22 A. I can say yes, but I can't say if something  
23 is not there because there is no way of telling.

24 MR. DORANS: Thank you very much.

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\* \* \*  
SCOTT KALE

a Witness, having been first  
duly sworn was examined and  
testified as follows:

DIRECT EXAMINATION

BY MR. MILLS:

Q. Can I get you to state your name for the  
record?

A. Scott Kale.

Q. Spell your last name?

A. K-a-l-e.

Q. Mr. Kale, where do you work?

A. Anicon.

Q. What is Anicon?

A. A distributor of multimedia and networking  
products.

Q. Can you give me more explanation as to what  
these products are?

A. Anything behind a computer network behind  
the computers that make the networks work. So  
anything from the cabling to the deface plates to  
the jacks in the wall to the electronic equipment  
that runs the networks.

1 Q. And what is your position at Anicon?

2 A. I am the data specialist for the eastern  
3 region.

4 Q. And what all does that involve?

5 A. I work for national accounts group east  
6 coast. Basically, east of the Mississippi on  
7 large accounts. Sales.

8 Q. Did you have any sales relationship with  
9 iTRiBE during '98?

10 A. Yes.

11 Q. What did you -- what were the products  
12 involved in that transaction?

13 A. Bay Networks which is now Nortel Networks.  
14 We sold them a Bay Networks chastity with a 5399  
15 card which is the model number for modems for  
16 their ISP. And then we sold also two Accelar  
17 until of our 1200 units, a-c-c-e-l-a-r units.

18 Q. What did the Accelar units do?

19 A. They are what's called a layer three switch  
20 which means they are a switch that also has  
21 routing capabilities that can sit on an edge of a  
22 network and can then send the network over the  
23 wide area network.

24 Q. How do they work in relationship to the  
25 router?

1 A. Well, they do routing capabilities, so they  
2 can act as a router in certain cases.

3 Q. Are there cases in which they can't act as  
4 a router?

5 A. Yes.

6 Q. What other cases they can't as a router?

7 A. It's depends on the protocol. In the case  
8 of iTRiBE, this was a question as to BGP.

9 THE COURT: That's what?

10 THE WITNESS: I'm not technical enough  
11 to tell you. It was a question of BGP3 OR BGP4  
12 which is what was needed to work for the clients  
13 or some of the clients they had.

14 BY MR. MILLS:

15 Q. Do you recall when this, when the Bay  
16 Accelar switches were shipped to iTRiBE?

17 A. The actual ship dates, the first product  
18 that was shipped was on 6/10/98. We invoiced on  
19 6/30/98 which means by the 30th they had received  
20 the material.

21 Q. Did they put them into operation  
22 immediately?

23 A. No. It was probably in August to September  
24 time frame. I think they might have immediately  
25 put one of the switches in place in their local

1 network where there was no configuration in order  
2 to route traffic, so it was put in place as a  
3 switch in the second layer two switch.

4 Q. But the one that was needed for Internet  
5 connectivity you don't believe went in at the  
6 time?

7 A. The sales engineer from Bay Networks came  
8 in sometime in August.

9 MR. DORANS: Judge, I think he's  
10 talking about somebody else. I don't have a  
11 problem with his testimony.

12 THE COURT: Don't take him into  
13 hearsay, please.

14 BY MR. MILLS:

15 Q. Did you arrange for this sales engineer to  
16 come?

17 A. Yes.

18 Q. What was the sales engineer to help them  
19 do?

20 A. To configure the switch to do what they  
21 wanted to do so that they could sit in their  
22 network and handle the client traffic.

23 Q. What date did this engineer come?

24 A. I don't know the exact date, it was  
25 sometime in August or September.

1 Q. Has iTRiBE paid you for these switches?

2 MR. DORANS: Objection. Relevance.

3 THE COURT: Sustained.

4 MR. MILLS: Your Honor, may I make  
5 my argument?

6 THE COURT: Sure.

7 MR. MILLS: Your Honor, there is an  
8 issue of the damage that if we could show that  
9 they had willfully breached the contract, the  
10 damage cap should be broken. Partially, this was  
11 not an expensive process to replace the switch.

12 Furthermore, Your Honor, they had to pay  
13 for the switch. The conduct was willfull and  
14 they intended to keep it.

15 MR. DORANS: I didn't follow any of  
16 that, Judge. I don't see what that had to do  
17 with the case.

18 THE COURT: Let's go through it  
19 again slower.

20 MR. MILLS: One of the issues that  
21 is before the Court --

22 THE COURT: Let me ask you this. To  
23 tell you where I'm having a problem and you can  
24 see my synopsis and you can connect it.

25 First, did they buy these switches or did

1 iTRiBE purchase these switches from this  
2 supplier?

3 BY MR. MILLS:

4 Q. Did they buy them from you, Mr. Kale?

5 A. The way the whole thing worked is that on  
6 June 30th, when they had them, it was called a  
7 demo basically. We gave them as a 30 day demo  
8 extended to basically 180 days. Actually  
9 invoiced them, got a physical PO and invoiced  
10 them in December of '98. At that time, it went  
11 on our books to be paid and it still stands.

12 THE COURT: They haven't paid?

13 THE WITNESS: No, sir.

14 THE COURT: They still have the  
15 switches?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay. I don't think  
18 that has anything to do with you. Move on.

19 They may have the switches whether they  
20 paid for them or not, I take it their on-line  
21 what difference is it to you? I mean, unless you  
22 are representing this man.

23 MR. MILLS: I'm not, Your Honor.

24 THE COURT: Let's move on.

25 MR. MILLS: Can I ask --

1 THE COURT: Not about the money, no

2 BY MR. MILLS:

3 Q. No, not about money.

4 Do you know if the switches are still  
5 currently on-line? I'm sorry, were still on-line  
6 at the end of '98?

7 A. To my knowledge, they were.

8 MR. MILLS: That's all of the  
9 questions I have.

10 MR. DORANS: I have no questions of  
11 this witness, Judge.

12 THE COURT: Is this gentleman free  
13 to go?

14 MR. MILLS: He is.

15 THE COURT: Your free, run for it.

16 MR. MILLS: We'll call Rodney  
17 Howell.

18

19

RODNEY HOWELL

20

a Witness, having been first

21

duly sworn was examined and

22

testified as follows:

23

24

25

DIRECT EXAMINATION

BY MR. MILLS:

Q. Could I get you to state your name for the record?

A. Rodney Howell.

Q. Mr. Howell, when did you work for iTRiBE?

A. Between August of '96 and February of '99 .

Q. What did you do for iTRiBE?

A. When I first came there I was a sale rep and promoted into a manager.

Q. A manager of what?

A. Of the networking division.

Q. Mr. Howell, what is your address?

A. 707 Providence Road, Chesapeake.

Q. And how long have you lived at this address?

A. About seven years now.

Q. Have you received any communications from iTRiBE at that address this year?

A. My W2, W4.

THE COURT: Hold on. On Providence Road for seven years?

THE WITNESS: Yes.

BY MR. MILLS:



1 Q. So you lived at Providence Road the entire  
2 time that you worked for iTRiBE?

3 A. Yes.

4 Q. During the time frame -- let me back up.  
5 Where did you work prior to iTRiBE?

6 A. For ProSoft.

7 Q. Who is ProSoft?

8 A. ProSoft is a government contractor and the  
9 same owners that own ProSoft own iTRiBE.

10 Q. And those owners are?

11 A. Mike Adolphi and Paul Wong.

12 THE COURT: Paul who?

13 THE WITNESS: Paul Wong.

14 BY MR. MILLS:

15 Q. At the time that you were working for  
16 ProSoft, how big an organization was it, do you  
17 know?

18 A. I'm not sure, several hundred employees.

19 Q. Were there any remote locations?

20 A. Yes.

21 Q. Do you know the names of the locations?

22 A. I know two of them. Which is the corporate  
23 office in Virginia Beach and the satellite office  
24 in Newport News.

25 Q. How many people approximately were at the

1 Virginia Beach office?

2 A. Probably around 100, but I'm not sure.

3 Q. How about the satellite office in Newport

4 News?

5 A. Fifty to 60, probably.

6 Q. Thank you. Since leaving iTRiBE, where

7 have you gone and what have you done?

8 A. I started my own company selling Internet

9 access, connectivity, hardware sells, systems

10 integrations.

11 Q. While you were responsible for sales and

12 manager of the division, what was the name of

13 that division again?

14 A. Connectivity division.

15 Q. What services and associated products was

16 iTRiBE offering?

17 A. My division actually sold dedicated

18 Internet access to businesses. Hardware sells,

19 system integrations so we would actually install

20 networks, hardware and stuff for networks. We

21 also sold some hosting contracts.

22 Q. What kind of hosting?

23 A. Web hosting.

24 Q. Was your division responsible for the dial

25 up connections?

1 A. No, not at all.

2 Q. You stated that one of the services that  
3 you sold was dedicated connectivity?

4 A. Yes.

5 Q. What is dedicated connectivity?

6 A. For businesses who needed more access than  
7 just a regular dial up line through the  
8 Internet. We sold them anywhere from an ISDN  
9 line which is 128 kilobits all the way up to T1  
10 which is 1.5 megs and in some cases case larger.

11 Q. Can you describe your role in negotiating  
12 the 5 MB Internet connectivity contract with  
13 Decipher?

14 A. At that time I was the sales representative  
15 and I was the sales rep for Decipher and I  
16 attended several meetings with Decipher and to  
17 upgrade them from their existing 1.5 MB  
18 connection to the 5 MB connection.

19 Q. You said several meetings, do you remember  
20 how many?

21 A. I remember at least two.

22 Q. Looking at the first one, do you remember  
23 who participated in that meeting?

24 A. Dale Maurice. We had multiple meetings on  
25 that, so I was their sales rep at the time so I

1 met with them quite a bit. Right before that I  
 2 sold them like \$8,000 worth of hardware. I met  
 3 them several times. And I mentioned upgrading  
 4 several times, but we had probably two meetings  
 5 before that specifically for upgrading to the  
 6 bandwidth. The higher bandwidth. And one meeting  
 7 occurred over at iTRiBE and I think Mike Adolphi  
 8 and myself, Dale Maurice and I can't -- there was  
 9 probably two other people from Decipher at that  
 10 time in that meeting.

11 Q. Okay. Were there any other meetings  
 12 between iTRiBE and Decipher that you are aware of  
 13 that you were not a part of?

14 A. Probably at the very end when I was  
 15 actually getting ready to leave iTRiBE back in  
 16 February of '99.

17 Q. I'm sorry, with regards to recreating the  
 18 contract?

19 A. Not that I know of.

20 Q. Okay. If I could get you to turn to, let  
 21 me make sure you have the exhibit book in front  
 22 of you. If you would turn to Tab 18.

23 MR. MILLS: I believe, Your Honor,  
 24 this came in as Plaintiff's Exhibit 1.

25 BY MR. MILLS:

1 Q. And Mr. Howell, do you recognize this  
2 document?

3 A. Yes.

4 Q. What is it?

5 A. It's a contract between iTRiBE and Decipher  
6 for the 5 MBs of bandwidth.

7 Q. Okay. If I could get you to look down to  
8 the lower part of this contract, there is  
9 something that says, "Carrier local loop \$795, 5  
10 MB connection for Cox Fibernet." What is that  
11 talking about?

12 A. That's actually talking about the fibernet  
13 connection running between our pop at St. Pauls  
14 Street --

15 THE COURT: What is a pop? I've  
16 been hearing that.

17 THE WITNESS: Point of presence.

18 THE COURT: Okay.

19 THE WITNESS: From our pop at St.  
20 Pauls street over to Decipher.

21 BY MR. MILLS:

22 Q. So your facility at the co-location at St.  
23 Pauls is a pop?

24 A. That's correct.

25 Q. So Cox ran the line from Decipher to the

1 pop, do you know what happened to it once you got  
2 to the pop?

3 A. Technically, no. I know it plugs into us.

4 Q. If I look back up to the next line which  
5 says, "Bandwith 5 MB \$32,000."

6 A. Right.

7 MR. DORANS: It's \$3,200, I think.

8 MR. MILLS: I'm sorry. This is for  
9 what?

10 THE WITNESS: This one is for the 5 MB  
11 of bandwith over a five year period of time.

12 THE COURT: Is that a monthly  
13 charge?

14 THE WITNESS: Yes.

15 MR. MILLS: And this is bandwith  
16 going where?

17 THE COURT: It's a fixed rate for  
18 five years?

19 THE WITNESS: Yes, it is.

20 THE COURT: All right. I  
21 understand.

22 THE WITNESS: This is a bandwith going  
23 out to the Internet for Decipher.

24 BY MR. MILLS:

25 Q. What is a DS3?

1 A. A DS3 is just a larger pipe that carries  
2 more bandwidth than a T1.

3 Q. What size is the DS3?

4 A. I think it's like 45 megs.

5 Q. Mr. Howell, what is iTRiBE's policy on  
6 overselling prior to -- excuse me.

7 What was iTRiBE's policy in 1997, '98 on  
8 overselling the bandwidth?

9 A. We really didn't have a policy. I know on  
10 our pricing scheme, we priced it --

11 MR. DORANS: Judge, I don't know how  
12 pricing has anything to do with this.

13 THE COURT: I'll let him answer.

14 MR. DORANS: Thank you, Judge.

15 THE WITNESS: On our pricing scheme,  
16 we set it up where we priced it -- we figured our  
17 cost for the bandwidth going out. Our actual cost  
18 and we priced it like at 3 to 1.

19 MR. MILLS: Meaning you would sell  
20 three times what you had?

21 THE WITNESS: Right.

22 THE COURT: What do you mean three  
23 times what you had?

24 THE WITNESS: If our bandwidth going  
25 out to the Internet was 10 megs of bandwidth going

1 out, we actually priced it like we had 30 megs  
2 going out.

3 THE COURT: But you didn't advertise  
4 30 megs out?

5 THE WITNESS: No.

6 BY MR. MILLS:

7 Q. What was told to the customer about this  
8 approach to oversell?

9 A. We didn't discuss it with the customers.

10 Q. Is this contract what you earlier described  
11 as dedicated connectivity?

12 A. Yes, it is.

13 Q. What does the word "dedicated" mean when we  
14 say it like this?

15 A. That it's up 24 hour a days, 7 days a  
16 week. There is no interruption in the actual  
17 connection.

18 Q. As the sales rep dealing with Decipher, can  
19 you tell us about any calls that you may have  
20 received from them after this connection was  
21 made?

22 A. We had the typical calls when we actually  
23 got it installed. We had the typical  
24 installation calls from Dale Maurice about  
25 getting the IP addresses and things like that.

\* \* \*



1 Q. The dial up connectivity business.

2 A. Other than what I was told by Pete Cousin  
3 who was in charge of that division, I wouldn't  
4 know. He just told me that he had approximately  
5 3,000 customers.

6 Q. Were you involved with the web hosting  
7 business at all?

8 A. Like I said before, we sold some of the  
9 contracts for that, but other than actually  
10 technically getting them put on lines things like  
11 that I wasn't.

12 Q. How many web host customers did you have?

13 A. I'm not sure.

14 Q. Who would know that?

15 A. Whoever actually maintained all of the  
16 files could know that. Obviously, from an  
17 accounting standpoint you would know that.

18 Q. Who maintained the contract files?

19 A. It went through several different hands  
20 while I was there. Mainly whoever the office  
21 manager was at that time would take care of that  
22 and then when I was actually the manager, it was  
23 Casey Hyatt. She maintained all of the  
24 contracts.

25 Q. Mr. Howell, if I could get you to flip to

1 Exhibit 34 in the book, do you recognize this  
2 document?

3 A. It's a contract for Harvey Lindsey  
4 Commercial Real Estate.

5 Q. What kind of contract?

6 A. This is an ISDN 120 kilobit dedicated  
7 Internet.

8 Q. For how long?

9 A. One year.

10 Q. And the date of the contract. If you would  
11 look on the third page that may help you?

12 A. 11/12/97.

13 Q. That date -- what date did this actually go  
14 into service; is that the date?

15 A. Typically not. Once we get the contract  
16 signed then we would go and provision the actual  
17 line through Bell Atlantic and depending on what  
18 their time was anywhere between 15 days and 45  
19 days back then.

20 Q. So when they actually went on-line it's  
21 hard to pinpoint from these documents, but you  
22 are guessing within that range?

23 A. Yes.

24 Q. Was that the typical experience that you  
25 had of getting these folks on-line?

1 A. Yes.

2 MR. MILLS: I would like to have  
3 this document admitted as Defendant's Exhibit  
4 34.

5  
6 (Whereupon, the Contract was marked  
7 Defendant's Exhibit No. 34).

8  
9 THE COURT: That's not one of the  
10 agreed to ones previously?

11 MR. MILLS: We had not stipulated to  
12 these, no, Your Honor.

13 THE COURT: Okay.

14 MR. MILLS: Your Honor, I have a  
15 series of nine more of these I'm going to go  
16 through. I want to go over the value of  
17 bandwidth. If you would like me to do this in any  
18 different method, please feel free to tell me to  
19 assist the Court.

20 THE COURT: Just any way you want  
21 to.

22 BY MR. MILLS:

23 Q. If I could get you to flip over to exhibit  
24 35.

25 A. (Witness complied.)

1 Q. Can you tell me what that is?

2 A. A contract with electrical supplies for an  
3 ISDN line for 128 kilobits dedicated Internet  
4 access.

5 Q. And the ISDN is what size?

6 A. One hundred twenty-eight kilobits.

7 Q. And the date of this contract?

8 A. Looks like I think that's 7/1/97.

9 MR. DORANS: Judge, no objection to  
10 this whole series of documents.

11 THE COURT: So you stipulate?

12 MR. DORANS: I stipulate to all.

13 MR. MILLS: Your Honor, we're fine  
14 with that. If he'll also stipulate that all of  
15 the services were in fact approximately within  
16 the date range on the contract.

17 THE COURT: Say that again.

18 MR. MILLS: If you will stipulate  
19 that all of the services were being provided --

20 THE COURT: You mean, you are going  
21 to put a condition on whether or not they are  
22 admissable?

23 MR. DORANS: He wants an additional  
24 stipulation of fact and I'm willing to do that.  
25 He wants a stipulation that the witness said that

1 the date of the contract was January 1st and the  
2 service started soon thereafter. That all of the  
3 contracts are there and all the dates are there  
4 and all the services started thereafter.

5 THE COURT: So we're going to do 35,  
6 36, 37 --

7 MR. MILLS: Through 43.

8 THE COURT: Let me have a minute.

9 MR. MILLS: There is one additional  
10 one that is out of order and it's 61.

11 THE COURT: Let me make this one for  
12 the record.

13 MR. MILLS: Okay.

14 THE COURT: What we did was -- where  
15 did we start 35?

16 MR. MILLS: Yes, Your Honor. I  
17 believe you've already done 23.

18 THE COURT: Defendant's Exhibit 35  
19 through 43 without objection are stipulated as  
20 admissible and have been marked by the Court and  
21 are in evidence.

22  
23 (Whereupon, the Contracts were marked  
24 Defendant's Exhibits Nos. 35 through 43)  
25

1 THE COURT: All right, what do you  
2 have now?

3 MR. MILLS: Exhibit 61, Your Honor.

4 THE COURT: Sixty-one, same  
5 stipulation?

6 MR. DORANS: I'm sure it's the same  
7 contract.

8 MR. MILLS: It's another  
9 interconnectivity contract.

10 THE COURT: All right. Hold on.  
11 Sixty-one admitted without objection.

12  
13 (Whereupon, the Contract was marked  
14 Defendant's Exhibit No. 61)

15  
16 BY MR. MILLS:

17 Q. Mr. Howell, we haven't walked through each  
18 of these documents. Have you previously seen  
19 these?

20 A. Yes, I have.

21 Q. Are you aware that each of these customers  
22 continued to use the service up until the time  
23 that you departed iTRiBE in February of '99? You  
24 can flip through those if you need to look at  
25 names. Feel free.

1 A. Yes, they were.

2 Q. So while the initial term of the contract  
3 may have expired, they were renewed?

4 A. Yes.

5 Q. In addition to these contracts, can you  
6 tell me if you remember any other renewal  
7 customers that were not new contract customers in  
8 December of '97 to '98?

9 A. I'm sure we had a number of them. The  
10 Funhouse upgraded their services.

11 Q. Do you know what they upgraded to in terms  
12 of size?

13 A. I think they went up to 512 kilobits.

14 Q. Do you know who NATO is?

15 A. NATO was an ISDN 128. They renewed.

16 Q. What relationship did you have with  
17 Steelmasters?

18 A. Steelmasters had a 128 kilobit ISDN  
19 connection.

20 Q. And Nussbaum Realty?

21 A. I think they were an ISDN line also 128  
22 kilobits.

23 Q. The contract that was 61 was the Lendman  
24 Group?

25 A. Yes.

1 Q. So that was a new contract during that  
2 period or was that a renewal?

3 A. That's a renewal.

4 Q. What size of connection is that?

5 A. That is a full T1, which is like 1.5 MB.

6 Q. Okay. How about the relationship with Hall  
7 Auto World?

8 A. I think they had a 256K connection, frame  
9 relay.

10 Q. Virginia Challenge?

11 A. They had 128 kilobits ISDN.

12 Q. Who is Commonwealth Challenge?

13 A. Same people.

14 THE COURT: I'm going to stand up  
15 for a while while you go through this. This  
16 chair is old and decrepit.

17 BY MR. MILLS:

18 Q. Chartway?

19 A. Chartway was an ISDN line, 128 kilobits.

20 Q. Flagship?

21 A. Flagship they were in the same building as  
22 us. And they were connected -- I'm not sure if  
23 they were paying for it, I would have to look at  
24 the contract.

25 Q. How were they connected?



1 A. Through Ethernet.

2 Q. Into where?

3 A. Into our pop locally at the World Trade  
4 Center.

5 Q. Was that a 10 meg Ethernet connection?

6 A. Yes. I'm sure they were paying for much  
7 less.

8 Q. Okay. Who is EFW?

9 A. That was a co-locator at our facility at  
10 World Trade Center.

11 Q. What is a "co-locator"?

12 A. Someone we sell space to who is also they  
13 provide some type of service on the Internet so  
14 they could have web servers, web hosting servers  
15 or Internet dial up accounts.

16 Q. Do you have to know what EFW did?

17 A. They had a little bit of both. They had  
18 some web hosting that they did and some dial up  
19 Internet access.

20 Q. And who is Global Connect?

21 A. Global Connect, basically the same thing.

22 Q. What was the contractual connectivity with  
23 ProSoft?

24 A. Contractual, I don't know. We provided  
25 them with -- they bought fiber links going to

1 both locations, Virginia Beach and Newport News.

2 Q. But you don't know if there was a contract  
3 behind that?

4 A. No, I never saw one.

5 Q. Previously, there had been a -- I believe  
6 it was a stipulation that Defendant's Exhibit 63  
7 was a business record that showed all invoices  
8 for hosting and dedicated access during '97  
9 and '98.

10 MR. DORANS: For the time frames  
11 indicated on that exhibit, right.

12 BY MR. MILLS:

13 Q. Okay. There are some names that came out  
14 of that that I would like to review with you, Mr.  
15 Howell, and tell me what you can tell me.

16 Abyss/Cellar Door Productions?

17 A. That was Virginia Beach. We actually for a  
18 time period there, we provided them an ISDN line  
19 128.

20 Q. Do you happen to recall what time period  
21 that was over?

22 A. Not really.

23 Q. How about AutoMark?

24 THE COURT: Auto Mart?

25 MR. MILLS: Mark with a "K".

1 THE WITNESS: They were actually  
2 co-located in the same building with us for a  
3 while there.

4 THE COURT: That is a confusing and  
5 similar name.

6 BY MR. MILLS:

7 Q. When you say that they were co-located,  
8 what does that mean?

9 A. They were actually physically in the same  
10 office facilities that we were in.

11 Q. Were they connected into your network?

12 A. Sure, yeah.

13 Q. R.J. Brunelli and Company?

14 A. I'm not familiar with them.

15 Q. I'm sorry, that came in as a prior exhibit  
16 as a web, I apologize. Beyond Interactive Web  
17 Development?

18 A. Not that familiar with them.

19 Q. Blink Media?

20 A. Not familiar with them.

21 Q. Blue Pete's Restaurant?

22 A. Not familiar with them.

23 Q. Bowditch Ford?

24 A. Not familiar with them.

25 Q. Capital Pontiac GMC?

- 1 A. Not familiar.
- 2 Q. Cavalier Resorts?
- 3 A. I think most of them are web hosting
- 4 contracts.
- 5 Q. CI Travel?
- 6 A. Not familiar.
- 7 Q. Digital City Hampton Roads?
- 8 A. Not familiar with that.
- 9 Q. Visual City, Inc.
- 10 A. Not familiar with that.
- 11 Q. Digital City Philadelphia.
- 12 A. Not familiar with that one.
- 13 Q. Digital City South Florida?
- 14 A. Not familiar wit them.
- 15 Q. Dixie Manufacturing.
- 16 A. Not familiar.
- 17 Q. Evergreen America Corporation?
- 18 A. Not familiar.
- 19 Q. Executive Productivity Systems?
- 20 A. Not familiar.
- 21 Q. Fareed & Company?
- 22 A. Not familiar.
- 23 Q. Four Sails?
- 24 A. Not familiar.
- 25 Q. Freedom Ford?

1 A. Not familiar.

2 Q. David Fronek?

3 A. Not familiar.

4 Q. Gist Enterprises?

5 A. Not familiar.

6 Q. The Gold Mine?

7 A. Not familiar.

8 Q. GHS Real Estate?

9 A. Not familiar.

10 Q. Hitz Internet Marketing?

11 A. Not familiar.

12 Q. HQ Saclant?

13 THE COURT: Saclant.

14 THE WITNESS: Not familiar.

15 BY MR. MILLS:

16 Q. IBM?

17 A. Not familiar.

18 Q. Ikon Norfolk?

19 A. Worked with them, but I don't think we ever

20 had from a dedicated connectivity standpoint I

21 don't think.

22 Q. Ikon what I guess is Southeast Virginia,

23 S-E-V-A?

24 A. Same.

25 Q. Innovative Network Decision?

1 A. Not familiar.

2 Q. Internet Connections?

3 THE COURT: What in the world are we  
4 doing here?

5 MR. MILLS: Your Honor, they have  
6 produced this input. We have asked for all of  
7 the web hosting and all the Internet --

8 THE COURT: There is about 50  
9 pages.

10 MR. MILLS: I've consolidated them  
11 down to the ones I don't have contracts on and  
12 I'm trying to determine if any of these were also  
13 connected to the Internet as Internet  
14 connectivity contractors and it goes to  
15 additional demand for bandwidth existence and  
16 additional demand so I'm trying to get it clear  
17 for the record who else existed.

18 MR. DORANS: Judge, I think it's  
19 clear for the record they all existed. We  
20 produced the document.

21 THE COURT: They what?

22 MR. DORANS: They all existed, we  
23 produced the document. You might as well show it  
24 him.

25 MR. MILLS: That's fine I have no

1 problem with that.

2 MR. DORANS: I don't think it has  
3 anything to do with anything, but let's try to  
4 move it along.

5 THE COURT: Doesn't have anything to  
6 do with what?

7 MR. DORANS: With the case. We  
8 started this yesterday. The hypothetical demand  
9 that's all this really deals with. Here is all  
10 of the potential customers we would have had and  
11 could at some point.

12 THE COURT: Were these people  
13 on-line.

14 MR. DORANS: They could have been  
15 on-line.

16 THE COURT: And you say it  
17 doesn't --

18 MR. DORANS: Again, it's all  
19 hypothetical. I think they already established  
20 there's a 10 meg line, and a 10 meg line and a 10  
21 meg line. But it's total demand can only be this  
22 times the 10 meg.

23 THE COURT: All right.

24 MR. MILLS: But that potentially  
25 increases by the greater number of people that

1 are out there.

2 THE COURT: I understand.

3 MR. MILLS: There is another whole  
4 page. If you would like --

5 THE COURT: All right. Go ahead.

6 BY MR. MILLS:

7 Q. Jeff D'ambrosio's?

8 A. Not familiar.

9 Q. Rich Kaiser?

10 A. Not familiar.

11 Q. Lynnhaven Drive Center?

12 A. Not familiar.

13 Q. Mary Immaculate Hospital?

14 A. Not familiar.

15 Q. McGraphics?

16 A. Not familiar.

17 Q. James McNider?

18 A. Not familiar.

19 Q. Media Access Group?

20 A. Not familiar.

21 Q. Meridia Group?

22 A. Not familiar.

23 Q. Miller Oil Company.

24 A. Not familiar.

25 Q. National Association of Home Builders?



1 A. Not familiar.

2 Q. Nationwide Medical Services?

3 A. Not familiar.

4 Q. NetImprovement?

5 A. NetImprovements was a company up in  
6 Richmond, but I don't think we had dedicated  
7 access with them.

8 Q. What is your relationship with them?

9 A. I think they were co-owned by some of the  
10 owners.

11 THE COURT: By who?

12 THE WITNESS: By some of the owners of  
13 iTRiBE.

14 THE COURT: Okay.

15 BY MR. MILLS:

16 Q. Ocean Front End?

17 A. That's a web hosting contract that I  
18 actually signed, so I'm familiar with that, but  
19 it's actually web hosting.

20 Q. Ourisman Automotive?

21 A. Not familiar.

22 Q. Peninsula Auto Group?

23 A. Not familiar.

24 Q. Pacifica Ford, Mazda, Hyundai?

25 A. Not familiar.

1 Q. Picus?

2 A. Not familiar.

3 THE COURT: Who?

4 MR. MILLS: Picus, P-i-c-u-s.

5 THE WITNESS: That was after I left.

6 BY MR. MILLS:

7 Q. The Pinnacle Group?

8 A. That's a web hosting, I'm familiar with  
9 that.

10 Q. Royal Oldsmobile?

11 A. Not familiar.

12 Q. Royal Silver Manufacturing?

13 A. Not familiar.

14 Q. Shocka Brew Coffee?

15 A. Not familiar.

16 Q. Smithfield Farms?

17 A. Not familiar.

18 Q. Spirit Cruises?

19 A. Not familiar.

20 Q. Sumitomo?

21 A. That's a web hosting contract. Not a  
22 dedicated.

23 Q. Sumitomo Cyclo Europe?

24 A. Same.

25 Q. Taylor Johnson Group?

1 A. Not familiar.

2 Q. TBI?

3 A. Not familiar.

4 Q. Tethys, T-e-t-h-y-s, Software Company?

5 A. Not familiar.

6 THE COURT: Spell it again.

7 MR. MILLS: T-e-t-h-y-s.

8 THE COURT: T-h-e or t-h-y?

9 MR. MILLS: T-e-t-h-y-s.

10 THE COURT: Whatever.

11 BY MR. MILLS:

12 Q. Tymoff and Moss Architects?

13 A. Not familiar.

14 Q. Tysons Ford?

15 A. Not familiar.

16 Q. United Auto Group?

17 A. Not familiar.

18 Q. US Sales Corp?

19 A. Not familiar.

20 Q. Vandeventer Black?

21 A. I did something with them, I can't

22 remember.

23 Q. You don't recall?

24 A. I would have to see the contract.

25 Q. Virginia Chamber of Commerce?

1 A. Not familiar.

2 Q. Virginia Beach Net?

3 A. Not familiar.

4 Q. Michael Walsh?

5 A. Not familiar.

6 Q. David Webster?

7 A. Not familiar.

8 Q. Eric Zarko?

9 A. Not familiar.

10 Q. I'm done with that now, Your Honor.

11 We spoke earlier about the customer service  
12 calls that Decipher made, can you tell me in  
13 general at this period of time or while you were  
14 the manager of the connectivity department the  
15 types of customer service calls that you had  
16 received?

17 A. It would range anywhere from if they had  
18 problems with the routers typically when we sold  
19 a dedicated Internet access contract we would  
20 provide support from the router on their end to  
21 the router on our end. So if anything happened  
22 in between there, we would provide support for  
23 that.

24 Once it left their router on their end, it  
25 was pretty much left up to them if there was a

\* \* \*

1 that once down the line.

2 MR. MILLS: I don't think we've been  
3 through it specifically with him. I was just  
4 trying to verify.

5 BY MR. MILLS:

6 Q. At the time that you were exchanging these  
7 voice mails with Kathy Eddleman --

8 A. Mm-hmm.

9 Q. -- what concern did you have with regards  
10 to Decipher's business with iTRiBE?

11 A. I knew they were unhappy with the service.

12 Q. Why did you know that?

13 A. Because of the phone calls.

14 Q. What about the phone calls told you that  
15 they were unhappy?

16 A. I think this was right at the time and I  
17 don't know what the time period is, Dale Maurice  
18 had left and they were calling over saying they  
19 didn't feel they were getting the support and the  
20 service.

21 Q. Is that it? Was that as explicit as it got  
22 or do you recall?

23 A. Excuse me?

24 Q. Was anything else said beyond that?

25 A. No, I pretty much just turned it over.

1 Q. Over to who?

2 A. Mainly Jamie if there were any service  
3 problem to have him fix it service and I made  
4 Mike aware of it.

5 Q. Mike?

6 A. Adolphi.

7 MR. MILLS: That's all I have, Your  
8 Honor.

9

10 RECROSS EXAMINATION

11

12 BY MR. DORANS:

13 Q. When is this that you are talking about; do  
14 you recall?

15 A. This was probably -- Mike and I actually  
16 had a meeting with them, I don't know what the  
17 period was, but it was probably six months or  
18 more before they actually terminated the  
19 contract.

20 Q. Is that the meeting that you talked about  
21 earlier where the only thing you recalled  
22 discussing was the fiber connection?

23 A. Yes.

24 Q. So now you recall more things?

25 A. I mean, that was part of it, the service.

1 They thought it was us and we told them it  
2 wasn't.

3 Q. So they complained about the service then  
4 that really wasn't your fault. It was a fiber  
5 connection totally unrelated to us, correct?

6 A. Yes.

7 MR. DORANS: I have nothing further  
8 of this witness.

9

10 FURTHER REDIRECT EXAMINATION

11

12 BY MR. MILLS:

13 Q. Now I'm confused. Did they express concern  
14 about anything beyond the cut with the line to  
15 Digex?

16 A. That was the main point of the meeting was  
17 that their service went down for this amount of  
18 hours and they weren't happy with that and they  
19 also added, I remember talking with Dale and he  
20 was telling me that they actually hosted their  
21 own web server and they had some gaming programs  
22 on there or something and the middle of the night  
23 was their busiest time and for some reason the  
24 service was disrupted. So again, I turned that  
25 over to Jamie to find out what was going on with

1 that and he communicated directly back with them,  
2 so I don't know what the results were on it.

3 Q. How many instances did Dale contact you  
4 about those things occurred?

5 A. I probably got a couple of e-mails a month  
6 from him.

7 MR. MILLS: Thank you.

8 THE COURT: What were the complaints  
9 on the couple of e-mails?

10 THE WITNESS: Disruption of service,  
11 he wasn't getting out to the Internet. I mean, I  
12 remember, you know, besides the fiber cut, I  
13 remember MAE East, went down one time. I don't,  
14 know if you've gone over that.

15 THE COURT: What is that?

16 THE WITNESS: MAE East is the actual  
17 connection where alot of the Tier 1 providers  
18 like our Digex connection where they actually  
19 connected up in DC and to the Internet back then  
20 and that's all controlled by certain groups of  
21 people companies. And apparently we had, there  
22 was a major outage at MAE East so we didn't get  
23 any connection out for some time period on that.

24 THE COURT: Go ahead.

25





\* \* \*

DIRECT EXAMINATION

BY MR. MILLS:

Q. Can you state your name for the record?

A. My name is Kathy spelled with a "K",  
Eddleman, E-d-d-l-e-m-a-n.

Q. Ms. Eddleman, who do you work for?

A. I work for Decipher Incorporated.

Q. What do you do there?

A. My role is currently Information Systems  
Manager.

Q. Have you had positions before this? Or  
what other positions have you had besides IS  
Manager?

A. When I first came to Decipher I believe in  
May of '96, I entered Decipher as a new employee  
as a web master.

Q. Do you recall when you moved on to IS  
manager?

A. I would say about four or five months  
later.

Q. What is the role and responsibility of the  
IS manager?

A. Basically, my role given the infrastructure  
at Decipher, we have a group that is responsible

\* \* \*  
1 discern a date when that connection went live?

2 A. According to this document, it is stated  
3 that the circuit went live on 6/23/97.

4 Q. Okay. You stated earlier that part of your  
5 responsibilities involved going and dealing with  
6 your internal customers when they were  
7 experiencing problems with the Internet  
8 connectivity and it sounded like you physically  
9 went up and sat with them; is that correct?

10 A. Absolutely.

11 Q. What type of problems were you seeing?

12 A. Well, I guess the best way to characterize  
13 the problems are when they would go to the  
14 Internet, one of the types of problems that I  
15 would see would be they would be able to get  
16 e-mail. They would be able to, you know, connect  
17 to other computers in the company, but when they  
18 would launch or open one of their web browsers  
19 and click on a site to go to, a site may not  
20 necessarily load. And the bottom of those  
21 browser windows, there is a little "Y" at the  
22 bottom that typically says things like contacting  
23 host, waiting for host to reply or stalled or  
24 something like that.

25 So that's one of the types of problems that

1 I saw where the browser on the computer is  
2 actually trying to communicate with something on  
3 the Internet. And it'll say contacting host. It  
4 would be about a moment where it would say  
5 stalled and I would see at times where it was say  
6 waiting for reply.

7 Q. When you saw those things, what did you try  
8 to do to pinpoint the calls?

9 A. There are a number of things that we  
10 typically try to run through in the problem  
11 solving scenario. The first thing, I have to  
12 make sure there is integrity at of the system at  
13 the desk. And we actually kind of joke that 90  
14 percent of the problems are really user errors  
15 and we would try to eliminate that first.

16 Q. How would you eliminate the user error?

17 A. I would actually have the individual  
18 physically show me what they were trying to do  
19 and how they were trying to accomplish it.

20 Q. And once you rule that out then what would  
21 you do?

22 A. Look at the integrity of the device itself  
23 or the computer itself. And the way we typically  
24 go about doing that is similar to what anyone  
25 would do, say is it plugged in? Is it turned

1 on? Is it plugged in? Are all of the  
2 connections made? Is the software, is this a  
3 software issue?

4 We have a program called Norton Disk Doctor  
5 that we would run on a computer to make sure that  
6 all of the software and the computer itself is  
7 functioning in an optimized state and then once  
8 we rule out those, then we generally begin  
9 conversations with other people that for instance  
10 in the web department who might have some insight  
11 as to what is actually happening when these  
12 events occur.

13 Q. What was -- were you generally successful  
14 at eliminating or discovering any problems in  
15 that process? With relationship to the Internet  
16 connectivity did you pinpoint the source of your  
17 problem?

18 A. That effort did not lead to a final  
19 resolution to our problem, no.

20 Q. Okay. What was the frequency in which you  
21 are seeing these types of stalled or waiting for  
22 reply type messages when people were trying to  
23 access web sites?

24 A. The problem would show itself  
25 intermittently. It was not something that you

1 could schedule and say at 8:00 on Monday I'm  
2 going to see this problem. It was a problem that  
3 would surface at various times. And so while you  
4 think you may have solved the problem, then it  
5 comes back and it would show itself again, so for  
6 a while, it was fairly consistent. You know, you  
7 could expect that it was going to happen because  
8 we had no resolution to it. Although we could  
9 not predict when it was going to happen.

10 Q. What efforts did Decipher take to try to  
11 escalate the identification of this problem?

12 A. Actually, that's when I was asked to come  
13 in to see if I could help to direct our efforts  
14 in away that might be more beneficial for the  
15 company.

16 And so, we started, I say we, "I" started  
17 looking at the problem the same way that I would  
18 attack a desktop issue. So I started looking at  
19 the connectivity of all of our internal parts.

20 So the first step I took was I contacted a  
21 company, a local Virginia Beach Company called  
22 Poe Enterprises and they are a cabling company  
23 and I believe they also resell some pieces of  
24 networking equipment. So I contacted them to  
25 come in and see if they would make sure that

1 every cable in my building that I was using for  
2 connectivity was a certified cable. Meaning that  
3 it was capable of carrying data from one end of  
4 it to the other without problems.

5 Q. Can I have you look at Exhibit 2, please.

6 A. (Witness complied.)

7 THE COURT: I don't have 2. Have we  
8 marked it at all?

9 MR. MILLS: No, we haven't. The  
10 first page says -- I believe you have it up  
11 there. Decipher cable scans. I'm sorry, do I  
12 have it wrong?

13 THE COURT: It's Plaintiff's 4.

14 MR. DORANS: He's referring to the  
15 notebook, Judge.

16 THE COURT: This is the notebook I  
17 have here. I don't see a 2. I see --

18 MR. DORANS: And this has not been  
19 introduced to my knowledge.

20 THE COURT: Okay. No, it hasn't.

21 BY MR. MILLS:

22 Q. Ms. Eddleman, what is this? Do you  
23 recognize this?

24 A. I do recognize this as the results of the  
25 day long testing that two engineers from Poe

1 Enterprise came out and tested the integrity of  
2 my cables and this is the report they gave me.

3 Q. What does this report show?

4 MR. DORANS: Objection. Your Honor.  
5 If she's going to testify to the conclusion of  
6 somebody else's testing.

7 MR. MILLS: Business record, Your  
8 Honor.

9 THE COURT: Overruled.

10 THE WITNESS: My interpretation of  
11 what this result shows is that these cable passed  
12 as being certified category 5 cables.

13 BY MR. MILLS:

14 Q. What in this document gives you that  
15 information?

16 A. Well, the line at the very top it says,  
17 "Auto test pass."

18 Q. Thank you. I would like to have this  
19 admitted, Your Honor as Defendant's Exhibit 2.

20 THE COURT: Any objection?

21 MR. DORANS: No, Judge, no  
22 objection.

23 THE COURT: Received and marked as  
24 such without objection.

25

1 (Whereupon, the Autotest Summary was  
2 marked Defendant's Exhibit No. 2)

3

4 BY MR. MILLS:

5 Q. Ms. Eddleman, what exactly did these people  
6 do when they came into test the cables?

7 A. Well, the procedure that I witnessed them  
8 perform was, they had an engineer who would stand  
9 in the telephone room where all of the data  
10 communication equipment is and they would take a  
11 particular port or connection in the wall where  
12 they would plug it in a computer and they would  
13 have a device that they plugged in a computer on  
14 one end and they had counterpart on whatever  
15 floor or whatever part in the building and they  
16 would plug those in. They would take the cable  
17 out of the computer and plug it into the other  
18 end so they were testing the run of cable all the  
19 way through from where we would have normally  
20 connected it to a computer through where we would  
21 have normally connected it through the network.

22 Q. Ms. Eddleman, can I have you look at  
23 Exhibit 1 that has been previously introduced and  
24 entered as Exhibit 1.

25 A. Yes.



1 Q. What is this, Ms. Eddleman?

2 A. This appears to be an invoice for the  
3 amount of labor for testing those category 5  
4 cables.

5 Q. So this is the invoice you received for  
6 that testing?

7 A. Yes.

8 Q. And in the ship to remarks in the upper  
9 right hand corner, it says, "Test patch cabling  
10 and replace with your problem patch cables with  
11 your new patch cables."

12 A. Correct.

13 Q. Can you explain what that means?

14 A. There were two cables and maybe I should  
15 clarify "patch." What they are referring to in  
16 this in the shorter cable that. We typically  
17 would connect the computer to the wall. And  
18 there were two cables in the wall. I believe one  
19 was on the web floor where an individual had  
20 rolled over the cable sufficiently with their  
21 chair that it was flat. It was still passing  
22 data, but there were concerns and there were two  
23 instances of that.

24 Q. What affect did this have on your whole  
25 network?

1 A. There would be no effect only for those  
2 specific computers.

3 Q. Were you aware if this was causing any  
4 problems particularly?

5 A. No.

6 Q. After you had had all of the cabling  
7 tested, you said that these results came back as  
8 passed. The problem continued, what did you do  
9 next?

10 A. Well, the next step in the process was to  
11 look at the computer itself and to look at the  
12 hardware that was associated with allowing the  
13 computer to communicate with the other devices  
14 and in this instance, we looked at what has been  
15 referred to as a Farallon card or a network  
16 interface card.

17 Q. What does a Farallon card do?

18 A. That would be the hardware that's plugged  
19 into the computer where you actually plug the  
20 cable. So what it does, it provides the computer  
21 the ability to communicate on a network.

22 Q. Are there any other methods for this  
23 computer to communicate on the network besides  
24 this card?

25 A. Not at my company, no.

1 Q. Mr. Maurice, as you heard, said something  
2 about only the art department communications were  
3 involved. Do you know what that refers to?

4 A. Actually, these cards that were installed  
5 in these computer allowed a faster transfer of  
6 data. These were 100 MB cards.

7 THE COURT: Say what?

8 THE WITNESS: One-hundred. Computers  
9 back in that time would be able to transfer data  
10 at 10 MB per seconds and we bought upgrade cards  
11 for some computers in the company that would  
12 transfer faster rates.

13 Because for instance, in our art department  
14 he's referring to, our entire art department had  
15 these upgraded cards because we deal with very  
16 large graphic files and sometimes they could get  
17 to be 300, 400 MB. And so, we wanted to make  
18 sure they had the ability to pass data.

19 THE COURT: Okay.

20 THE WITNESS: They were --

21 BY MR. MILLS:

22 Q. Why was this related to your effort to  
23 identify your problem with the web sites?

24 A. There were other individuals in the  
25 company, senior managers for instance, who also

1 had these upgraded cards in their computers as  
2 well.

3 Q. Were they experiencing problems as well?

4 A. Yes.

5 Q. Could I have you turn to Exhibit 3.

6 A. (Witness complied.)

7 Q. Which has previously been admitted.

8 What is this, Ms. Eddleman?

9 A. The first page is a packing list from  
10 Farallon Communications for four fast Ethernet  
11 cards.

12 Q. Are these the Farallon cards we've been  
13 discussing?

14 A. Yes.

15 Q. And the next page?

16 A. The next page is an invoice for eight  
17 additional cards that were shipped.

18 Q. How many cards in total did you get?

19 A. I do not recall exactly. Because we were  
20 able to demonstrate with the Farallon Corporation  
21 that the cabling was not an issue and that the  
22 connectivity problems that we were having were  
23 not the result of the cabling.

24 They gave us a discount on a large order of  
25 cards. And although, I do recall that some of

1 those cards sat in their closet because we did  
2 not have computers that we were putting them in  
3 at that time.

4 Q. How many did you actually put them into?

5 A. I believe at the time we installed five,  
6 possibly six cards.

7 Q. Without a Farallon card in the system or  
8 its predecessor, could the computer communicate  
9 with the network or with the Internet or is this  
10 type of card -- I'll let you answer.

11 A. This card would be necessary for data  
12 communication.

13 Q. Anywhere in the network?

14 A. Correct.

15 THE COURT: I'm sorry, I didn't hear  
16 you.

17 THE WITNESS: I'm sorry, data  
18 communication.

19 BY MR. MILLS:

20 Q. What was your experience with the problems  
21 users were calling you about following the  
22 upgrade of the Farallon cards?

23 A. We still experienced intermittent problems  
24 with data connectivity.

25 Q. What did you do next?

1     A.     Well, the next step after we had ruled out  
2     that it was not a hardware issue on the computers  
3     and obviously as a part of our routine  
4     maintenance is to look and make sure that there  
5     is integrity of the software so that the  
6     operating system software does allow the  
7     computers to communicate.

8           And we did that with a program of testing  
9     and running a routine program called Norton Disk  
10    Doctor on the computers. In fact, we do that  
11    every two to three weeks. Sometimes it extends a  
12    little longer based on our work schedules, but  
13    that's a routine that we follow. And that gives  
14    you reports and it tells you whether the computer  
15    passed and if there are any problems. And once  
16    you get that, we fix them.

17          There are typical problems that did not  
18    have anything that related to Internet  
19    connectivity, so we took that step. And then  
20    from there, I really didn't know where to go, so  
21    I had contacted an organization call Bell  
22    Atlantic Network Integration to see if they could  
23    come in and tell me about what our network was  
24    and if there were any problems that we, that they  
25    saw we had internally that we could fix that

1 would take care of our network interconnectivity  
2 problems that we were experiencing.

3 Q. Do you recall the time that you initiated  
4 this process with Bell Atlantic?

5 A. I believe I contacted them maybe in  
6 January.

7 Q. So they came and -- tell me more about the  
8 process you went through with Bell Atlantic.

9 A. Yes, you know, it's like most scenarios  
10 when you are making a connection with a new  
11 vendor and company. There is a series of phone  
12 calls and you try to find the right individual  
13 that you need to speak with.

14 At the time, I had been introduced to an  
15 individual named John Salisbury and he and  
16 another sales engineer, I believe, agreed to come  
17 down and sit and meet with us to see what it is  
18 they wanted us to do, what we wanted them to do.

19 So they came the Decipher and I did make a  
20 list of what I wanted them to tell me. What kind  
21 of network that I have, what kind of problems do  
22 you see, how is it set up, what are the devices  
23 in the network, and what would your  
24 recommendation be to change our network so that  
25 we can fix this problem that we are continuing to

1 chase.

2 Q. What did they do for you after you had this  
3 meeting and asked them to do these things?

4 A. Well, they did a number of things. The  
5 first thing they did that was extremely helpful  
6 to me, they gave me a schemata of the original  
7 network as it was in place at the time. And they  
8 also provided another schemata. How they would  
9 recommend changing our internal network to  
10 alleviate some potential problems area that they  
11 saw.

12 Q. Tell me more about the recommended change  
13 to alleviate your internal problems.

14 A. Well, the process as they drew out of the  
15 diagram they were able to shows us that all of  
16 our traffic --

17 MR. DORANS: Judge, I don't know if  
18 we can go into what they told her. None of these  
19 people are here. That's my objection.

20 THE COURT: Overruled.

21 THE WITNESS: Basically, what they  
22 told us through this diagram, they showed he how  
23 the network was originally designed and they  
24 showed me a picture of how they would redesign  
25 it. And their recommendation was to separate the



1 traffic that was going through the Internet or  
2 coming to Decipher from the Internet away from  
3 the traffic that was local to our company.

4 And so, they drew a picture of the devices  
5 that they would put into place and they talked to  
6 me about what it would require to make that  
7 happen and their suggestion would be that then  
8 that way we could see if the problems behind our  
9 local network were caused by any congestion on  
10 our end or if we needed to look somewhere else.

11 Q. When did Decipher implement the solution?

12 THE COURT: When did what?

13 BY MR. MILLS:

14 Q. When did Decipher implement this  
15 recommendation?

16 A. I recall that we were pretty excited about  
17 the fact that we felt we were moving somewhere.  
18 And so we went ahead and agreed that we would  
19 implement the solution as they had recommended to  
20 us. In that process, I don't really remember the  
21 actual dates. I believe --

22 Q. How close in time to that initial January  
23 meeting I think you referenced?

24 A. I don't believe it was immediate. I  
25 believe what happened was we had to take some

1 time to coordinate and time to get purchase  
2 orders for equipment and get those approved and  
3 order the equipment and then provision to have  
4 her come in. I say "her," I'm referring to  
5 Jessica Salomonsky, the network engineer that  
6 would be installing this equipment for us.

7 Q. So Jessica did come in and install this?

8 A. Yes.

9 Q. During the process of this installation,  
10 what else did you discover about your Internet  
11 connectivity?

12 A. Well, as a part of the process in order to  
13 make this happen, their recommendation was that  
14 we took our -- at the time I believe we had three  
15 web servers and I could be wrong. We had web  
16 servers sitting and we wanted to put it outside  
17 our local network. And their recommendation was  
18 to put that on a device called a switch which  
19 would be considered a DMZ zone or I believe that  
20 refers to a demilitarized zone.

21 THE COURT: Demilitarized?

22 THE WITNESS: Yes. Yes, sir, I  
23 believe that refers back to the time of the  
24 defense network and that just got kind of pulled  
25 over into the commercial.

1 THE COURT: Okay.

2 BY MR. MILLS:

3 Q. What was purpose of this DMZ?

4 A. The purpose of the DMZ was to put the web  
5 servers on a switch so that switch could connect  
6 to another device call as pix, p-i-x, firewall  
7 which is a hardware wall. Which basically says  
8 no traffic can come through here unless it starts  
9 from outside. So if you are inside or behind the  
10 firewall, as we refer to it, we start inside the  
11 firewall and go in here and say we want to have a  
12 connection. We can't want to talk to you out  
13 here. The firewall will allow that to happen,  
14 but if somebody from outside tries to come in for  
15 instance get to my particular computer, it will  
16 not allow that task to pass through.

17 Q. Ms. Eddleman, can I have you turn to  
18 Exhibit 4.

19 A. (Witness complied.)

20 Q. What is this?

21 A. This is an invoice dated 5/22/98 and this  
22 is for ten hours of engineer and time and  
23 materials from Bell Atlantic Network Integration.

24 Q. What was the work that this invoice was  
25 for?

1 A. I believe these ten hours were for our  
2 initial implementation of coming down and  
3 surveying the site and working with me to  
4 implement the segregation of the matter.

5 Q. Actually implement?

6 A. Actually, it was like a survey, site  
7 survey.

8 Q. And if I could get you to flip over to  
9 Exhibit 5.

10 A. (Witness complied.) Yes.

11 Q. What is this?

12 A. This is a quote for that same ten hours.

13 Q. So this was just a quote that was later  
14 sent to put the invoice against?

15 A. Correct.

16 Q. Ms. Eddleman, can I get you to move over  
17 to -- Your Honor, all of those exhibits have  
18 previously been admitted -- to Exhibit 15.

19 A. (Witness complied.) Yes.

20 Q. What is this?

21 A. This diagram or schemata is a  
22 representation of our network that Dale Maurice  
23 provided us before he left the company showing us  
24 the connectivity of how he had designed and  
25 implemented the internal and external network.

1 Q. Is this the solution that BANI gave you?

2 A. This is not the solution.

3 Q. I'm sorry, BANI is Bell Atlantic Network  
4 Integration. So this is prior to BANI?

5 A. Correct.

6 MR. MILLS: Your Honor, I would like  
7 to admit this as Exhibit 15 as a defense  
8 Exhibit.

9 MR. DORANS: Judge, I don't have an  
10 objection to the exhibit. The copy I have has  
11 handwriting on it.

12 MR. MILLS: There is no handwriting  
13 on it. You were given two in discovery.

14 MR. DORANS: That's fine. What's the  
15 exhibit number?

16 MR. MILLS: It's 15.

17 THE COURT: So admitted.

18

19 (Whereupon, the Diagram was marked  
20 Defendant's Exhibit No. 15)

21

22 BY MR. MILLS:

23 Q. Thank you, Your Honor.

24 So this was your network prior to doing  
25 anything with BANI. You subsequently had BANI

1     come in and they made recommendations and you  
2     choose to act on those recommendations and can  
3     you tell me what transpired in that process of  
4     actually implementing the recommendation?

5     A.     Well, as a part of the process, we had to  
6     add new devices to the network to be able to have  
7     all of those devices communicate with one  
8     another. We had to add another switch so that  
9     that would become the demilitarized zone. We had  
10    to add the pix firewall which would separate and  
11    sort of provide some security for our  
12    corporation. And as a part of that, those  
13    devices had to have an address.

14           And since I was not familiar with the IP or  
15    the IP addresses of these devices, Jessica  
16    Salomonsky, who was the engineer from Bell  
17    Atlantic Network Integration performed a pix test  
18    to see if she could find an address that was  
19    available and arrange address for the PING  
20    spots. In doing so, when that PING test came  
21    back, we watched a myriad of addresses in that  
22    same range of numbers come back on her computer  
23    screen.

24    Q.     What did that mean to you?

25           MR. DORANS: Objection. If he's

1 going to call for a technical conclusion. I  
2 think this witness has been very candid that she  
3 relies on others for decisions. She's more of an  
4 overseer.

5 THE COURT: How would you know what  
6 it meant aside from what you thought it meant?

7 THE WITNESS: What I -- can I rephrase  
8 that question, Judge?

9 THE COURT: You can rephrase your  
10 answer.

11 THE WITNESS: I'm just trying to  
12 understand. How would I know what it meant if I  
13 didn't --

14 THE COURT: The difference is,  
15 between what you know it meant and what you  
16 thought you knew it meant. Because if you are  
17 not technically trained, it's been challenged,  
18 you've been challenged on whether or not you can  
19 testify of what it meant.

20 Now, of course, everybody has an opinion  
21 about everything in the world, so you can have an  
22 opinion of what it meant. The question is  
23 whether or not your opinion has any evidentiary  
24 value under the rules of evidence.

25 THE WITNESS: I understand, Your

1 Honor. My expectation was when these devices  
2 came back because essentially it was just a test  
3 to just go out and see what other computers were  
4 out there, the ones that would come back, would  
5 be devices on my network that I would work with  
6 everyday. And that would be Mike's computer,  
7 Rick's computers or somebody else's computer  
8 based on that address. What came back showed one  
9 of those was a Decipher address and there was a  
10 bunch of other addresses that I did not expect to  
11 see.

12 THE COURT: So you're not telling me  
13 what you thought it meant but what you saw?

14 THE WITNESS: That's what I saw.

15 MR. DORANS: No objection to what she  
16 saw, Judge.

17 THE COURT: That is admissable.  
18 Now, why -- probably his next question is, why  
19 did you get a bunch of addresses that you did not  
20 expect to get? That's where it might get a  
21 little tougher for us. Is that your next  
22 question?

23 MR. MILLS: Ms. Eddleman, I will not  
24 go there just yet, Your Honor.

25 THE COURT: I was going to sustain my



1 objection to my question.

2 BY MR. MILLS:

3 Q. What other devices came back as being  
4 machines on the IP addresses, did you know?

5 A. I did not know what those devices were.

6 Q. So you knew that they were not your own  
7 devices?

8 A. Correct.

9 THE COURT: Counsel, you still have  
10 an expert to testify so why don't we pass on  
11 that. Put a little asterisk by that.

12 MR. MILLS: Yes, Judge.

13 THE COURT: A lot of these things --  
14 there is no use to try to ask questions with  
15 somebody who is not an expert. It just gives  
16 rise to a lot of objections about a lot of things  
17 that could be handled by your expert.

18 BY MR. MILLS:

19 Q. Ms. Eddleman, as a result of the process of  
20 implementing the BANI recommendation, you  
21 obviously had the surprise you didn't expect to  
22 see these machines for whatever value that is.  
23 What conclusion -- well, what did Decipher  
24 ultimately do at this point to try to improve  
25 their Internet connectivity?

1 A. Well, at this point, we took other steps in  
2 the process other than looking at those devices  
3 and trying to understand where that came from.

4 Q. You ultimately installed the recommendation  
5 of BANI?

6 A. Absolutely. That was in process of  
7 happening and that installation carried forward.

8 Q. Once that recommendation was installed, did  
9 you continue to experience problems that you had  
10 experienced before?

11 A. Yes.

12 Q. What did you then do?

13 Well, Ms. Eddleman, let me get you to refer  
14 to Exhibit 16.

15 A. (Witness complied.)

16 Q. What is this, Ms. Eddleman?

17 A. This is a couple of pages excerpted from a  
18 very poorly kept phone log at my desk.

19 Q. This is yours?

20 A. Yes, it is.

21 MR. MILLS: Your Honor, I would like  
22 to admit this.

23 MR. DORANS: It's not number 16 in  
24 mine.

25 THE COURT: All right.

\*

\*

\*

1 A. That is correct.

2 Q. So from some time in June until December,  
3 you continued to use iTRiBE though you were  
4 moving to MCI?

5 A. That's correct.

6 Q. Why did it take so long to terminate with  
7 iTRiBE?

8 A. There were a number of reasons. The first  
9 reason was the coordination of a number of  
10 individuals that could be available to make it  
11 happen consistent with the things that were going  
12 on at our company that may have been impacted by  
13 us. You know, making a transition to a different  
14 Internet service carrier.

15 As well as once those, the new Internet  
16 service came up, a time for the traffic to learn  
17 that Decipher no longer lived at the same  
18 address, basically.

19 Q. If I could get you to turn to Exhibit 30,  
20 the previous exhibit.

21 A. (Witness complied.)

22 Q. Do you recognize this?

23 A. I do.

24 Q. I would like -- what is it?

25 A. This is --

1 MR. DORANS: Are you admitting it?

2 MR. MILLS: Yes.

3 MR. DORANS: Ikon.

4 THE COURT: Thirty?

5 MR. MILLS: Yes, Your Honor. It is

6 the e-mail to Chris and Calvin. Salutation

7 Chris/Calvin from Kathy Eddleman dated 9/28/98.

8 THE COURT: Yes, I have it. This is

9 30.

10

11 (Whereupon, the E-mail memo was

12 marked Defendant's Exhibit No. 30)

13

14 BY MR. MILLS:

15 Q. Ms. Eddleman, can you explain what that

16 e-mail is about?

17 A. This e-mail is my request to coordinate

18 efforts with individuals in both the web group

19 and the IS group to make a time that we could

20 make our switch over to the MCI network.

21 Q. So as of 9/28/98 you are starting to work

22 toward that switch?

23 A. That's correct.

24 Q. Ms. Eddleman, there is a line right in the

25 middle of that. You continued seeing enormous

1 problem on the iTRiBE line?

2 A. That line means that there is a device that  
3 has a port that connects that would connect out  
4 to our Internet service provider. When you log  
5 into that device or when you sign into it like  
6 you would sign into a computer, you could see the  
7 statistics for what's happening on that  
8 particular port in terms of traffic.

9 Basically, what this means, there were a  
10 high rate of collisions or instances where two  
11 devices were trying to speak at the same time and  
12 one would have to stop and wait and listen and  
13 that produces an error called an collision.

14 Q. So you were still seeing problems then  
15 throughout this time that you were trying to  
16 convert?

17 A. That's correct.

18 THE COURT: This is in-house mail;  
19 is that right?

20 THE WITNESS: Yes, sir, this is  
21 from --

22 THE COURT: Did you ever send such a  
23 message to any of the personnel at iTRiBE?

24 THE WITNESS: No, sir.

25 BY MR. MILLS:

1 Q. Ms. Eddleman, we had previously heard about  
2 a flood that occurred at Decipher. What  
3 assistance did you receive from iTRiBE during  
4 that flood --

5 A. To my knowledge --

6 Q. -- with the equipment?

7 A. To my knowledge, none.

8 Q. Since you have moved to the new Internet  
9 service provider, can you give me a description  
10 of the body of the service that you received?

11 A. My experience with the new Internet service  
12 provider has been a positive one. I no longer  
13 get those phone calls to go to people's desks and  
14 explain to me why their network browser isn't  
15 working or they can't get the sites.

16 I receive daily reports from this Internet  
17 service provider about the Internet usage in  
18 terms of our four circuits over a period of 24  
19 hours, I get that daily.

20 There have been instances where they have  
21 proactively contacted me and suggested that they  
22 saw some things that might not really be a  
23 problem, but wanted to alert me of that. So  
24 they've been proactive and very responsive in the  
25 times when I have had questions and have

1 contacted them.

2 MR. MILLS: Thank you Ms. Eddleman,  
3 that's all of my questions.

4  
5 CROSS-EXAMINATION

6  
7 BY MR. DORANS:

8 Q. Ms. Eddleman, my name is Barry Dorans and  
9 I'm going to ask you some questions.

10 Isn't it fair to say that Dale Maurice was  
11 really more hands on involved with the Internet  
12 connectivity issues than you while he was there?

13 A. That would be an accurate statement.

14 Q. In fact, you were never personally involved  
15 in the customer support problems with relating to  
16 the Internet, correct, with iTRiBE?

17 A. Could you rephrase that question?

18 Q. Sure. You were never personally involved  
19 in the customer support problem, to the extent  
20 there was one with iTRiBE?

21 A. I was involved to the extent that I was  
22 made aware.

23 Q. But you were never personally involved, you  
24 personally?

25 A. Correct.



1 before in another e-mail that was forwarded.

2 THE COURT: All right.

3

4 (Whereupon, the Fax was marked  
5 Plaintiff's Exhibit No. 10)

6

7 BY MR. DORANS:

8 Q. This was your memo which you recommended a  
9 switch over; is that correct?

10 A. That is correct. This was my proposal as a  
11 viable solution.

12 Q. And "direct to the backbone," what does  
13 that mean?

14 A. That means that we would be traversing  
15 lines that were nationwide that were owned by the  
16 provisioned -- I should say by the company  
17 itself, MCI in this case.

18 Q. Aren't you always traversing lines that are  
19 owned by a provider at some point?

20 A. That is correct.

21 Q. What direct to the backbone really means is  
22 that you are getting step closer to the backbone  
23 than a Tier 2?

24 A. That is correct.

25 Q. Let me show you this document and see if



\* \* \*  
1 efforts to take care of our slow speed access to  
2 the Internet and to make sure that the slowness  
3 that we experienced or the potential down times  
4 that we had, the down times that we had were not  
5 related to anything we had in our corporation.

6 We wanted to make sure that everything we  
7 were doing on our end was optimized and not a  
8 source of the problem.

9 Q. But you didn't contact iTRiBE at that point  
10 to see if they could run a test to tell you  
11 whether or not you were getting through?

12 A. At the point in time, my role was to look  
13 and begin to dissect the components at our  
14 company to see if I could find out or phase any  
15 problems that we had in house that might be  
16 problematic.

17 At the same time, I believe Dale Maurice  
18 was still responsible for the administration of  
19 the web and the Internet connectivity.

20 Q. But in about April or May of '97, you spent  
21 about \$30,000 reconfiguring your network,  
22 correct? Sorry '98?

23 A. I believe so, yes.

24 Q. And that was just to see where the problem  
25 may be?

1 A. That's correct.

2 Q. Not to have somebody fix the problem, just  
3 to see where it might be?

4 A. That's correct.

5 Q. Some of the outages that you were aware of  
6 were very short duration; is that correct?

7 A. That's correct.

8 Q. Less than ten minutes sometimes?

9 A. I don't recall.

10 Q. Were you involved in the negotiating the  
11 contract with MCI?

12 A. I was involved in the room when they were  
13 talking about what we could have and what the  
14 circuits would be and how it would be  
15 provisioned.

16 Q. Did you review any of the contracts  
17 themselves?

18 A. Yes.

19 Q. You were aware under MCI an outage less  
20 than ten minutes, you don't get any credit at  
21 all?

22 A. I'm not aware of that.

23 Q. Let me get you to turn to their Exhibit 6.  
24 Sorry, their Exhibit 10 in their exhibit book and  
25 the pages are conveniently bates-stamped

\* \* \*

1 A. I remember on one occasion Rodney Howell  
2 left me a voice mail and that is the only  
3 instance.

4 MR. DORANS: Thank you, Your Honor.  
5 I'm done with this witness.

6 THE COURT: Take a ten minute  
7 recess.

8

9 (Recess)

10

11 MR. FARMER: Our next witness is  
12 Daryl Jwbala, D-a-r-y-l, J-w-b-a-l-a.

13

14 DARYL JWBALA  
15 a Witness, having been first  
16 duly sworn was examined and  
17 testified as follows:

18

19 DIRECT EXAMINATION

20

21 BY MR. MILLS:

22 Q. Mr. Jwbala, state your name for the  
23 record.

24 A. It's Daryl Jwbala.

25 Q. Okay. Mr. Jwbala, what do you do as a

1 profession?

2 A. I own a wire Interneting consulting firm  
3 and we network groups out in North Carolina. We  
4 provide Internet access to customers on networks,  
5 typically networks that we design. We are  
6 partners with Interpath a Tier 1 Internet service  
7 provider with whom we provide our bandwith  
8 customers.

9 Other typical customers have several  
10 sites. One of the larger ones has up to 30 sites  
11 I believe at this time. So typically, we  
12 maintain lengths that require high bandwith lines  
13 and routers and web sites.

14 Q. How long have you been doing this?

15 A. Approximately, eight years now.

16 Q. All of this with your own company?

17 A. No. A combination with my own company  
18 which has been for the last two years. For a  
19 year previous to that, I was working at a  
20 Interpath of Information Systems, also at the  
21 Nottingham Company of which I was also consulting  
22 on the side.

23 And actually, as a function of that job  
24 before that, I was working for Microage which is  
25 valued research for Micrafee.

1 THE COURT: How do you spell that?

2 THE WITNESS: M-i-c-r-a-f-e-e, and I  
3 was working in their service department and  
4 Internet work as an engineer and set up much of  
5 the same type of routers.

6 Previous to that, I was working consulting  
7 freelance and worked for many different  
8 companies. Some of Internet service providers  
9 and as well as some multi-site clients that had  
10 high Internet needs.

11 Q. How long have you been doing Internet  
12 connectivity?

13 A. Since 1992 when it became public.

14 THE COURT: When what?

15 THE WITNESS: When it became public.

16 BY MR. MILLS:

17 Q. What is your familiarity with Cicso  
18 equipment?

19 A. Cicso equipment is the typical equipment  
20 that we use. Interpath is a Cisco solutions  
21 partner, so in all of our wide area networks  
22 which are through them from bandwidth that is the  
23 provider for our wide area hardware.

24 Q. Mr. Jwbala, what training do you have in  
25 network engineering and related fields?

1 A. Formalized training other than the  
2 experience that I have in the field, I have  
3 several MicroSoft certifications, many vendor  
4 certifications. Most Hewlett Packard server and  
5 desktop equipment. Most Toshiba equipment and  
6 several lessor industry recognized certifications  
7 such as a Comp TIAA Plus and that's all that  
8 comes to mind right now.

9 Q. What MicroSoft certificates do you have?

10 A. If I can remember correctly, at this point  
11 I have TCP/IP, MicroSoft Windows NT, Enterprise  
12 and Networking Essentials. I believe I have a  
13 few others, but not that would be relevant to the  
14 topics that we're covering right now.

15 Q. What is your familiarity with the Internet  
16 service providers?

17 A. As I mentioned, I've been working with  
18 Internet service providers for quite a while  
19 since '92, so since they were really commercially  
20 available Internet service providers.

21 And as a matter of course in our business,  
22 one of our customers provide Internet service and  
23 they do not have the technical staffing for that  
24 and it's a typical arrangement that we actually  
25 run the Internet service. They have the

1 equipment on their site. They do the billing,  
2 but we take care of the technical back end of it  
3 for them.

4 Q. How about what has been referred to as Tier  
5 1 providers, what is your familiarity with those?

6 A. Depending on the customer we'll use a Tier  
7 1 provider such as AT&T and the arrangement with  
8 some of the companies that we were dealing with  
9 running the ISPs for Interpath although it's a  
10 slightly different definition of it because they  
11 do have backbone link and do peer at network  
12 access, but they are only regional. They only  
13 cover DV and typically a network provider is  
14 considered nationwide.

15 Q. Mr. Jwbala, you mentioned that you did  
16 network design for wider networks?

17 A. Any network that is going to spend --  
18 typically, the definition is between buildings or  
19 between the diverse sites. Anything far enough  
20 away that you can't physically stretch. A piece  
21 of cable, privately owned cable in between them,  
22 and you need to go out on using the public switch  
23 telephone network or other public media to  
24 connect into a local area network. Two or more  
25 local area networks together.

1 MR. MILLS: Your Honor, at this time  
2 I would like to off Mr. Jwbala as a network  
3 engineer including all of the associated  
4 technology and communication lines as well as an  
5 expert in the reputation and quality of various,  
6 first and second of tier Internet providers in  
7 the difference between as well as a customer and  
8 users and as we already said network,  
9 engineering.

10 THE COURT: Voir dire?

11 MR. DORANS: Yes. Thank you, Your  
12 Honor.

13 THE COURT: You understand he has  
14 the right to question you about your  
15 credentials. If he's satisfied, he will  
16 stipulate that you are an expert. If not, he  
17 will challenged you as an expert.

18 THE WITNESS: I understand.

19  
20 CROSS-EXAMINATION

21  
22 BY MR. DORANS:

23 Q. What Cicso certifications do you have?

24 A. I don't hold any Cicso certificates.

25 Q. Certifications, are they the same?

✱

✱

✱



1                                   \*                   \*                   \*  
2    suggest we move on to the question.   If he asks  
3    about a particular piece of equipment.

4                                   THE COURT:   All right.   That's  
5    good.

6                                   MR. DORANS:   Again, he's certainly an  
7    expert on the wide area issue.

8    BY MR. MILLS:

9    Q.       Mr. Jwbala, you had the opportunity to sit  
10   in the courtroom and hear all of the evidence  
11   that's been presented and as well as the  
12   documents that have been provided to you through  
13   the discovery process.

14                   Do you have an opinion as to whether  
15   Decipher was able to receive 5 megs of bandwidth  
16   through the connectivity with iTRiBE?

17   A.       On the information I heard and based on the  
18   information I reviewed in that period, I don't  
19   think that Decipher was able to consistently get  
20   5 MBs.

21   Q.       What facts lead to this conclusion for you?

22   A.       There were several bottlenecks in the megs  
23   work.   Several points that I see that could cause  
24   and I assume are causing the problems.

25                   When you add the reduced bandwidth available  
26   to the Internet through the Digex connection,

1     which is the bandwidth caused by these  
2     bottlenecks, and then also take away the probable  
3     amount of bandwidth that was being used by the  
4     other customers and internal users on iTRiBE's  
5     network, it's not reasonable to think that they  
6     were able to have their 5 MBs available to them.

7             I'm making this opinion based on several  
8     things. Not the least of which in the industry  
9     typically you oversell your bandwidth three to  
10    one. Based on the numbers I'm seeing, there were  
11    certainly not that ratio. It was certainly  
12    higher on this network. Therefore, overall, all  
13    of the customers are going to notice  
14    significantly reduced performance.

15    Q.     We have a demonstrative that will cover  
16    much of the testimony.

17             THE COURT:    We talked about just a  
18    flat plaque.

19             MR. MILLS:    It's this one.

20             THE COURT:    Is it going to be a  
21    demonstrative?

22             MR. MILLS:    This is.

23             THE COURT:    Okay. Mr. Jwbala, can  
24    you tell me what this section of this chart  
25    represents?

1                   THE WITNESS: This top section of the  
2 chart represents dedicated Internet service  
3 contracts with iTRiBE and also has the amount of  
4 bandwidth that each contract was for. That each  
5 customer has.

6 BY MR. MILLS:

7 Q.       And how was the date ranges arrived as they  
8 were put on this chart?

9 A.       The date ranges actually start on the date  
10 of the contract. It was written for, as we know,  
11 from previous testimony the bandwidth usage would  
12 have actually started 15 to 45 days past that  
13 date due to provisions and installation time.

14 Q.       And the word with the "renewal," what does  
15 that represent?

16 A.       Those were continuations of those contracts  
17 of the same amount of bandwidth.

18                   MR. MILLS:   Your Honor, I'll  
19 stipulate this piece of evidence did not come in  
20 on this last line.

21               This section right here, can you tell me  
22 what this represents, indicating the second  
23 section on the chart.

24                   THE COURT:   For the record, the top  
25 half has some purple and mostly yellow bars and

1 below it's all purple about a yard wide.

2 MR. MILLS: Your Honor, there is a  
3 smaller version of that in your exhibit book.

4 THE COURT: That's okay.

5 THE WITNESS: The center section of  
6 that is also for iTRiBE's dedicated bandwidth  
7 customers and it's for contracts that were  
8 already enforced or renewed during the course of  
9 the dates listed on that.

10 BY MR. MILLS:

11 Q. The two ProSoft Newport News and ProSoft  
12 Virginia Beach, where did those valley?

13 A. Those valleys -- we had testimony -- I'm  
14 sorry, I do not remember.

15 Q. Mr. Bowden, possibly?

16 A. Yes. Yes, it was Mr. Bowden who testified  
17 as to the configuration of the network and he  
18 specified that those were 10 MB Cox Ethernet  
19 lines between the two of them.

20 Q. And there is two handwritten notes here and  
21 made it a 25. One that changed from Flagship  
22 from a 512 to a 2 MB. Can you explain why that  
23 was done?

24 A. Also, based on testimony, we found that  
25 Flagship was actually co-located I believe at the

1 World Trade Center. So it's really not a  
2 significant web site, but it was co-located.  
3 Where it was actually physically plugged into the  
4 land and the 256K was also I believe from Mr.  
5 Bowden's testimony.

6 Q. Okay. Then the next section is labeled  
7 "web hosting contracts," can you tell me what  
8 this is referencing?

9 A. Yes, that is just a list of contracts or  
10 customer names for web hosting contracts. It  
11 does not have the same type of bandwidth  
12 associated with it as the first sections do  
13 because we don't have any realistic numbers on  
14 that. Because of the nature of -- unless there  
15 was actual traffic analysis done, we can't tell.

16 Q. Do web sites that are hosted require  
17 bandwidth?

18 A. Absolutely.

19 Q. For what purpose?

20 A. Anybody makes a request, types in the  
21 address of the web site in their Internet browser  
22 they are requesting pages from it and the web  
23 server has to send the page and graphics to them  
24 through the Internet back to the person  
25 requesting them. And it takes bandwidth to do

1     that.

2     Q.     And the final one labeled down here labeled  
3     "dial up," what is that referencing?

4     A.     Those are the I believe three devices the S  
5     N max OR devices on the network at the Cox  
6     co-location site which are called modem dialup  
7     tools that reflects the total bandwidth in the  
8     total number of modems in each one. That  
9     actually reflects a low and high number based on  
10    the modems connected at the 28K and if they  
11    connected at the 56K.

12    Q.     And you discerned that from Mr. Darden's  
13    testimony earlier?

14    A.     Yes, the devices.

15    Q.     The numbers here at the bottom, what are  
16    they reflecting?

17    A.     Those numbers at the bottom are  
18    calculations of the total number, the total  
19    amount of bandwidth during each month on that  
20    chart. It's a low number and high number based  
21    on the least amount of bandwidth we figure being  
22    sold based on those connections or that was  
23    possible to pull from the network and the bottom  
24    number on that is the highest number.

25    Q.     So I'm seeing these numbers range up until

1 Decipher terminated this contracts between 15 0  
2 6.48 to 65.8; is that correct?

3 A. That's correct.

4 Q. Does this represent the demand that  
5 actually could sit upon the router going out to  
6 the Internet connection?

7 A. No, it did not.

8 Q. What does it represent then?

9 A. It represents the amount of bandwith that  
10 was basically sold or the amount of bandwith that  
11 was being made available to different customers  
12 or different customer sites at any given time.

13 Q. But you've seen no bandwith reports from  
14 the various customer sites to tell you actually  
15 which ones are demanding at any time?

16 A. I've seen no bandwith reports at all.

17 Q. Now, I will like to move to the other  
18 exhibit.

19 THE COURT: Are you going to mark  
20 that one?

21 MR. MILLS: This is a demonstrative  
22 but it can't be admitted, if I'm correct. May it  
23 be admitted?

24 THE COURT: I wouldn't have any  
25 reason to believe that it couldn't be admitted.

1                   MR. MILLS:   Well, I'll move for  
2 admission, Your Honor.

3                   THE COURT:   Otherwise we are just  
4 talking about things.

5                   MR. DORANS:   For the purposes of the  
6 record, can we actually have a piece of paper as  
7 opposed to the poster?

8                   THE COURT:   What we are going to do  
9 is mark that one and then you have a color shot  
10 of that?

11                   MR. MILLS:   Yes, Your Honor I do.  
12 Number 46.   The one in the back does not have a  
13 handbook.

14                   MR. DORANS:   The last time I had to  
15 bring a 150 pound hydraulic piece to Superior  
16 Court.   They don't like when you bring big  
17 things.   He said there were handwritten changes  
18 and he'll make those and we'll accept that.

19                   THE COURT:   That's Defendant's  
20 Exhibit 46.   And I'm going to mark the board as  
21 46A.   Exactly from what the witness was  
22 testifying from.

23

24

25                   (Whereupon, the Chart and Poster



1 Board was marked Defendant's Exhibits Nos. 46 and  
2 46A respectively.)

3  
4 MR. MILLS: Mr. Jwbala, referring  
5 now to this diagram which has previously come in.

6 THE COURT: Which one is that?

7 MR. MILLS: Forty-four, I believe.

8 THE COURT: It's already marked?

9 MR. MILLS: Or it may be 45, Your  
10 Honor. Was it not admitted when Jimmy Bowden was  
11 on the stand?

12 MR. DORANS: I don't have a problem  
13 with it being admitted.

14 MR. FARMER: I believe you admitted  
15 that. You said it was a demonstrative at the  
16 time and you said that you would hold off.

17 THE COURT: Are there any  
18 objections?

19 MR. DORANS: I don't have any  
20 objections.

21 THE COURT: We're going to put that  
22 one in behind Tab 45 and we'll mark the board as  
23 45A.

24  
25 (Whereupon, the Schematic and Chart

1 was marked Defendant's Exhibits Nos. 45 and 45A  
2 respectively.)  
3

4 THE COURT: Now, as far as taking  
5 those things up, if those things go up on appeal,  
6 counsel can stipulate that the exhibits are in  
7 evidence as 45 and 45A and if the clerks suggest  
8 that they want 45A then, these things aren't that  
9 big to carry. It's not like it's 150 pounds.

10 BY MR. MILLS:

11 Q. Mr. Jwbala, you indicated earlier when you  
12 were giving your opinion that there was  
13 bottlenecks in the system. Can you direct us to  
14 where in this network of configurations where the  
15 bottleneck exists?

16 A. Yes, I believe the biggest bottleneck is on  
17 the right labeled Cicso 2514 BGP router.

18 Q. What does a BGP router do?

19 A. What did this one do or the BGP do?

20 Q. Generally, what is the BGPs purpose?

21 A. It stands for Border Gateway Protocol.  
22 Every machine on the Internet has an IP address  
23 like a phone number. Different networks have  
24 their own set of IP addresses. You can register  
25 your own set of IP addresses through an

1 organization.

2 Q. If you have your own set of numbers you  
3 need to send --

4 THE COURT: Autonomous set of  
5 numbers?

6 THE WITNESS: You need to have a  
7 device that can talk with the BGP to your  
8 upstream provider and that continues to get  
9 passed on to basically let the rest of the  
10 Internet know this is where you can find my  
11 autonomous numbers, my set of IP addresses.

12 Q. So what happens to packets when it flows  
13 through these routers?

14 A. In this circumstances the -- do you want to  
15 give me a location to start from?

16 Q. Why don't we go from Decipher on to the  
17 Internet.

18 A. From Decipher, it will go through the Cox 5  
19 meg fiber and then go into iTRiBE's threecon link  
20 switch and that is a 10 MB Ethernet connection.  
21 And it would then go through one of the Ethernet  
22 ports on the Cicso 2514 router. It would then  
23 pass through that router to the other Ethernet  
24 port also to a 10 MB connection that went to the  
25 Cox megabit fiber line.

1           From that fiber line which goes over to the  
2 Cox co-location, it then connects to Digex's 7513  
3 router which is where their actual 10 MB Internet  
4 connection starts. And that's where the base  
5 location for that connection is from.

6 Q.       So these packets all had to be told where  
7 to go?

8 A.       Any pass connective networks has to go  
9 through the 2514, that configuration. There is  
10 no other way to or from the Internet.

11 Q.       Why did you consider this to be a  
12 bottleneck?

13 A.       That router is being used in a position  
14 where it's what would be considered an enterprise  
15 position. You would put an enterprise piece of  
16 equipment there. Meaning, you have a significant  
17 number of equipment with significant bandwidth  
18 demands on the other size side of that.

19           MR. DORANS: Objection. If he's  
20 going to testify what the router designs, I think  
21 he admitted he never went to any of the classes  
22 or received any formal education.

23           THE WITNESS: I admit I didn't have a  
24 certificate. I didn't speak of classes that I  
25 had gone to.

1 THE COURT: Goes to the weight.  
2 I'll accept your objection. Goes to the weight.  
3 The weight will be considered.

4 MR. DORANS: Thank you, Judge.

5 THE WITNESS: That router is  
6 considered a remote access router. It's  
7 typically for smaller sites. Something like 10  
8 or 15 users out at the edge of your network and  
9 possibly more, but what it was designed for  
10 initially, it has got serial ports on it.  
11 Synchronous serial ports. I know we discussed  
12 before on this. They are for T1 circuits. They  
13 are designs for 1.5 MB.

14 Q. Are these the ones being used in this  
15 situation?

16 A. They are actually not. It's my  
17 understanding that may be one of them used to go  
18 to a customer site. That doesn't have anything  
19 to do with the route out to the Internet for this  
20 function. So for simplicity sake, since we are  
21 discussing from the iTRiBE side, we don't need of  
22 the consider those.

23 It's actually plugged into the Ethernet's  
24 ports on there. And every packet that has to go  
25 through that router which as we said every packet

1 that needs to go from this Internet, from this  
2 network, has to be looked at and has to decide  
3 where that should go and have it go through and  
4 what interface. And that takes processing time.

5 It has to process time just like a  
6 desktop. As a matter of fact, this one has a  
7 Motorola 68.020. That is the same process of an  
8 Apple Macintosh. It doesn't really have enough  
9 processing power to cope with the type of  
10 bandwidth that is being asked to push through.

11 According to the technical specifications  
12 that can be found on Cisco's web site, the number  
13 of packets that a router can pass through it can  
14 be calculated for Ethernet to equal 5 to 6 MB.

15 Q. So it was a bottleneck measure that it  
16 could not pass through the 10?

17 A. That is correct.

18 Q. We have heard testimony that at some point  
19 they brought in, a Bay Acellar switch that that  
20 solved all of their problems?

21 A. I wouldn't say it solved all of their  
22 problems. In my opinion, the other problem is  
23 still that the bandwidth is over sold because they  
24 have too many other connections besides  
25 Decipher. It would solve the problem with the

1   Cicso 2415 being a bottleneck because a Bay  
2   Accelar switch which would perform the functions  
3   that the Cicso router was being asked to do, but  
4   it would perform them appropriately.

5   Q.     What are the other connections that you are  
6   referring to?

7   A.     The other connections consist of the iTRiBE  
8   internal network at the World Trade Center.  
9   Several silicone graphics machines that were  
10  being used for Internet service between e-mail  
11  and customer web hosting and FTP service. Ascend  
12  max boxes which were used as dial up, for dial up  
13  access for their dial up customers as well as the  
14  two ProSoft sites.

15               THE COURT:   As well as the few  
16  what?

17               THE WITNESS: The two ProSoft sites,  
18  the Virginia Beach and Newport News sites. Which  
19  also consisted of an internal network and other  
20  various connections to other customers for  
21  dedicated bandwith. So there are many  
22  connections off of them that are requiring  
23  bandwith from the same Internet connection.

24  Q.     And all of these as the original  
25  configuration they came into this switch and then

1 out through the router. How did this change from  
2 the Bay Accelar from your understanding?

3 A. To my understanding, when the Bay Accelar  
4 is in, two things. Rather than everything going  
5 in the threecon link switch, everything that went  
6 into that Bay Accelar. And rather than the  
7 Internet connection going to the one port of the  
8 BGP router, it went to a port on the Bay Accelar  
9 which is the BGP router from receiving Internet  
10 traffic.

11 Q. We will look at some totaling bandwidth  
12 numbers on the previous exhibit and those numbers  
13 come from customers and other allowed users  
14 whether they are customers or not?

15 A. Total bandwidth sold allowable.

16 Q. Correct, through various locations. They  
17 don't all plug into this switch?

18 A. No, they do not. To actually put that  
19 actual demand on it.

20 Q. And so to the extent that many of these are  
21 over here in the World Trade Center, what is the  
22 practical limitation of what can come out of the  
23 World Trade Center of the demand?

24 A. Just out the World Trade Center that would  
25 be 10 MB because we have a connection between the



1 two that the connection of the Cox megabit  
2 fiber.

3 Q. And the same would be true of the ProSoft  
4 sites?

5 A. That is correct.

6 Q. And we've previously been told Decipher is  
7 limited to 5 as well?

8 A. That is correct.

9 Q. Tell me how much we are talking about.

10 A. We're looking at about 35 at this point.

11 Q. And to that, we're told it's at least a T1?

12 A. So we can add 1.5, 36.5.

13 Q. And then we have dial ups, did you get any  
14 bandwidth information on exactly what those are or  
15 did you --

16 A. As we calculated in the previous exhibit,  
17 we were connected at 278K which would probably be  
18 the lowest speed. We could expect about A 7.2.  
19 It's not realistic that they would all be pulling  
20 that consistently, but that is the possible  
21 realistic demand that the device could have on  
22 the network.

23 THE COURT: Possible demand?

24 THE WITNESS: Possible network.

25 THE COURT: How much is that

1 possible?

2 THE WITNESS: About 7.2 MB.

3 BY MR. MILLS:

4 Q. Based on what you know about this  
5 configuration, where is the greatest source of  
6 demand on this network?

7 A. The greatest source of demand appears to be  
8 coming from the iTRiBE World Trade Center  
9 location. During that 10 MB Cox fiber.

10 Q. But we are not able to say concretely how  
11 much potential demand based on this situation,  
12 based on what you have been told?

13 A. No, I don't have any figure on it. We  
14 don't have any figures of bandwidth.

15 Q. Okay. I believe I'm finished with the  
16 chart.

17 Mr. Jwbala, what is a DS3?

18 A. A DS3 is a 45 MB circuit usually provided  
19 by the telephone company.

20 Q. When you are talking with people in the  
21 industry and you are talking about less than a  
22 full DS3, when is the terminology used to refer  
23 to that?

24 A. If the traffic is being carried on a DS3  
25 circuit and it's less than a 45 MB, it's

1 typically referred to as a fractional DS3 and  
2 however much for 3 MB, for example.

3 Q. Are you familiar with whenever the ISP  
4 themselves use the terminology?

5 A. Yes, ISPs use the terminology DS3 to mean  
6 45 MB and they call it a frac DS3 or a  
7 fractionalized DS3 for any portion thereof.

8 Q. Based on your view of the contract and your  
9 knowledge of the industry, what should Decipher  
10 expect in terms of the bandwidth they received?

11 A. It's reasonable to expect that they would  
12 get their 5 MB of bandwidth to the Internet.  
13 That's what they contracted for. There are going  
14 to be interruptions, but they should expect to  
15 get the 5 MB.

16 THE COURT: Say that again. I want  
17 to hear the question and answer. Readback, I'll  
18 have a question when you are done.

19  
20 (Thereupon, the Reporter read  
21 the record as requested.)  
22

23 MR. MILLS: Mr. Jwbala, can you tell  
24 us based on the difference provided by UUNET and  
25 Digex --

\* \* \*

\* \* \*

1 greater at the time as well as currently can  
2 usually expect a responsive normally 24/7  
3 technical support staff at their ISP.

4 They should be able to expect someone to  
5 answer their phone calls and at least be able to  
6 check at all times on the ISP network to tell  
7 them if they are having problems. This is a  
8 problem that we're having and we'll address it or  
9 we're sorry this is your problem and you need to  
10 fix it. At the very least that determination.

11 Q. Thank you. Based on your expertise in  
12 network engineering and the process that you  
13 heard Kathy Eddleman describe to identify the  
14 problem, how would you describe that in terms of  
15 logicalness and et cetera?

16 A. It was a logical, reasonable course of  
17 action to take to eliminate possibilities of  
18 anything on their internal network causing the  
19 bottleneck out to the Internet.

20 MR. MILLS: Your Honor, I have no  
21 more questions of this witness.

\* \* \*

\* \* \*  
1 lot of that equipment?

2 A. That's what they do.

3 Q. And BANI could test that and it could take  
4 them what a couple of hours at most?

5 A. They would have to have the cooperation of  
6 iTRiBE to do that. They would need physical  
7 access of iTRiBE's premises to do that.

8 Q. BANI could have called iTRiBE?

9 A. Is it technically feasible, absolutely.  
10 Yes, it is.

11 Q. And it's done in practice from time to  
12 time, they test links, correct?

13 A. Yes.

14 Q. They use sniffers; is that right?

15 A. That's one method of doing it, correct.

16 Q. And how long will that test take?

17 A. It depends on the type of test you want to  
18 do. If you wanted to do a typical test, it would  
19 be reasonable to check the integrity of the  
20 line. Probably 10 to 15 minutes of actual down  
21 time in the machine. Possibly up to a half an  
22 hour of set up and tear down around each test.

23 Q. And you could do that all the way up to  
24 Digex and back, correct?

25 A. The links would have to be tested

1 separately, but yes, if you isolated each link it  
2 could be done. That would require absolutely  
3 isolating each link which in this network. It  
4 would require completely disconnecting all of  
5 iTRiBE customers at one point.

6 Q. For 20 minutes to half an hour?

7 A. Correct.

8 Q. How much would that test cost, do you have  
9 any idea?

10 A. Typically BANI is going to come out and  
11 send a couple of engineers. You are going to end  
12 up paying \$2,000 to \$3,000 a day for their time.  
13 If you are talking about testing all of the  
14 links, if they didn't really have to fight  
15 against much waiting for the right time to take  
16 the lines down, they could probably take the  
17 whole thing down in one day.

18 Q. Couple thousand at the most?

19 A. In the environment whatever they needed to  
20 do. I don't know if it's practical in the live  
21 environment.

22 Q. Is there another thing she could have done  
23 which was just test using the router at Decipher  
24 to get an idea how much traffic was going through  
25 that router?

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\* \* \*  
1 seems that BANI took a reasonable course of  
2 action.

3 Q. In terms of upgrading their network?

4 A. In terms of diagnosing the problems and  
5 rolling that -- in also not wasting their work  
6 and not wasting their times. If both of these  
7 things even in the course of testing which they  
8 didn't need to separate these things to test the  
9 telephone, you really are doing a disservice to  
10 not really leave it that way and allow them the  
11 benefit from the time that you already spent to  
12 do the testing, they might as well get a benefit  
13 from actually having it upgrading.

14 Q. But they have found a much easier test if  
15 Decipher was not getting through that pipe,  
16 correct?

17 A. I don't know that I could really say that  
18 it would be a much easier test.

19 Q. Does Cicso Works have software about \$500?

20 A. Yes, Cicso Works does have software.

21 Q. And that measures traffic?

22 A. It will measure traffic only. That's  
23 correct.

24 Q. And that could have been set up on that  
25 particular router or Decipher to figure out what

1 type of traffic was going through?

2 A. Not so much what type, how much.

3 Q. How much, sorry.

4 A. Yes, going in that interface, that's  
5 correct.

6 Q. And that would be about \$500; is that your  
7 understanding?

8 A. I haven't checked recently. That seems to  
9 be a reasonable figure to see how interface is  
10 exactly at their site. Not how much, but that's  
11 a separate thing.

12 Q. But they are related; isn't that true?

13 A. Certainly, they are related. Any link in  
14 that chain to that Internet is certainly  
15 related.

16 THE COURT: Up to whose sites?

17 THE WITNESS: All the way up --

18 THE COURT: Where iTRiBE sends it  
19 over on Cox?

20 THE WITNESS: To Digex. Actually,  
21 where it connects to Digex.

22 BY MR. DORANS:

23 Q. It's all data going through that interface,  
24 correct?

25 A. Which interface?



1 Q. The interface that you are testing?

2 A. All data to and from the Digex internal  
3 network has to go through. That is going through  
4 the Internet or from the Internet needs to go  
5 through the interface on their Cicso router at  
6 their site.

7 Q. Okay. I've drawn for you Digex, iTRiBE,  
8 Decipher.

9 A. Okay.

10 Q. That's not a logical depiction, but it  
11 gives information where the information goes?

12 A. Correct.

13 Q. There is a router at the Decipher end?

14 A. Correct.

15 Q. And there is another router here at iTRiBE?

16 A. Correct.

17 Q. And it goes through to Digex?

18 A. And a router at Digex.

19 Q. And a router at Digex that goes on, when we  
20 test the router to see how much information is  
21 going through, do we know where the information  
22 is going?

23 A. To the extent that you know it's going  
24 somewhere outside of Decipher's network.

25 Q. It would go to iTRiBE's?

1 A. You know, it's going to make it to iTRiBE.  
2 Q. And in fact it's going to go to Digex?  
3 A. That would be the intent. You don't know  
4 that from that test.  
5 Q. Wouldn't iTRiBE's router if it wasn't going  
6 to Digex say hold on a second. I can't process  
7 this information?  
8 A. Well, it doesn't really go back to the  
9 router. Yes, it's called dropping packets. It  
10 would drop packets.  
11 Q. It would say don't send me anymore I'm  
12 full?  
13 A. Not necessarily.  
14 Q. Are you sure about that?  
15 A. Yes, I am.  
16 Q. But you can run a test to tell you how far  
17 you are going from Decipher to iTRiBE?  
18 A. How far.  
19 Q. How much information is going through that  
20 pipe?  
21 A. Yes.  
22 Q. And it can tell you if you use the sniffer  
23 how much information is going from iTRiBE to  
24 Digex?  
25 A. That is a technical possibility to do that,

1 absolutely.

2 Q. And it's done? Not just technically, it's  
3 done from time to time?

4 A. I don't know about in this situation. I'm  
5 telling you. It is a technical possibility to do  
6 that. The testimony that I've heard from iTRiBE  
7 employees, they could not take this network down  
8 to test it in that fashion, so I can't tell you  
9 that it could be practically done in this  
10 circumstance.

11 Q. This identification of the router as being  
12 a bottleneck, what packet size were you using to  
13 run that bandwidth?

14 A. Ethernet packet size is variable, but I was  
15 using information that I got from the Cicso site  
16 where they had calculated that already. I did  
17 not have the calculations the 4.5 to 6 MB figure  
18 that was a prepared number.

19 Q. But you don't know what packet size they  
20 were using?

21 A. I don't have that information with me, no.

22 Q. Do you know what speed they were assuming  
23 the processing of the packets?

24 A. I'm sorry?

25 Q. Packets per second.

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1 A. I don't have the figure in front of me, but  
2 it was calculated based on what was testified. I  
3 believe right here we have '96 modems on one and  
4 six on another and six on a third.

5 Q. Okay. You talked about DS3 and how it  
6 refers to the industry?

7 A. Yes.

8 Q. Is it true that a 45 meg DS3 is not called  
9 a DS3 it's called something else?

10 A. Yes, because the terminology is used  
11 interchangeable albeit incorrectly with a T3 and  
12 fractional T3.

13 Q. And sometimes they call a DS3 45 a full  
14 rate DS3?

15 A. Absolutely. Just like some people call a  
16 T1 a full rate T1. You can modify it.

17 Q. So a DS3 has more than one meaning?

18 A. No, it provides a 45 meg.

19 Q. But it provided --

20 A. If you get a fractional DS3, you can have a  
21 fractional DS3 on a DS3 circuit, yes.

22 Q. It is common in the industry to get a 24/7  
23 customer service?

24 A. Yes.

25 Q. That is Tier 1, Tier two, which?

1 THE COURT: Are what?

2 BY MR. DORANS:

3 Q. Upgrades?

4 A. Yes, they are.

5 Q. And Tier 2 services at 5 meg that was  
6 available in Hampton Roads in 1998; is that  
7 correct?

8 A. At least from iTRiBE.

9 Q. And from others as far as you know?

10 A. To my knowledge.

11 MR. DORANS: I have nothing further  
12 of this witness, Judge.

13

14 FURTHER REDIRECT EXAMINATION

15

16 BY MR. MILLS:

17 Q. Looking back at Plaintiff's Exhibit 11, is  
18 there anything in this e-mail to suggest to you  
19 that they were actually experiencing broadcasting  
20 pings suggesting denial of service?

21 A. No, I would have to assume there would be a  
22 whole lot more alarm and not just speak of a  
23 denial of attack service happening.

24 Q. Is it common for customers to test their  
25 ISP providers equipment for problems by using

1 sniffers and all of these things?

2 A. It's not typical for them to actually test  
3 ISP equipment. Most customers will test for  
4 connectivity just as a basic are we connected or  
5 not, but that's usually the extent of it. It's  
6 up to the ISP to monitor their own equipment.

7 Q. Given at the time Decipher started the  
8 process of identification, they didn't know that  
9 iTRiBE was the problem, they had yet to identify  
10 that, should they have started with iTRiBE as  
11 their first concern the connectivity there?

12 A. That's really a judgement call. If they  
13 felt they could identify something within their  
14 own network first, then it's reasonable to go  
15 after them.

16 Q. Are you aware of any documents or any other  
17 information that has come out during this course  
18 of trial that indicated any of the routers that  
19 stated ProSoft locations were a problem?

20 A. No, I have not.

21 Q. You never heard that.

22 Mr. Jwbala, we talked about routers and  
23 what you could actually discern by looking at the  
24 statistics that that router connected. When you  
25 go to that router typically what do you do to

1 obtain those circumstances?

2 A. You actually -- well, you can tell net into  
3 it if you are on the network or you could  
4 physically connect to it with a serial cable and  
5 you log into the router and tell it to show  
6 interfaces. And it shows you the various  
7 connections configured to it and splits up the  
8 statistics for each one of those interfaces.

9 Q. And standard, what are those statistics on  
10 traffic going through that router? Are they  
11 averages of some sort?

12 A. Usually a five minute average is shown and  
13 a total number of packets in or out of collisions  
14 are shown since the last time the counter on that  
15 interface was reset and those are resettable or  
16 when you power off and on they will reset.

17 Q. From looking at just the statistics coming  
18 off the router, do you know if that traffic got  
19 through the router at iTRiBE?

20 A. From looking at the statistics on which  
21 router?

22 Q. On the router of Decipher?

23 A. No, you don't know if it made through the  
24 router of iTRiBE based on the router at  
25 Decipher.

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\* \* \*  
1 a Witness, having been first  
2 duly sworn was examined and  
3 testified as follows:  
4

5 FURTHER DIRECT EXAMINATION  
6

7 BY MR. DORANS:

8 Q. I show you a document that has been  
9 previously marked for identification as Exhibit10 A. Can you tell us how that document came to be  
11 located?12 A. Well, after you did the deposition of Mark  
13 Imbriaco, you called me and said Mike, Mark was  
14 saying that you may have received these Digex  
15 reports and I said I don't know of any Digex  
16 reports. But I went back to an old machine that  
17 I had, an old laptop and pulled it out and looked  
18 for the e-mails that I had that had Digex in them  
19 and Mark's name and I found the one. And it's  
20 just this one that was ever forwarded to you and  
21 that was just last week.22 Q. Prior to that, did you have any  
23 recollection of receiving Digex reports?

24 A. No, I didn't know there was some.

25 THE COURT: Which one is this?

\* \* \*



\* \* \*  
1 THE COURT: I'll sustain the  
2 objection.

3 MR. DORANS: Thank you, Your Honor.

4 MR. FARMER: When Mr. Darden gets up  
5 we'll address that issue, Your Honor.

6 THE COURT: Do you have other  
7 evidence for me?

8 MR. DORANS: That was it.

9 THE COURT: Are you going to call  
10 Mr. Darden?

11 MR. DORANS: Are we going to stop at  
12 5:30?

13 THE COURT: I said 5:30 and 6.

14 MR. DORANS: We'll call Mr. Darden on  
15 rebuttal.

16 THE COURT: Let me tell you this,  
17 they couldn't pick a poorer judge to handle this  
18 kind of case. You talk about a guy who failed  
19 physics, math and everything else. What am I  
20 doing here?

21

22

23

24

25

MICHAEL DARDEN

1                   a Witness, having been first  
2                   duly sworn was examined and  
3                   testified as follows:  
4

5                   FURTHER DIRECT EXAMINATION  
6

7       BY MR. DORANS:

8       Q.       To refresh the Court's recollection, do you  
9       have any certifications from Cicso?

10      A.       Yes.   I'm a Cisco Certified Design  
11      Associate.

12      Q.       How do you get that type of certification?

13      A.       By attending Cisco classes and then  
14      following up and actually take the certifications  
15      exams.

16      Q.       Do they set up the course material, Cicso?

17      A.       Yes, they do.

18      Q.       And do they --

19                   THE COURT:    Are we going to need  
20      this?

21                   MR. FARMER:   What book is that?  
22      That's the depositions?

23                   THE COURT:    Yes.

24                   MR. FARMER:   If he's going to talk  
25      about the network architecture.   We absolutely

1 are.

2 THE COURT: We have a book of  
3 depositions here.

4 BY MR. DORANS:

5 Q. They, Cisco, prescribe the course  
6 material?

7 A. Yes, they do.

8 Q. And in that course material they deal with  
9 their router and abilities?

10 A. Extensively

11 Q. You've heard the Defendants expert testify  
12 about a congestion point of being a particular  
13 route?

14 A. That's correct.

15 Q. Could you describe your impression of what  
16 you think the actual situation is?

17 A. The router in question is a capable of  
18 delivering wire speed that is 10 MB between ports  
19 at burst rates.

20 Q. And what's a "burst rate"?

21 A. A burst rate is all network traffic is.  
22 It's not a steady stream of traffic like voice  
23 traffic would be. It comes in peaks and lulls.  
24 And all routers by nature are designed to be able  
25 to handle those peaks while maintaining the

1 average amount of throughput.

2 Q. What would sustain throughput -- would that  
3 period of throughput be sustained. Say a period  
4 of 15 minutes or longer, so basically if it's ten  
5 minutes or less, do you call that a burst?

6 A. Just a burst or a peak.

7 Q. And the router in question the 2514, would  
8 that handle a burst of 10 meg?

9 A. Yes, it will.

10 Q. And your opinion is that somewhere related  
11 to the classes that you took offered by Cicso?

12 A. Absolutely.

13 Q. The collisions, we saw that e-mail that  
14 talked about collisions?

15 A. Yes.

16 Q. Could you tell us what your opinion of the  
17 collisions are?

18 A. Since they were observing the collisions  
19 over the interface of their router, the collision  
20 domain exists between their router and the Cox  
21 piece of equipment known as the Racal for the  
22 router. So the collisions could only happen at a  
23 very small section. That would be either on the  
24 router interface themselves the piece of wire  
25 connecting to the Racal or the transreceiver on

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\* \* \*

1 Q. Previously, the iTRiBE router --

2 A. Actually, either diagram goes into a  
3 switch.

4 Q. Okay. And so the network collisions that  
5 she was seeing, the enormous collisions, where  
6 was she on this chart?

7 A. Between the router at their location and  
8 the piece of Racal location provided at their  
9 location by Cox.

10 Q. Did iTRiBE supply any of that?

11 A. No.

12 Q. What causes the collisions?

13 A. Typically collisions created in normal  
14 collisions like that, enormous problems, a piece  
15 of cable not punched down correctly, a  
16 transreceiver going bad, bad settings, it's  
17 always a physical error problem when it's just  
18 two devices.

19 Q. Okay. And you said a bad transreceiver.  
20 Who supplied the transreceiver?

21 A. It could have been supplied by either  
22 Decipher or Cox.

23 Q. Provided that they have a Racal box and the  
24 Racal you are talking about?

25 A. The transreceiver component to the Racal

1 box.

2 Q. So there is some sort of thing in here  
3 which is the transreceiver which you are talking  
4 about?

5 A. Exactly.

6 Q. What does the transreceiver do?

7 A. It's a media converter. It converts AUIs.

8 Q. And what's the difference between AUI --

9 A. An AUI port connection that you use some  
10 sort of media to put it on to a network. Whether  
11 it be fiber 10 base T, Internet several different  
12 forms of media that you use in this 10 base T.

13 Q. Ten base T on one side, what was the other  
14 side?

15 A. AUI port. A printer on a PC.

16 Q. Is there any different way to send the  
17 signals back and forth?

18 A. Yes, the AUI connection has transmitted and  
19 received the lines coming out the particular pins  
20 and the ten base T is actually a RF signal. It's  
21 basically an enclosed antenna.

22 Q. And what's the difference between those  
23 two?

24 A. The AUI is a port that you typically see on  
25 a piece of equipment where you are going to be

1     able to connect to multiple media.

2     Q.     But the transreceiver does translations to  
3     get the information from one form to the other?

4     A.     Yes, that's correct.

5     Q.     And the collisions are indicating that  
6     there is a problem either in the translations or  
7     in the wires or something?

8     A.     Right, a physical issue.

9     Q.     And what would that cause if you had those  
10    enormous collisions?

11    A.     Enormous collisions intend to use up your  
12    bandwith. Every packet you would send out would  
13    actually, if it caused a collision, would have to  
14    be re-sent over and over until it made it through  
15    that short connection.

16    Q.     And so how would that use up your bandwith?

17    A.     You would have the same packet being  
18    re-sent 20, 30 times instead of just flowing  
19    through.

20    Q.     And would that slow down your connection?

21    A.     Absolutely.

22    Q.     You have a fine amount of bandwith there  
23    and if you are trying to push through and in this  
24    case it's five 5 MB. If you are trying to push  
25    three 5 megs of data, and there is a collision

1 you may only get half of that.

2 Q. And again, none of this is supplied by  
3 iTRiBE?

4 THE COURT: How do you define a  
5 normal collision?

6 THE WITNESS: When you look at the  
7 interface on the router it shows how many packets  
8 that you have gone through and a number of  
9 collisions that you have. And if you have 10  
10 million packets sent 500,000 collisions that's an  
11 extremely high number.

12 THE COURT: I see.

13 THE WITNESS: It's a health  
14 indicator.

15 BY MR. DORANS:

16 Q. What other information do you see on that  
17 router? What other information will that router  
18 at Decipher tell you about bandwidth?

19 A. That router is capable of actually  
20 displaying on a continuous basis the packets that  
21 are going through and by taking that data and  
22 piping it out to a PC like a simple program like  
23 Excel or Lotus. You could actually graph the  
24 amount of data going in and out of that router.  
25 It will also tell you whether the packets have to

\* \* \*



1 and I think it was?

2 THE WITNESS: If the line had been cut  
3 at any one point in there, the networks replies  
4 with information saying that the network is  
5 unreachable.

6 BY MR. DORANS:

7 Q. So what would that mean?

8 A. It would tell you actually the device that  
9 reported that the network was unreachable, it  
10 would show you how far up you got before it  
11 decided --

12 Q. On that little router or something?

13 A. Right. Just an average ping won't answer  
14 back with that information.

15 Q. The fact that he saw 80 percent on the  
16 occasions that he indicated, what would that  
17 indicate to you about Decipher's ability to get  
18 their 5 meg?

19 A. It would indicate they were moving 4 MB  
20 that at point.

21 Q. Over average?

22 A. Right.

23 Q. Over five minutes?

24 A. Right.

25 Q. Sometimes more sometimes less?

1     A.     Right. That deny of service attack, it's  
2     when a malicious person on the Internet sends  
3     data to your server whether it be in the form of  
4     broadcast pings or anything that your server has  
5     to answer and cause your server to be able to  
6     perform the function that it's designed for like  
7     web services or e-mail services.

8     Q.     And did we look at an exhibit that would  
9     indicate that some hacking was going on?

10    A.     Yes, we did.

11    Q.     Is that traceroute?

12    A.     No.

13    Q.     It's the --

14    A.     I believe it's the letter before it.

15    Q.     And that is Plaintiff's Exhibit 11, Judge.  
16    If I can get that back from you.

17           And that addresses that in that first  
18    paragraph?

19    A.     Yes, it does address it. Broadcast pings,  
20    anything just beyond just a couple, anything that  
21    you notice on the CPU utilization on your servers  
22    indicate that you are being attacked by hackers.  
23    It's one of the things, the primary things we  
24    look out for as an Internet service provider on  
25    our own equipment.

1 Q. And Plaintiff 11 they took some steps to  
2 stop the response to that?

3 A. That's correct. They put a firewall in,  
4 turned off the IP directed broadcast portion on  
5 the router to prevent those pings from making it  
6 through past the router.

7 Q. Would that in fact stop the denial of  
8 service attack?

9 A. It will stop the denial of service attack,  
10 but it doesn't stop all of the attacks.

11 Q. Okay. You heard some descriptions about  
12 the reconfiguration of their networks to move the  
13 web servers outside of the firewall?

14 A. That's correct.

15 Q. Tell us in your opinion what impact that  
16 had on their operations.

17 A. I'm sure it had a major impact on their  
18 operations. I've heard a lot of testimony today  
19 that said that they live and breathe by this web  
20 business. They have e-mail servers, web server  
21 all of these servers and had them behind the  
22 device that constricted access to them. By  
23 moving them out in front of that device and  
24 reconfiguring the network they certainly gained a  
25 major upgrade on how they operate.

\* \* \*

1 server would still be alive, and you can still  
2 ping it, but you can't get a page from it.

3 Q. That's unrelated to iTRiBE?

4 A. That's wholly unrelated.

5 Q. You saw some billings which indicate they  
6 bought a pix; is that right?

7 A. Yes, a pix firewall.

8 Q. What did a pix firewall do in terms of  
9 determining their bandwidth utilization?

10 A. The pix has many reports. It can run one  
11 of them will tell you exactly that. It will tell  
12 you just the amount of bandwidth going in and out  
13 of that device at any point in time or over a 24  
14 hour period.

15 Q. So again, that will tell them how their  
16 connection to iTRiBE was doing?

17 A. Yes.

18 Q. Do you have an opinion as to whether  
19 Decipher was able to achieve its 5 meg under this  
20 contract during the terms of the contract?

21 A. Yes, I do.

22 Q. And what is that opinion?

23 A. My opinion is, that they certainly should  
24 have been able to receive and they did in fact  
25 receive their 5 MB of bandwidth usage. I base

1     that on a lot of information.

2     Q.     Tell us what those things are.

3     A.     The information given in testimony by  
4     several other people indicated the utilization  
5     that they had going on. The problems that I've  
6     heard reported all have, you know, many, many,  
7     answers, but the simple answers are usually the  
8     correct ones.

9             And that is, when you don't see any packets  
10    on a web server or hits drop to 0 on a web server  
11    it's probably a bad web server and not the entire  
12    network that's down. And another thing that I  
13    base that on, is that I'm currently an Internet  
14    service provider. I inherited this very network  
15    and we currently have about seven times the load  
16    with dial up customers, three times the load with  
17    dedicated access customers and I'm sure we would  
18    have double the load in our web serves services.

19            And we monitor our upstream connections by  
20    the same functions they did back then and that is  
21    we get reports from the upstream provider  
22    indicating the usage that we have. These reports  
23    give me averages and peaks and I get them  
24    weekly. They tell me exactly what I use. I  
25    think I heard Kathy say that she gets the same

1 reports.

2 Based on that, my average right across the  
3 last year has been about 4 MB with peaks to 8  
4 MB. We don't really have a policy on how many to  
5 one we sell. We sell and when we see utilization  
6 increased to the point where the peaks are  
7 starting to get to our upper limits we go ahead  
8 and bump up our bandwidth to accommodate.

9 MR. MILLS: Your Honor, I object to  
10 the extent that he's testifying as to what their  
11 Internet, how their overselling ratio was at the  
12 time that he was not even employed by them. He  
13 is not able to give that testimony, it's  
14 hearsay.

15 MR. DORANS: I don't know if he  
16 testified to that, Judge.

17 MR. MILLS: If he's testifying as to  
18 what their the current policy is now that's  
19 irrelevant to this contract.

20 MR. DORANS: We haven't asked about  
21 the policy. And I thought the witness said he  
22 currently has the same customers plus additional  
23 customers, such it's the dial up has increased by  
24 factors of the -- the existing Internet  
25 connectivity have increased by three and yet that

1 entire bandwidth is consumed by 4 and 8 MB that  
2 entirety --

3 THE COURT: That's since --

4 MR. DORANS: Since they left, right.

5 THE COURT: Okay.

6 MR. DORANS: He's talking about the  
7 same -- in other words, to the extent we talk  
8 about the graph at all. The graph that shows the  
9 demand --

10 THE COURT: Counsel, I've heard what  
11 he said. He said since your gone they've  
12 increased their demand and new demand and they  
13 are supplying that with no more configuration  
14 than they had when you were in there if I  
15 understood him correctly.

16 THE WITNESS: That's correct.

17 THE COURT: And so, I think that's  
18 rebuttal evidence. Overruled. Go ahead.

19 BY MR. DORANS:

20 Q. So they indicate in here what the total  
21 demand is the very bottom line being anywhere  
22 from 56 meg to I guess 60 something meg?

23 A. Yes.

24 Q. Do you think that's your actual demand?

25 A. No, it's definitely not an actual demand.

1 Q. How can it be that you sell more than 10 or  
2 20 or 30 meg, but you only use 4 or 8? Can you  
3 describe that very briefly for us.

4 A. The majority of the customers on there are  
5 not hitting their usage at 100 percent all the  
6 time. Any one of the customers can hit 100  
7 percent utilization without causing problems, but  
8 we would see that in our usage reports and we  
9 would adjust our bandwidth accordingly.

10 Q. But explain for me. For example, if I'm  
11 sitting in my office and I pull up a web page and  
12 I look at that. Tell me the time and traffic  
13 that's involved in that.

14 A. The process is you request a web page, the  
15 web page loads however long it takes for the web  
16 page to load on your system and the entire time  
17 that you are reading the web page or reading your  
18 e-mail you received, you are using no bandwidth.

19 Q. So it's only when the packets are moving  
20 out and coming back?

21 A. Absolutely. And that would be the peaks  
22 and lulls that I referred to.

23 Q. What's the number of dial up customers that  
24 you currently serve, do you know?

25 A. I believe it's 20 to 25,000.



1 THE COURT: Somebody mentioned  
2 \$30,000?

3 MR. DORANS: I think \$3,000 is what  
4 we had originally, Judge.

5 THE COURT: Oh.

6 BY MR. DORANS:

7 Q. If you were to visit Decipher's office in  
8 1998, was there away to test the amount of  
9 bandwidth they received from iTRiBE?

10 A. Yes, the same way you can today.

11 Q. How is that?

12 A. With a software package or just information  
13 off the router, provided that you have the  
14 technical skill to can do that.

15 Q. Is there any other services they can get  
16 someone can check that?

17 MR. MILLS: Objection, Your Honor,  
18 he was not employed in 1998. How does he know if  
19 he had the tools in 1998?

20 THE COURT: Overruled.

21 BY MR. DORANS:

22 Q. People in the industry had tools in '98 to  
23 do this?

24 A. Yes, these tools have been available for  
25 some time.

1 Q. And you heard about BANI, what type of  
2 tools do they have?

3 A. Bell Atlantic Network Integration has the  
4 best set of tools available. That's one the  
5 reasons that their rate is \$150 an hour.

6 Q. What would the tools allow you to do?

7 A. Their tools would allow you to just put it  
8 on the network and monitor usage and see exactly  
9 where the packets run to and from. I mean, if  
10 you wanted to really monitor the bandwidth usage,  
11 you can do it. And you can see the complete  
12 turnaround form where the packet started to where  
13 it ended and the total round trip and utilization  
14 without interfering with the network at all.

15 Q. So you wouldn't have to take the network  
16 down?

17 A. No.

18 Q. And you could tell whether or not you are  
19 getting the 5 meg through iTRiBE if you were  
20 sitting Decipher?

21 A. Absolutely.

22 Q. Do you have any idea what the cost of that  
23 would be?

24 A. If I was a customer, I would want it done  
25 over a period of time. Say maybe four hours and

1 you know, their rate is \$150 a hour I think you  
2 saw it in some the bills.

3 MR. DORANS: One second, Judge. I  
4 think I'm winding up.

5 BY MR. DORANS:

6 Q. Is there any doubt in your mind as to  
7 whether Decipher had the ability to get 5 meg  
8 during this contract?

9 A. No.

10 MR. DORANS: I have no further  
11 questions for this witness, Judge.

12

13 FURTHER RECROSS EXAMINATION

14

15 BY MR. MILLS:

16 Q. The burst rate on the router that's  
17 typically measured over a very small increment of  
18 time; isn't it?

19 A. Yes, the burst rate is over a period of  
20 five to ten minutes, something like that.

21 Q. Isn't it normally even less than a second  
22 is typically what they look at when they are  
23 giving a burst rate --

24 A. No.

25 Q. -- in the Cicso specifications?

1 A. No.

2 Q. You are sure?

3 A. Yes.

4 Q. In the e-mail that we looked at that  
5 referenced collisions.

6 A. Yes.

7 Q. From that you are not able to tell where  
8 that collision was, are you, by just looking at  
9 that e-mail. It doesn't tell where the  
10 collisions occurred, did it?

11 A. The e-mail and her testimony did tell me  
12 where she saw the collisions on the interface on  
13 the router. And the only place she would have  
14 been able to see those collisions was on her  
15 router and it would happen within the collision  
16 domains. It's just the way it works.

17 Q. But it only happened in that domain you  
18 don't know what domain was what?

19 A. Yes, I know that collision domain starts at  
20 her router and ends at that Racal box. That box  
21 is actually a bridge and collisions are not being  
22 to go beyond the bridge.

23 Q. From the e-mail where they are talking  
24 about pings coming, broadcast pings, there is  
25 nothing there to say that it shut them down or a

\* \* \*

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

-----  
iTRiBE, INCORPORATED, )  
Plaintiff/ )  
Counterclaim Defendant, )  
vs. )  
DECIPHER, INCORPORATED, )  
Defendant/ )  
Counterclaim Plaintiff. )  
-----

AT LAW

NO. 99-1311

CLERK  
SUPREME COURT OF VIRGINIA

DEC 13 2000

RICHMOND, VIRGINIA

TRANSCRIPT OF PROCEEDINGS

BEFORE: The Honorable Leonard B. Sachs, Judge.

Courtroom No. 9

May 25, 2000

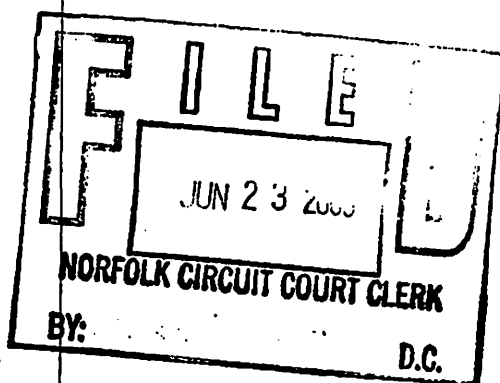
9:00 a.m.

APPEARANCES: MESSRS. WOLCOTT, RIVERS, WHEARY,  
BASNIGHT & KELLY

By Mr. Barry Dorans,  
Attorney appearing in behalf  
of the Plaintiff/Counterclaim  
Defendant.

MESSRS. McCANDLISH, KAINE &  
GRANT

By Mr. John B. Farmer  
and Mr. Terrell W. Mills,  
Attorneys appearing in behalf  
of the Defendant/Counterclaim  
Plaintiff.



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\* \* \*

1 evidence. But there was a point when we wanted to  
2 put into evidence, and I think we made a proffer on  
3 this, that they switched away from DIGEX or  
4 diminished their use of DIGEX.

5 MR. DORANS: For the record, I do want  
6 to object to any evidence about evidence that has  
7 been excluded.

8 THE COURT: What was that?

9 MR. FARMER: I am just going to make a  
10 fairness point, Your Honor.

11 THE COURT: Okay.

12 MR. FARMER: The fairness point is we  
13 wanted to bring in, at one point --

14 THE COURT: Frankly, I was distracted  
15 by somebody that came in and walked across the back  
16 of the courtroom. So say it again. Then I will  
17 know what the objection of Mr. Dorans was.

18 MR. FARMER: Sure.

19 I am not saying the Court should  
20 consider this in weighing the merits of the case.  
21 What I am saying is that, at one point during the  
22 case, we wanted to introduce some evidence of  
23 post-contract conduct.

24 We wanted to introduce evidence that  
25 they had eliminated or diminished their use of

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1 DIGEX. The Court said, no, that is post-contract.

2 I am not going to go into it.

3 THE COURT: I see what you are saying.

4 MR. FARMER: We do feel like both  
5 sides ought to go the same way. So that is on  
6 bandwidth, Your Honor.

7 Now I would like to talk about the  
8 DS3, which relates to bandwidth, Your Honor. What  
9 is a DS3? Well --

10 THE COURT: Frankly, I am going to put  
11 your mind at ease. I hadn't really considered very  
12 much the effect of that testimony as a fact. I  
13 just thought that was argument, really. I just  
14 want you to understand I wouldn't decide this case  
15 based on that evidence. My decision --

16 MR. FARMER: I am not quite picking up  
17 the signal.

18 THE COURT: My decision will be based  
19 on between the time the contract was formed --

20 MR. FARMER: I understand.

21 THE COURT: -- and the time that it  
22 was terminated.

23 MR. FARMER: I was already one leap  
24 down the road, Your Honor. I didn't pick up on the  
25 point. I apologize.

1                   THE COURT: I heard him with interest.  
2 But my decision is going to be based on the facts  
3 between the execution of the contract, the  
4 negotiation of the contract, the execution of the  
5 contract and the termination date.

6                   MR. FARMER: Thank you, Your Honor.

7                   THE COURT: Okay. I want you to feel  
8 at ease about that.

9                   MR. FARMER: I appreciate that. I  
10 know the client appreciates it, too.

11                   Regarding the DS3, remember, this all  
12 has to deal with this part of the chart. In other  
13 words, what line was supposed to go between iTRiBE  
14 and DIGEX. And their testimony is that they  
15 installed a 10-megabyte line. I think it is an  
16 Ethernet line, but 10-megabyte line here.

17                   And we kept pointing to that provision  
18 in the contract that says iTRiBE will install a DS3  
19 for this --

20                   THE COURT: This is an issue -- I will  
21 bring it up. I didn't bring it up with  
22 Mr. Dorans, although it is a troublesome question  
23 for me.

24                   MR. FARMER: Yes, Your Honor.

25                   THE COURT: It may be the only fly in



1 the ointment for the unambiguity of the contract.  
2 And that was raised by the evidence in the trial.  
3 That it is a 45-meg factor, and that, in the  
4 industry, normally when you take less than the full  
5 45, they call it a frac, f-r-a-c. I guess short  
6 for fracture.

7 MR. FARMER: For a fractional.

8 THE COURT: Fractional DS3.

9 And the contract does not call for a  
10 fractured or fractional or frac DS3. That is --  
11 that -- I haven't decided this yet, but that may be  
12 an issue that brings in parol evidence. And I am  
13 working that through my brain.

14 Okay.

15 MR. FARMER: Yes. Well, that is  
16 exactly the point I was going to raise, Your Honor.  
17 That is before they could get into whether  
18 something less was satisfactory, they have got to  
19 get past the parol-evidence rule.

20 THE COURT: I had every intention to  
21 ask Mr. Dorans on it, and it slipped my mind. But  
22 he will have a chance to do it shortly.

23 MR. FARMER: And if the Court does go  
24 that far, I would point out the following  
25 individuals testified it is a DS3 45-meg pipe:

1 Bowden, Maple, a former employee --

2 THE COURT: Everybody.

3 MR. FARMER: -- Rodney.

4 THE COURT: Everybody. You don't have  
5 to worry about that. Everybody said that is what  
6 it is.

7 MR. FARMER: Everybody.

8 And that is a big difference, Your  
9 Honor, because, as we can see in this case,  
10 bandwidth costs money.

11 THE COURT: Well, there was a question  
12 -- I asked somebody did you ever think you would  
13 need 45 megs, and he said no.

14 MR. FARMER: Do you recall who that  
15 was, Your Honor?

16 THE COURT: Huh?

17 MR. FARMER: Do you recall who that  
18 was?

19 THE COURT: I don't remember. But it  
20 might have been Bowden. It might have been  
21 Mr. Eddleman. I don't remember who. I think  
22 Mr. Eddleman.

23 MR. FARMER: I would suggest to the  
24 Court it wouldn't be Mr. Eddleman because  
25 Mr. Eddleman --

\*

\*

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1 THE COURT: All right.

2 MR. DORANS: So it just has nothing  
3 -- in other words, they have alleged a breach.  
4 They have shown that we failed to do what the  
5 contract required. They did show that. But they  
6 failed to show that defeats the essential purpose.

7 In contrast, we say they failed to pay  
8 us the money they were supposed to every month.  
9 And that is the essential purpose. You are  
10 supposed to pay us. So that is the burden of proof  
11 that -- I would say that compare and contrast.

12 Fairly quickly -- and you are going to  
13 be looking at the documents on this. And if you  
14 are going to ask for depositions, I hate to ask for  
15 more.

16 Mr. Darden said that 500-dollar  
17 software could be purchased. They would not have  
18 to take down their network, that they could set it  
19 up and it would read it all the time. It would  
20 tell them whatever they wanted about how much  
21 throughput there was. iTRiBE wouldn't have to shut  
22 down. DIGEX wouldn't have to shut down. Nobody  
23 would shut down anything.

24 Small piece of software, and it would  
25 keep track, if that was their concern. So that is

\* \* \*

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1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itrbe.net

# iTRiBE Internet Connectivity Contract

<b>Basic Information:</b>		<b>Purchase Order Information:</b>
Organization:	Decipher, Inc	P.O. #:
Name/Title:	Jim Bain	Contact:
Address:	253 Granby Street	
City / State / Zip:	Norfolk, VA 23510	<b>Domain Name Requested:</b>
Phone:	757.623.3600	First:
Fax:	757.664.2141	Second:
		Third:
Administrative Contact:		Email:
Technical Contact:	Dale Maurice	
iTRiBE Contract:	Rodney Howell	

Please give us a brief description of your organization and how it is going to use the Internet:

<b>Service Order and Length:</b>	
Service start date: _____	
Length of service: <input type="checkbox"/> 6 mos. <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input type="checkbox"/> 3 years <input checked="" type="checkbox"/> 5 years	
<b>Payment Information:</b>	
<input type="checkbox"/> Check / Money Order	<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service below:
<input type="checkbox"/> MasterCard / Visa	
<input type="checkbox"/> American Express	
<input type="checkbox"/> Discover	
Card number:	Exp. Date:

<b>Initial and Monthly Recurring Costs:</b>	
<b>Hardware and Installation:</b>	
Hardware (Router, CSU/DSU):	
Taxes:	
Carrier install fees:	
IP service setup fees:	
Total One Time Cost:	0.00
<b>Monthly Service Fees:</b>	
Bandwidth: SMB	\$3200.00
Term discount:	
Carrier local loop:	795.00
Virtual mail server:	
News feed:	
Other:	
Total Monthly Recurring Service Fee:	\$3995.00
Comments / Service description:	
iTRiBE will install a DS3 for this.	
5 MB connection from COX Fibernet	
Discounted for five year contract.	



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Initial: *DEM*  
iTRiBE Internet Connectivity Contract (Rev 3.4) Page 1/3  
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**Terms and Conditions**

iTRIBE, Inc. (the "company") has established a communications network that facilitates the transmission of data to and from the Internet (the "service" or "services") subject to your compliance with the terms and conditions below (collectively, the "Terms and Conditions"). The subscriber (the "subscriber") refers to the person or entity signatory to this contract that wishes to access the Internet using the company's established network and services. Please completely read these terms and conditions before signing.

- 1) **Term.** The initial Term begins on the first day of the month following the company's installation of equipment or acceptance of previously installed equipment or facilities. This Agreement shall continue in effect for the period identified in Length of Service. Upon the expiration of the original term, and each renewal term, this contract will automatically renew for a successive term of ninety (90) days unless prior to the date of expiration, either party gives notice of an intent to terminate.
- 2) **Lawful Use.** Services provided to the subscriber by the company may only be used for lawful purposes. Transmission or storage of any information, data or material in violation of US Federal or state regulation or law is prohibited. This includes, but is not limited to material protected by copyright, trade secret, or any other statute, threatening material or obscene material. The subscriber agrees to indemnify and hold harmless the company from any claims resulting from the subscriber's use of the service which damages either the subscriber or another party or parties.
- 3) **Payment.** Payment of the monthly service fee is due on the first day of the month to be served. Payments not made by the 10<sup>th</sup> of the month are to be considered delinquent and may be subject to reasonable collection and legal fees as well as interest accrued at 1.5% per month, or the state legal limit, whichever is lower. Returned checks are subject to a charge of \$25.00. Credit card customers: The subscriber agrees to pay all billed amounts according to card issuer agreement until the subscriber cancels its service with the company or discontinues credit card billing.
- 4) The subscriber agrees that the company has the right to delete all data, files or other information that is stored regarding the subscriber's service if the subscriber's service with the company is terminated, for any reason, by either the company or the subscriber.
- 5) The company's services cannot be transferred or used by anyone other than the subscriber. Accounts which have been transferred to other parties, or show activity in violation of this paragraph, are subject to immediate cancellation.
- 6) Services provided by the company, can be canceled at any time by the company with written notice sent thereafter to the subscriber at the address listed in the company's records. It shall be the responsibility of the subscriber to keep the company informed as to a valid mailing address to which this notice can be sent.
- 7) **Termination.** Service may be terminated voluntarily by the subscriber with penalty, for non-payment or for other causes.
  - (a) **Voluntary.** Service may be terminated by the subscriber for any reason upon thirty (30) days prior written notice. In the event of early termination, subscriber will pay a lump sum equal to one hundred percent (100%) of the monthly recurring fee for each service terminated, plus fifty percent (50%) of the monthly recurring fee for each service terminated for each month remaining in the Length of Service. Subscriber will not be liable for termination charges if services of the same or greater monthly base price and length of service are ordered at the same time as the notice of termination is received.
  - (b) **For Non-Payment.** After sixty (60) days of non-payment from the due date, the company may disable the service. After ninety (90) days of non-payment from the due date, the company may terminate the service permanently.
  - (c) **For Other Causes.** Service may be terminated by the company upon any violation of paragraph 2 (unlawful uses) and paragraph 5 (resale) of these Terms and Conditions.

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Initial: *DLA*  
iTRIBE Internet Connectivity Contract (Rev 3.4) Page 23  
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- 8) Suspension of service. The company shall have the right to suspend service to the subscriber at any time, and for any reason, without notice. The company will take reasonable steps to notify the subscriber in advance of the timing and reason for any service suspension. If no such prior notice has been given, then the subscriber will be promptly notified following suspension as to the reason. The company shall take all reasonable steps to restore service to the subscriber as soon as possible, except that the company will not be responsible for restoring service if (i) the suspension is related to use by the subscriber of equipment or software not provided by the company that is likely to cause hazard, interference or service obstruction and (ii) the subscriber has not complied with paragraph 12 of this agreement.
- 9) The subscriber shall in no way represent itself nor permit any party acting on its behalf to represent itself as a partner, joint venture, agent, employee or general representative of the company.
- 10) The subscriber recognizes that as part of the services provided hereunder, they are able to connect to the Internet. The subscriber understands and agrees that the company has no control over the Internet or the computers connected to the Internet. Accordingly, this subscriber agrees to indemnify and hold the company harmless from any claims or losses of any kind, whether sustained by the subscriber or any other, arising out of or in any way relating to the subscriber's connecting to the Internet.
- 11) The subscriber shall at its own expense provide all necessary preparations required to comply with the company's installation and maintenance specifications, shall be responsible for the costs of relocation of services provided by the company once installed by the company, and shall provide to the company and to suppliers of communications lines reasonable access to subscriber's premises to perform any acts required by this agreement.
- 12) The company shall not be responsible for the installation, operation or maintenance of equipment or software not provided by the company; nor shall the company be responsible for the transmission or reception of information by equipment or software not provided by the company. The subscriber shall be responsible for the use and compatibility of equipment or software not provided by the company. In the event that the subscriber uses equipment or software not provided by the company that impairs the subscriber's use of the company's services, the subscriber shall nonetheless be liable for payment of services provided by the company. Upon notice from the company that the equipment or software not provided by the company is causing or is likely to cause hazard, interference or service obstruction, the subscriber shall eliminate the likelihood of hazard, interference or obstruction. The subscriber shall if necessary pay the company to troubleshoot difficulties caused by equipment or software not provided by the company.
- 13) The company shall not be liable, either in contract or tort, for protection from unauthorized access of subscriber's transmission facilities or subscriber premise equipment; or for unauthorized access to or alteration, theft or destruction of subscriber's data files, programs, procedures or information through accident, fraudulent means or devices, or any other method, even should such access occur as a result of the company's negligence.
- 14) The pricing proposal is hereby incorporated by reference.
- 15) LIMITED LIABILITY. THE COMPANY HEREBY DISCLAIMS ANY AND ALL LIABILITIES FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER. ANY LIABILITY OF THE COMPANY, INCLUDING WITHOUT LIMITATION ANY LIABILITY FOR DAMAGES CAUSED OR ALLEGEDLY CAUSED BY ANY FAILURE OR PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMMUNICATIONS LINE FAILURE, THEFT, OR DESTRUCTION OF OR UNAUTHORIZED ACCESS TO, ALTERATION OF, OR USE OF RECORDS, WHETHER FOR BREACH OF CONTRACT, TORTIOUS BEHAVIOR, NEGLIGENCE, OR UNDER ANY OTHER CAUSE OF ACTION, SHALL BE STRICTLY LIMITED TO THE AMOUNT PAID BY OR ON BEHALF OF THE SUBSCRIBER TO THE COMPANY FOR THE TWO PRIOR MONTHS.
- 16) These Terms and Conditions supersede all previous representations, agreements or understandings and shall prevail notwithstanding any variance with terms and conditions of any order submitted.
- 17) Use of the company's services constitutes acceptance of these Terms and Conditions.

Signature:

Joe R Man

Date:

Feb 24, 1997

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Initial: DCM  
iTRIBE Internet Connectivity Contract (Rev 3.4) Page 3/3  
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JOHN HOGAN

PHONE NO. : 4102969378

May. 02 1997 11:56AM P2



## DIGEX AGENT Service Order Form

**RECEIVED**  
MAY 05 1997

Company Name: I Tribe  
Billing Address: 1700 World Trade Center  
Norfolk, Va 23510  
Customer Contact: Rodney C. Howell  
Phone Number: 757-446-9060  
AGENT: Net 2000  
CHANNEL MANAGER: John Hogan

Number of Lines: 1  
Requested Domain: itribe.net  
Reseller: Yes  
Contract Term (months): 36  
Telco Quota by: Customer Provided

LL 6505

### Service: Leased Line

#### Fractional T1 & 56K

Fractional T1: 64Kbps Fractional T1: 512 Kbps  
Fractional T1: 128Kbps Fractional T1: 768Kbps  
Fractional T1: 256Kbps Full T1: 1.544Mbps  
Fractional T1: 384 Kbps

Install

Telco Install\*

Monthly

DIGEX Install  
Telco Monthly\*  
DIGEX Monthly

ADD 6/4/97

#### Fractional T3 Leased Line

Frac T3 - 3 Mbps Frac T3 - 15 Mbps Frac T3 - 27 Mbps Frac T3 - 39 Mbps  
Frac T3 - 6 Mbps Frac T3 - 18 Mbps Frac T3 - 30 Mbps Frac T3 - 42 Mbps  
Frac T3 - 9 Mbps Frac T3 - 21 Mbps Frac T3 - 33 Mbps Full T3 - 48 Mbps  
Frac T3 - 12 Mbps Frac T3 - 24 Mbps Frac T3 - 36 Mbps

### Service: Frame Relay

36Kbps Frame Relay CIR: 32Kbps Burst: 56Kbps  
T1Kbps Frame Relay CIR: 54Kbps Burst: 128Kbps  
T1Kbps Frame Relay CIR: 128Kbps Burst: 256Kbps  
T1Kbps Frame Relay CIR: 256Kbps Burst: 512Kbps  
T1Kbps Frame Relay CIR: 512Kbps Burst: 1.02Mbps

Install

Telco Install\*  
DIGEX Install

Monthly

Telco Monthly\*  
DIGEX Monthly

### Service: SMDS

1.17Mbps SMDS CIR: 1.17 Mbps 25 Mbps SMDS CIR: 25 Mbps  
4 Mbps SMDS CIR: 4 Mbps 34 Mbps SMDS CIR: 34 Mbps  
10 Mbps SMDS CIR: 10 Mbps  
16 Mbps SMDS CIR: 16 Mbps

Install

Telco Install\*  
DIGEX Install

Monthly

Telco Monthly\*  
DIGEX Monthly

### Service: FNS

10 Mbps

Install

Telco Install\* Customer Provided  
DIGEX Install Waived

Monthly

Telco Monthly\*  
DIGEX Monthly \$8,000

### CPE:

Router  
Cost \$

CSU/DSU  
Cost \$

Hardware Total

Contract Summary  
First Year: \$96,000

Total Contract: \$188,000

\* Telco Rates are estimates based on current Telco Carrier tariffs. These charges are subject to change if tariffs change or if actual Telco billing is different. These charges do not include an Special Construction or Inside Wiring fees.

Customer Signature

*[Signature]*  
John V. Hogan

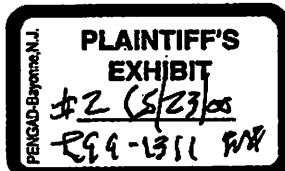
Date:

4/30/97

DIGEX Signature

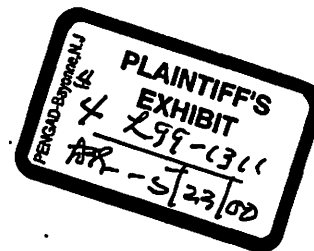
Date:

4/30/97



**Decipher**™

Eddleman  
A'L



Mike Adolphi  
iTribe  
Suite 1700 World Trade Center  
Norfolk, Virginia 23510

December 1, 1998

Dear Mike,

This letter is to inform you that Decipher Inc. wishes to terminate our contract for Internet services provided by iTribe effective immediately. As you are probably aware, Decipher has experienced exponential growth over the past several years. This growth has placed us in a business position where we have become heavily reliant upon the use of the Internet in order to conduct our business. Our web site has grown in terms of the number of hits we experience on a regular basis and we have implemented an Internet direct sales plan that generates enormous revenue for us monthly.

Unfortunately the connectivity once suitable for the operation of our business no longer provides us with the solution we need in order for us to continue to expand our business plan. In the past we have experienced repeated outages, poor performance due to shared media as well as slow throughput once connected to Digex. As a growing company I am sure you can understand our need to evaluate these networking issues rigorously.

At one point in time, I made several calls to reach you and/or you colleague Brian to discuss our growing needs. Obviously our needs were determined to be insignificant in that while Brian returned calls I was never able get anyone here to meet with my management team in attempts to resolve our concerns. Given this lack of customer service combined with our growing needs we feel it in our best interest to migrate to another provider.

I will be available as will Rick Eddleman, VP Finance to discuss these issues should you require more information. If I can be of any assistance in the termination of our contract please do not hesitate to contact me.

Best regards,

*Kathy*

Kathy Eddleman, Ed.D.  
IS Manager  
Decipher Inc.

757-664-1135 phone  
757-664-2135 fax

D E C I P H E R, I N C.

P.O. Box 56 • Norfolk, VA 23501 • (757) 623-3600 • FAX (757) 623-3630



Subject: Fwd: who am i? why am i here?  
Date: 11/18/99 02:50 PM  
Received: 11/18/99 03:19 PM  
From: Carol Wisely, carolw@decipher.com  
To: Rick Eddleman, ricke@Decipher.com



----- Begin Forwarded Message -----

Date: 6/24/97 11:57 PM  
Received: 6/24/97 11:58 PM  
From: Dale Maurice, dale  
To: Carol Wisely, carolw

Subject: who am i? why am i here?  
Sent: 6/24/97 11:57 PM  
Received: 6/24/97 11:58 PM  
From: Dale Maurice, dale  
To: Carol Wisely, carolw

goodday... i guess. im in a weird kinda wired freaky mood tonight.. i think the lack of rest and eating one small meal a day is catching up to me :)

just though u might like to know what i've been upto so you don't get hit with anything..

today i did the switch to the new network numbers assigned to us.. i've readdressed all the suns, and the routers. i still have to do the 2 fast switches (which are running the 100baseT connections)

I've started rebuilding our DNS to be reflected with the new numbers.. I readdressed the netscape servers as well as a plethora of other items on the list.

i thought of a potential problem with the webstar server (running on a mac) because it can't run more than one ip address at a time.. i have figured out a way to maintain the old address on one of the suns and redirect any traffic to that to the new address.. neat huh? i just have to coordinate the switch with MIS.

I got the ISDN lines working with the new addresses as well.. Yay!! And I managed to figure out a way to save 2/3 of our address space used by the ISDN lines, so now instead of using 3 ip addresses for each port, we now only use 1.. yay #2!!

there was some intermittent downtime during the day, but hopefully not too noticable to people.. some things took a wee bit longer than i'd originally scoped out because of some addressing difficulties on rothko... the other servers went fine, but it's running an older version of the OS so it was be'n onery (however ya spell it).

all together, we seem to be do'n fine.. a few little minor PIA's to work on but i should get them all solved tomorrow. np.

one thing you might like to know i haven't told anybody yet, is that irtibe apparently decided to use somebody oth-- (i think) our

DEC 000186

routes appear to be going through somebody else, i haven't had time to get the scoop on what the deal is at itribe.

another 'sorta' bonus at the moment, itribe hasn't set down their bandwidth so we are actually getting 10Mb of throughput instead of 5Mb. but you didn't hear that from me :)

the new guy they hired to replace christian is really good though... perhaps better even.

I believe I fixed the bug with the bbs's that has been causing the intermittent corruption of the dbs.. very rare, but i think it's ok now.. no corruptions all day since yesterday morning when i made the change.

dale

ps.. pardon my e. e. cummings typing mode, the caps lock key must not be work'n tonight ;) err morning.

----- End Forwarded Message -----

-----  
Carol Wisely  
V.P. Marketing  
Decipher Inc.  
<http://www.decipher.com>

email: [carolw@decipher.com](mailto:carolw@decipher.com)  
phone: 757 664 1128  
fax: 757 664 2128

Incoming Message

Re: Direct to the backbone

Page 1 of 2

Subject: Re: Direct to the backbone  
Date: 6/4/98 10:43 AM  
Received: 6/4/98 10:44 AM  
From: Warren Holland, chairman&ceo@decipher.com  
To: Kathy Eddleman, kathy@decipher.com  
CC: Rick Eddleman, ricke@decipher.com  
Carol Wisely, carolw@decipher.com



&gt;Warren,

&gt;

>Rick and I have been successful in meeting with MCI to determine the  
>viability of moving our ISP services from Itribe to MCI direct.  
>Yesterday we had a meeting with Jay Larry, Data Accounts Sales at MCI and  
>Henrietta Mitchell, Accounts Development Manager at MCI along with Mike  
>Matthews and Jon Salisbury from Bell Atlantic Network Integration. The  
>Bell Atlantic guys are my consultants for re-designing our network. The  
>purpose was for us to be able to utilize as much of the current  
>configurations as possible without having to purchase more hardware,  
>change configurations etc. when considering the move to MCI.

&gt;

>Our goal was to move us to MCI direct, no shared pipes of any nature with  
>guaranteed throughput. I believe we have reached a very clean solution  
>that we will be able to implement in a timely manner.

Sounds good.

>Our current situation is such that we share a 10mb pipe with about 144  
>other companies. Although we are paying for 5mb, as we know, it is  
>virtually impossible to guarantee throughput under this scenario.

Just curious. Any conversation with ITribe about getting credit for this?  
We were sold on a 5mb dedicated pipe.

&gt;The

>reselling of bandwidth is a common practice among tier 2 ISP's. We are  
>also sharing our access on the Cox fiber ring. This picture is about to  
>change, however.

&gt;

>Our proposed solution is to go direct to the backbone via Cox fiber to  
>the local MCI pop who will route us directly to the backbone, bypassing  
>May East, a source of huge congestion. We will have dedicated bandwidth  
>from Cox..not shared.. and dedicated bandwidth on the backbone with  
>guaranteed throughput. MCI will serve as our secondary DNS which offers  
>two benefits. First there will be fail safe should our DNS services or  
>Suns fail for any reason, we will never NOT be advertised on the  
>internet. Second, removing secondary DNS from the Suns will help to  
>alleviate loads on the Suns as well.

Exactly what we want.

>We expressed in our meeting the necessity to make this happen as soon as  
>possible. MCI went to work and determined they could reduce the normal  
>21+ day cutover to around 10 days. You, Carol and Rick will need to  
>discuss the best time to make this cutover. Once you have determined a  
>date at least 10 days from now, I will make this happen as painlessly as  
>possible :-)

Incoming Message

Re: Direct to the backbone

Page 2 of 2

The earliest weekend available is best (the 13th/14th or 20th/21st). We should be over the DS9 project by then. While there is no shortage of stuff to do in art, the network problems that put them down for the weekend last time should not be an issues this time. Also, as you know, our web traffic is always lower on weekends. Unless the web group has something special planned for that time, I'd say go for it. The end of (Tribal Yes!

Also, when this is done, I think it deserves a techie web story about how we are on the backbone. Some of our customers care about this stuff, and it puts Decipher on the cutting edge. Also, I could use such a story with Lucas and others when discussing our internet business. None of this is as important as having the 'real world' performance of the system be wonderful, but it doesn't hurt.

>Please let me know if you have any other questions. At this point, I do  
>not have contracts or anything of a more specific nature as we are in the  
>initial stages but expect those by the end of this week or early next.

>

>K

All in all, very cool.

Warren

Subject: iTribe...  
Date: 6/8/98 11:33 AM  
To: Becky Higgerson, bekyh@decipher.com



Becky,

Do you have any Contracts we may have signed with iTribe? I am looking for anything that may reference Terms of our Agreement and any special "termination" notice days that we may need to submit...

We will be changing to MCI with 10-15 days... I need to address the above asap!

Thanks  
Rick

Incoming Message

Re: Web not working.

Page 1 of 1

Subject: Re: Web not working.  
Date: 9/29/98 07:05 PM  
Received: 9/29/98 07:05 PM  
From: Kathy Eddleman, kathy@decipher.com  
To: Rick Eddleman, RickE@decipher.com

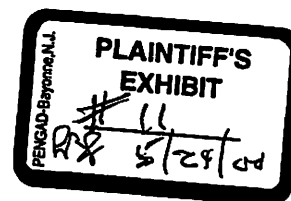
>>Nothing is working on the web again.

>

>Any Ideas?

>

>Rick



After working on testing from my end from today I can provide you with the following stats and insights. We have disabled the ability for our outside routers to receive PINGs, TraceRoutes and Queries. This is what Warren experienced by not getting anything back on this trace route. I have since opened this back up so that I could just compare ITribe to MCI. The reason we turned this off was that Chris and Calvin were experiencing a number of broadcast pings when means when they are received at our web address, all the servers must respond thereby taking down the cpu for each of the machines. There is really no need anyone would need to do this on our network.

I understand that Warren and others use this tool to try and troubleshoot iTribe problems. This will no longer work for us if we want to keep our Suns secure and optimized. I can turn this back on but our Suns will no longer be optimized for cpu performance. I am certain I sent an email to people who use WhatRoute letting them know this.

If you look at the stats I have enclosed you will see the following:

The first listing you see is the stats taken from the trace route to apple.com

This is from our iTribe connection. You can tell because the first hop is a 209.49 address

Following this you will see that it takes 17 hops to get there from here.

At the end of each line there are numbers listed in milliseconds. This is the amount of time it takes to get to each hop. While the times look pretty good for this site I have been randomly doing traces to other sites that have taken on average 20+ plus hops with many of these exceeding 700msec.

If you compare this to MCI you will see fewer hops with exceeding less travel times.

I need to test the router 1 configuration still and change what configs we have on the PIX box. This will take me only a matter of minutes to make the changes. Su has asked that I not do this until there is a notice put up on the web.

K

Tracing the route to A17-254-0-50.apple.com (17.254.0.50)

```

 1 bgp.itrbe.net (209.49.144.34) [AS 3561] 4 msec 8 msec 8 msec
 2 206.181.38.9 [AS 3561] 12 msec 8 msec 12 msec
 3 orf1-core2-fa6-0-0.atlas.digex.net (165.117.56.90) [AS 3561] 4 msec 8 msec 8
 msec
 4 ric2-core2-pt1-0-0.atlas.digex.net (165.117.51.45) [AS 3561] 8 msec 8 msec 1
 2 msec
 5 clt1-core1-h8-0.atlas.digex.net (165.117.50.102) [AS 3561] 24 msec 24 msec 2
 4 msec
 6 clt1-core2-fa6-0-0.atlas.digex.net (165.117.53.14) [AS 3561] 20 msec 20 msec
 20 msec
 7 atl2-core1-s9-0-0.atlas.digex.net (165.117.50.37) [AS 3561] 24 msec 24 msec
 28 msec
 8 atl1-core1-h9-0.atlas.digex.net (165.117.53.54) [AS 3561] 28 msec 24 msec 32
 msec
 9 500.Hss11-1-0.GW1.ATL1.ALTER.NET (137.39.140.21) [AS 3561] 32 msec 32
 msec
 32 msec
 10 103.ATM2-0.XR2.ATL1.ALTER.NET (146.188.232.46) [AS 3561] 24 msec 32
 msec 32
 msec
 11 294.ATM3-0.TR2.ATL1.ALTER.NET (146.188.232.110) [AS 3561] 36 msec 40
 msec 24
 msec
 12 109.ATM6-0.TR2.SCL1.ALTER.NET (146.188.136.70) [AS 3561] 96 msec 104
 msec 10
 0 msec
 13 298.ATM6-0.XR2.SCL1.ALTER.NET (146.188.146.25) [AS 3561] 108 msec 104
 msec 1
 16 msec
 14 194.ATM11-0-0.GW2.SCL1.ALTER.NET (146.188.145.141) [AS 3561] 104 msec
 100 ms
 ec 108 msec
 15 savvis-scl-gw.customer.ALTER.NET (157.130.192.254) [AS 3561] 124 msec 104 ms
 ec 104 msec
 16 ton.apple.com (205.180.175.30) [AS 3561] 108 msec 112 msec 104 msec
 17 A17-254-0-50.apple.com (17.254.0.50) [AS 3561] 116 msec 124 msec 104 msec
 Outside_router1#

```

Type escape sequence to abort.

Tracing the route to A17-254-0-50.apple.com (17.254.0.50)

1 bordercore4-hssi6-0-6.Greensboro.cw.net (166.48.122.25) [AS 3561] 12 msec  
bordercore4-hssi5-0-17.Greensboro.cw.net (166.48.120.69) [AS 3561] 12 msec  
bordercore4-hssi6-0-6.Greensboro.cw.net (166.48.122.25) [AS 3561] 12 msec  
2 core2.Dallas.cw.net (204.70.4.69) [AS 3561] 52 msec 52 msec 52 msec  
3 borderx1-fddi-1.Dallas.cw.net (204.70.114.52) [AS 3561] 192 msec 208 msec 23  
6 msec  
4 diamond-net.Dallas.cw.net (204.70.114.106) [AS 3561] 60 msec 216 msec 56 msec  
c  
5 APPLE-1.DllsTX.savvis.net (209.44.32.2) [AS 3561] 60 msec 64 msec 60 msec  
6 209.44.33.18 [AS 3561] 64 msec 64 msec 64 msec  
7 ton.apple.com (205.180.175.30) [AS 3561] 92 msec 92 msec 92 msec  
8 A17-254-0-50.apple.com (17.254.0.50) [AS 3561] 100 msec 92 msec 100 msec

^



# **SUMMARY OF DAMAGES INCURRED BY DECIPHER, INC.**

<b>Testing of all internal cabling</b>	<b>\$255.00</b>
<b>Replacement of Farallon Ethernet cards</b>	<b>\$680.44</b>
<b>Reconfiguration of internal network to remove Internet traffic</b>	<b>\$32,029.09</b>

*Initial consultation* \$1,450.00

*Implementation of the proposed solution* \$30,579.09

(Invoice amount of \$34,427.22 less maintenance  
\$3726.00 and associated taxes on the maintenance.)

<b>Cover services for the remaining thirty-eight months</b>	<b>\$75,713.27</b>
---	--------------------

*Equipment for connection to the cover service* \$17,255.97

*Excess fees paid for cover service* \$58,457.30

(iTRiBE charged \$3,995.00/5Mb, or \$799.00/Mb.

Cover charges \$6,640.00/6Mb, or \$1,106.67/Mb.

Increase per Mb for cover service totals  $\$307.67 = 1,106.67 - 799.00$ .

Total monthly excess paid by Decipher is obtained by multiplying the per Mb increase by 5, for the 5Mb promised by iTRiBE, which totals  $\$1,538.35/\text{month} = 307.67 * 5$ .

Total excess paid by Decipher over the term of the iTRiBE contract is obtained by multiplying the total monthly excess in fees by 38 months, the number of months remaining on the iTRiBE contract, which totals  $\$58,457.30 = 1,538.35 * 38$ .)

<b>TOTAL DAMAGES:</b>	<b><u>\$108,422.80</u></b>
-----------------------	----------------------------

# CORRECTED

## SUMMARY OF DAMAGES INCURRED BY DECIPHER, INC.

Testing of all internal cabling \$255.00

Replacement of Farallon Ethernet cards \$680.44

Reconfiguration of internal network to remove Internet traffic \$32,029.09

*Initial consultation* \$1,450.00

*Implementation of the proposed solution* \$30,579.09

(Invoice amount of \$34,427.22 less maintenance  
\$3726.00 and associated taxes on the maintenance.)

Cover services for the remaining thirty-eight months \$105,923.27

*Equipment for connection to the cover service* \$17,255.97

*Excess fees paid for cover service* \$88,667.30

(iTRiBE charged \$3,200.00/5Mb, or \$640.00/Mb.

Cover charges \$6,640.00/6Mb, or \$1,106.67/Mb.

Increase per Mb for cover service totals  $\$466.67 = 1,106.67 - 640.00$ .

Total monthly excess paid by Decipher is obtained by multiplying the per Mb increase by 5, for the 5Mb promised by iTRiBE, which totals  $\$2,333.35/\text{month} = 466.67 * 5$ .

Total excess paid by Decipher over the term of the iTRiBE contract is obtained by multiplying the total monthly excess in fees by 38 months, the number of months remaining on the iTRiBE contract, which totals  $\$88,667.30 = 2,333.35 * 38$ .)

**TOTAL DAMAGES:**

**\$138,887.80**



1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itrbe.net

# iTRiBE Internet Connectivity Contract

Basic Information		Purchase Order Information	
Organization:	Decipher, Inc	P.O. #:	
Name/Title:	Jim Bain	Contact:	
Address:	253 Granby Street		
City / State / Zip:	Norfolk, VA 23510	Domain Name Requested:	
Phone:	757.623.3600	First:	
Fax:	757.664.2141	Second:	
		Third:	
Administrative Contact:		Email:	
Technical Contact:	Dale Maurice		
iTRiBE Contract:	Rodney Howell		

Please give us a brief description of your organization and how it is going to use the Internet:

Service Start and Length	
Service start date:	
Length of service:	<input type="checkbox"/> 6 mos. <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input type="checkbox"/> 3 years <input checked="" type="checkbox"/> 5 years
<input type="checkbox"/> Check / Money Order	<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service below:
<input type="checkbox"/> MasterCard / Visa	
<input type="checkbox"/> American Express	
<input type="checkbox"/> Discover	
Card number:	Exp. Date:

Initial and Monthly Recurring Costs	
Hardware (Router, CSU/DSU):	
Taxes:	
Carrier install fees:	
IP service setup fees:	
Total One Time Cost:	0.00
Monthly Recurring Service Fee	
Bandwidth: SMB	\$3200.00
Term discount:	
Carrier local loop:	795.00
Virtual mail server:	
News feed:	
Other:	
Total Monthly Recurring Service Fee:	\$3995.00

Comments / Service description:

iTRiBE will install a DS3 for this.

5 MB connection from COX Fibernet

Discounted for five year contract.

**ORIGINAL**

**Terms and Conditions**

iTRiBE, Inc. (the "company") has established a communications network that facilitates the transmission of data to and from the Internet (the "service" or "services") subject to your compliance with the terms and conditions below (collectively, the "Terms and Conditions"). The subscriber (the "subscriber") refers to the person or entity signatory to this contract that wishes to access the Internet using the company's established network and services. Please completely read these terms and conditions before signing.

- 1) **Term.** The initial Term begins on the first day of the month following the company's installation of equipment or acceptance of previously installed equipment or facilities. This Agreement shall continue in effect for the period identified in Length of Service. Upon the expiration of the original term, and each renewal term, this contract will automatically renew for a successive term of ninety (90) days unless prior to the date of expiration, either party gives notice of an intent to terminate.
- 2) **Lawful Use.** Services provided to the subscriber by the company may only be used for lawful purposes. Transmission or storage of any information, data or material in violation of US Federal or state regulation or law is prohibited. This includes, but is not limited to material protected by copyright, trade secret, or any other statute, threatening material or obscene material. The subscriber agrees to indemnify and hold harmless the company from any claims resulting from the subscriber's use of the service which damages either the subscriber or another party or parties.
- 3) **Payment.** Payment of the monthly service fee is due on the first day of the month to be served. Payments not made by the 10<sup>th</sup> of the month are to be considered delinquent and may be subject to reasonable collection and legal fees as well as interest accrued at 1.5% per month, or the state legal limit, whichever is lower. Returned checks are subject to a charge of \$25.00. Credit card customers: The subscriber agrees to pay all billed amounts according to card issuer agreement until the subscriber cancels its service with the company or discontinues credit card billing.
- 4) The subscriber agrees that the company has the right to delete all data, files or other information that is stored regarding the subscriber's service if the subscriber's service with the company is terminated, for any reason, by either the company or the subscriber.
- 5) The company's services cannot be transferred or used by anyone other than the subscriber. Accounts which have been transferred to other parties, or show activity in violation of this paragraph, are subject to immediate cancellation.
- 6) Services provided by the company, can be canceled at any time by the company with written notice sent thereafter to the subscriber at the address listed in the company's records. It shall be the responsibility of the subscriber to keep the company informed as to a valid mailing address to which this notice can be sent.
- 7) **Termination.** Service may be terminated voluntarily by the subscriber with penalty, for non-payment or for other causes.
  - (a) **Voluntary.** Service may be terminated by the subscriber for any reason upon thirty (30) days prior written notice. In the event of early termination, subscriber will pay a lump sum equal to one hundred percent (100%) of the monthly recurring fee for each service terminated, plus fifty percent (50%) of the monthly recurring fee for each service terminated for each month remaining in the Length of Service. Subscriber will not be liable for termination charges if services of the same or greater monthly base price and length of service are ordered at the same time as the notice of termination is received.
  - (b) **For Non-Payment.** After sixty (60) days of non-payment from the due date, the company may disable the service. After ninety (90) days of non-payment from the due date, the company may terminate the service permanently.
  - (c) **For Other Causes.** Service may be terminated by the company upon any violation of paragraph 2 (unlawful uses) and paragraph 5 (resale) of these Terms and Conditions.

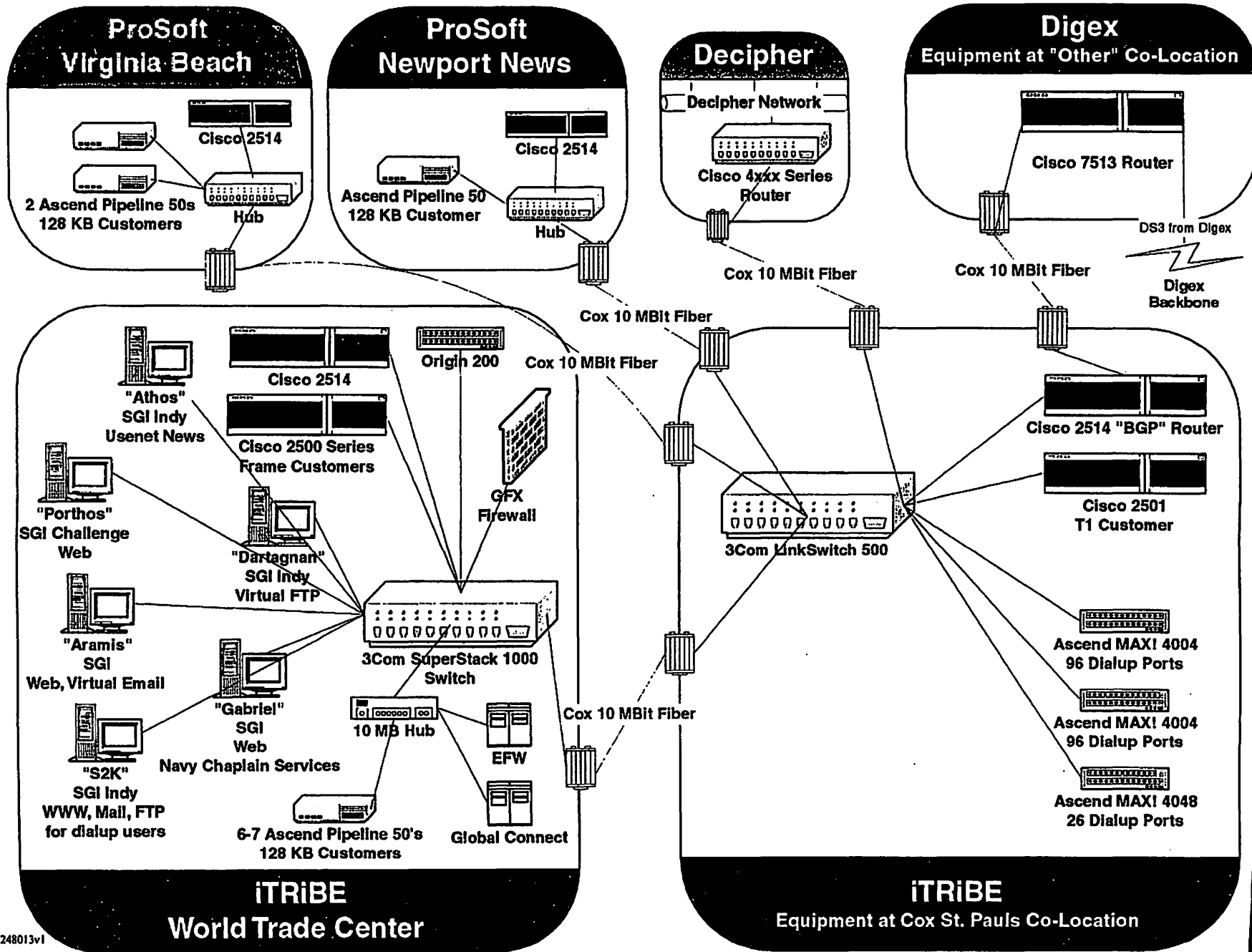
**ORIGINAL**

Initial: *DLH*  
iTRiBE Internet Connectivity Contract (Rev 3.4) Page 2/3  
Copyright © 1996 iTRiBE, Inc.

- 8) Suspension of service. The company shall have the right to suspend service to the subscriber at any time, and for any reason, without notice. The company will take reasonable steps to notify the subscriber in advance of the timing and reason for any service suspension. If no such prior notice has been given, then the subscriber will be promptly notified following suspension as to the reason. The company shall take all reasonable steps to restore service to the subscriber as soon as possible, except that the company will not be responsible for restoring service if (i) the suspension is related to use by the subscriber of equipment or software not provided by the company that is likely to cause hazard, interference or service obstruction and (ii) the subscriber has not complied with paragraph 12 of this agreement.
- 9) The subscriber shall in no way represent itself nor permit any party acting on its behalf to represent itself as a partner, joint venture, agent, employee or general representative of the company.
- 10) The subscriber recognizes that as part of the services provided hereunder, they are able to connect to the Internet. The subscriber understands and agrees that the company has no control over the Internet or the computers connected to the Internet. Accordingly, this subscriber agrees to indemnify and hold the company harmless from any claims or losses of any kind, whether sustained by the subscriber or any other, arising out of or in any way relating to the subscriber's connecting to the Internet.
- 11) The subscriber shall at its own expense provide all necessary preparations required to comply with the company's installation and maintenance specifications, shall be responsible for the costs of relocation of services provided by the company once installed by the company, and shall provide to the company and to suppliers of communications lines reasonable access to subscriber's premises to perform any acts required by this agreement.
- 12) The company shall not be responsible for the installation, operation or maintenance of equipment or software not provided by the company; nor shall the company be responsible for the transmission or reception of information by equipment or software not provided by the company. The subscriber shall be responsible for the use and compatibility of equipment or software not provided by the company. In the event that the subscriber uses equipment or software not provided by the company that impairs the subscriber's user of the company's services, the subscriber shall nonetheless be liable for payment of services provided by the company. Upon notice from the company that the equipment or software not provided by the company is causing or is likely to cause hazard, interference or service obstruction, the subscriber shall eliminate the likelihood of hazard, interference or obstruction. The subscriber shall if necessary pay the company to troubleshoot difficulties caused by equipment or software not provided by the company.
- 13) The company shall not be liable, either in contract or tort, for protection from unauthorized access of subscriber's transmission facilities or subscriber premise equipment; or for unauthorized access to or alteration, theft or destruction of subscriber's data files, programs, procedures or information through accident, fraudulent means or devices, or any other method, even should such access occur as a result of the company's negligence.
- 14) The pricing proposal is hereby incorporated by reference.
- 15) LIMITED LIABILITY. THE COMPANY HEREBY DISCLAIMS ANY AND ALL LIABILITIES FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY NATURE WHATSOEVER. ANY LIABILITY OF THE COMPANY, INCLUDING WITHOUT LIMITATION ANY LIABILITY FOR DAMAGES CAUSED OR ALLEGEDLY CAUSED BY ANY FAILURE OR PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DELETION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, COMMUNICATIONS LINE FAILURE, THEFT, OR DESTRUCTION OF OR UNAUTHORIZED ACCESS TO, ALTERATION OF, OR USE OF RECORDS, WHETHER FOR BREACH OF CONTRACT, TORTIOUS BEHAVIOR, NEGLIGENCE, OR UNDER ANY OTHER CAUSE OF ACTION, SHALL BE STRICTLY LIMITED TO THE AMOUNT PAID BY OR ON BEHALF OF THE SUBSCRIBER TO THE COMPANY FOR THE TWO PRIOR MONTHS.
- 16) These Terms and Conditions supersede all previous representations, agreements or understandings and shall prevail notwithstanding any variance with terms and conditions of any order submitted.
- 17) Use of the company's services constitutes acceptance of these Terms and Conditions.

Signature: Joe R ManDate: Feb 24, 1997**ORIGINAL**

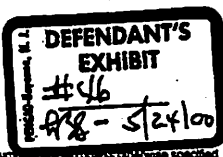
Initial: DEM  
ITRIBE Internet Connectivity Contract (Rev 3.4) Page 3/5  
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DEFENDANT'S  
EXHIBIT  
345  
5/24/02  
PENGAD-Beyonne, N. J.

# ITRiBE Internet Bandwidth Capacity Commitments



All numbers are in thousands unless otherwise specified

## NEW Internet Connectivity Contracts and Subsequent Renewals

1997												1998												1999			
Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb			
Decipher, Inc. 5Mb																											
										Harvey Lindsay Commercial Real Estate 128Kb														Renewal			
										Electric Supplies 128Kb														Renewal			
										Computer Instruments.com 128Kb														Renewal			
										Ameridata 128Kb														Renewal			
																								Wolcott, Rivers, Wheary, Basnight & Kelley, P.C. 128Kb			
										Atlantic Fleet Federal Credit Union 128Kb																	
										Catholic High Schools 256Kb																	
										Applied Technical Systems 1.544Mb														Renewal			
										SFA 256Kb																	
										Environmental Engineering 128Kb														Renewal			
S <sup>3</sup> 126Kb				Signed sometime during this time frame as a new customer																							
5,128	5,128	5,128	5,128	6,672	7,184	7,184	7,440	7,440	7,568	7,568	7,568	7,696	7,696	7,952	8,080	8,080	8,080	8,080	8,080	8,080	8,080	3,080	3,080	3,080			

## RENEWAL Internet Connectivity Contracts and Other Connectivity Users

1997												1998												1999	
Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb		
PostHouse 512Kb																									
ProSci Virginia Beach 10Mb																									
ProSci Newport News 10Mb																									
NATO 256Kb																									
Steel Mfg 256Kb																									
NusQuest Realty 128Kb																									
Centimark Group 544Mb																									
Harvard World 128Kb																									
Virginia Challenge 128Kb																									
Chinway 256Kb																									
Bachman 256Kb																									
ERW 10Mb																									
Global Gateway 10Mb																									
43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720	43,720

## WEB Hosting Contracts

1997												1998												1999	
Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb		
Bandwidth demand not provided, but did exist																									
Customers included: Alpha Music, Amphicar USA LTD., Besset Pontiac, Bessau New York, R.J. Brunell & Co., Inc., Casey Auto Group, Dave Irens & Assoc., Inc., INDI, Insight Therapeutics, Bob Varner																									
-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-		

## DIAL UP Connectivity Customers

1997												1998												1999	
Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	
250 modems ranging from speeds of 28.8 Kb to 56 Kb – Maximum bandwidth usage between 7.2Mb and 14.0Mb																									

## GRAND TOTAL - Without the use by Web hosting or other users not identified

1997												1998												1999	
Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	
56,048	56,048	56,048	56,048	57,592	58,104	58,104	58,360	58,360	58,488	58,488	58,488	58,616	58,616	58,616	59,000	59,000	59,000	59,000	59,000	59,000	59,000	59,000	54,000	54,000	
to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	to	
62,848	62,848	62,848	62,848	64,392	64,904	64,904	65,160	65,160	65,288	65,288	65,288	65,416	65,416	65,416	65,572	65,800	65,800	65,800	65,800	65,800	65,800	65,800	60,800	60,800	

47

05/17/00 WED 15:29 FAX 757 497 7267

WOLCOTT RIVERS

012



1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itriba.net

## iTRiBE Web Services Contract

<b>Organization:</b> Alpha Music		<b>Purchase Order Information:</b>	
<b>Name/Title:</b> Eddie Hancock		<b>P.O. #:</b>	
<b>Address:</b> 3234 Virginia Beach Blvd.		<b>Contact:</b>	
<b>City / State / Zip:</b> Virginia Beach, VA 23452		<b>Domain Name Requested:</b>	
<b>Phone:</b> 757.486.2001		<b>First:</b> www.alphamusicva.com	
<b>Fax:</b> 757.486.7027		<b>Second:</b>	
<b>Administrative Contact:</b>		<b>Third:</b>	
<b>Technical Contact:</b>		<b>Email:</b> <u>info</u> Eddie@alphamusicva.com	
<b>iTRiBE Contract:</b> Rodney Howell		<u>Sokes @</u>	

Please give us a brief description of your organization and how it is going to use the Internet:

Service	Price	Quantity	Total
Domain Name registration	100.00	50.00	[ ]
Online Promotion			[ ]
<b>Monthly Recurring Services</b>			
Primary DNS for Virtual Hosting			[ ]
Virtual Web Server	160.00	0	[ ]
Virtual FTP Server			[ ]
Primary DNS/Web/FTP Bundle			[ ]
Electronic Mailing List			[ ]
Virtual Pop Mail Server			[ ]
<b>Total:</b>	<b>\$160.00</b>	<b>\$50.00</b>	

100.00 x 12 = 1200.00 / mos

Storage	Price	Quantity	Total
0 - 500Mb	no charge	10,000	
501Mb - 1Gb	\$75	20,000	
1.01Gb - 2Gb	\$150	40,000	
2.01Gb - 2.5Gb	\$225	80,000	

First month service is \$75

<b>Service start date:</b> 05/14/97 <u>6/1/97</u>	
<b>Length of service:</b> [ ] 6 mos. [x] 1 Year [ ] 2 years [ ] 3 years [ ] 5 years	
<b>Payment Method:</b>	
[ ] Check / Money Order	[ ] If submitting a purchase order, enter the name of the person authorizing this service below:
[ ] MasterCard / Visa	
[ ] American Express	
[ ] Discover	
<b>Card number:</b>	<b>Exp. Date:</b>

ORIGINAL

Initial: \_\_\_\_\_  
iTRiBE Web Services Contract (Rev 1.0) Page 1/3  
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Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itribe.net

# iTRiBE Web Services Contract

<b>Basic Information</b>		<b>Date:</b> Monday, May 04, 1998
<b>Organization:</b>	<u>Amphistar USA Ltd</u>	<b>Purchase Order Information:</b>
<b>Name/Title:</b>	<u>Tom Kasmark</u>	<b>P.O. #:</b>
<b>Address</b>	<u>714 Stapleton Avenue</u>	<b>Contact:</b>
<b>City / State / Zip</b>	<u>Norfolk, Virginia 23504</u>	<b>Domain Name Requested:</b>
<b>Phone:</b>	<u>(757) 622 4964</u>	<b>First:</b>
<b>Fax:</b>	<u>(757) 622 4876</u>	<b>Second:</b>
<b>Administrative Contact:</b>	<u>Tommy Kasmark</u>	<b>Third:</b>
<b>Technical Contact:</b>		<b>Email:</b>
<b>iTRiBE Contract:</b>	<u>George Felts</u>	

Please give us a brief description of your organization and how it is going to use the Internet:

One Time Services:		One Time Fee	
Domain Name registration			[ ]
Online Promotion			[ ]
Monthly Recurring Services:	Monthly Fee**	Setup	
Primary DNS for Virtual Hosting	60.00	130.00	X includes modification to existing Website, (address change, password change, Add links, telephone numbers change.
Virtual Web Server	60.00	130.00	
Virtual FTP Server			
Primary DNS/Web/FTP Bundle			
Electronic Mailing List			

Initial: SC

iTRiBE Web Services Contract (Rev 1.0) Page 1/3  
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300

## Virtual Dealership Contract

iTRiBE Incorporated (iTRiBE, Inc.), a Virginia corporation, will provide web and/or inventory Internet technology services for the auto dealership(s) described herein as:

<b>Organization</b> Ashland Ford-Mercury, Inc. <b>Name</b> <u>Jim Jaletha</u> <b>Title</b> <u>CEO</u> <b>Address</b> <u>418 South Washington Highway</u>  <b>City / State / Zip</b> <u>Ashland / VA / 23005</u> <b>Phone</b> <u>(804) 798 - 4791</u> <b>Fax</b> <u>(804) 798 - 6311</u> <b>E-mail Address</b> _____  <b>Account Executive</b> <u>Christian S. Thornton</u> <b>Sales Manager</b> <u>Chuck Lewis</u>		<b>Domain Name(s) Requested [ ] / Transferred [ x ]:</b> <b>First:</b> <u>www.ashlandford.com</u> <b>Second:</b> _____  <b>System Type:</b> [ ] ADP [ ] EDS [ ] UCS [ ] Carman [X] Reynolds  <b>Inventory Update:</b> [x] Daily [ ] Weekly [ ] Monthly  <b>System Administrator:</b> <u>Judy Payne</u>
<p>The auto dealer agrees to pay the web site set-up fee of \$3,500.00, monthly site hosting and inventory processing and posting fee of \$450.00. Approved web site layout and specifications to be attached as a separate Addendum (A) to this agreement. Once this agreement is signed and received, the iTRiBE dealer is invoiced for full development fee and first month of hosting. iTRiBE will begin work on the web site once materials, content and approved site plan are received. Additional changes to the client's web site after initial approval of site is billed at \$65 per hour at a pre-negotiated rate for projects/changes estimated to be in excess of \$500.00. iTRiBE is not responsible for delays in completion caused by client's failure to deliver requested materials.</p>		
<b>Service start date:</b> <u>December 18, 1998</u>  <b>Term of service:</b> [ ] 6 mos. [ ] 12 Months [x] 24 Months [ ] 30 Months [ ] 36 Months		
<b>Payment method:</b> <input checked="" type="checkbox"/> Check / Money Order <input type="checkbox"/> Purchase Order	If submitting a purchase order, enter the name of the person authorizing this service below and the P.O. #:	

The undersigned agree to the fees and terms above.

Authorized Representative of Client and Date

Ashland Ford Mercury  
 Print Client Name

Jim Jaletha GM

iTRiBE Sales Representative and Date

12/18/98  
 iTRiBE Sales Manager and Date

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**HARNESSING THE POWER OF THE INTERNET FOR BUSINESS**

MAY 17 2000 15:37

757 497 7267

PAGE. 15

Dec 2 '98 17:00

11/11/98

## Work Order

ITRIBE Interactive Dealer Solutions

ITRIBE Incorporated (ITRIBE) a Virginia corporation, will provide web and/or inventory Internet technology services for the auto dealership(s) described herein as:

Company <u>Bassett Pontiac GMC</u>		Retains ITRIBE for production of a WEB SITE AND INVENTORY POSTING & HOSTING for the period of <u>24 months</u> to begin upon web site and completion of approximately 4 weeks from receipt of graphics and text for web site beginning January 15, 1999 to end January 14, 2001	
1) Dealer and Franchise(s): <u>Bassett Pontiac GMC</u>			
2) Address: <u>812 E McGuffard, Murcy, IN 47303</u>			
3) Company point of contact(s): <u>Steve Addington, Pam Boughman</u>			
MIS System Administrator: <u>Pam Boughman</u>		System Type: <u>ADP</u>	
Modem #: <u>(765) 289-4792</u>			
Log in: _____ Password: _____		Weekly or Daily Updates: <u>Daily</u>	
4) Franchise(s):	Number of:	Franchise(s):	Number of:
<u>Pontiac</u>	_____	_____	_____
<u>GMC</u>	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
5) Phone: <u>(765) 289-0201</u>	Fax: <u>(765) 287-2439</u>		
6) Web Development project description: <u>WEB SITE PACKAGE (SPECIFY) Premium Package See Attached Description</u>			
7) URL (Domain Name) Requested: 1st choice: <u>bassettpontiacgmc.com</u>			
2nd Choice: _____			

The auto dealer agrees to pay web site set-up fee of: \$3,250.00, monthly site hosting and inventory processing and posting fee of: \$450.00, and URL registration of: \$150.00 per URL requested (for 2 years). Approved web site layout and specifications to be attached as a separate Addendum (A) to this agreement. Once this agreement is signed and received ITRIBE dealer is invoiced for full development fee and first month of hosting. ITRIBE will begin work on the web site once materials, content and approved site plan are received. Additional changes to the client's web site after initial approval of site is billed at \$65 per hour at a pre-negotiated rate for projects/changes estimated to be in excess of \$500. ITRIBE is not responsible for delays in completion caused by client's failure to deliver requested materials.

The undersigned agree to the fees and terms above.

Authorized Representative of Client and Date 12/3/98

Mr. Steve Addington  
Print Client Name

ITRIBE Sales Representative and Date 12-2-98

Chuck Lewis  
ITRIBE Sales Manager and Date

ITRIBE, Inc.  
World Trade Center, Suite 370  
Norfolk, VA 23510  
Phone (757) 446-9080 Fax (757) 446-9081



1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9080  
<http://www.itribe.net>

# iTRiBE Web Development Contract

<b>Organization:</b> Bateaux New York <b>Name/Title:</b> Greg Fulcher <b>Address:</b> 501 Front Street  <b>City / State / Zip:</b> Norfolk, VA 23510 <b>Phone:</b> 757.627.2900 <b>Fax:</b> 757.640.9275		<b>Purchase Order Information:</b> <b>P.O. #:</b> _____ <b>Contact:</b> _____  <b>Domain Name Requested:</b> <b>First:</b> Bateauxny.com <b>Second:</b> _____ <b>Third:</b> _____  <b>Email:</b> _____
<b>Administrative Contact:</b> Greg Fulcher <b>Technical Contact:</b> _____ <b>iTRiBE Contact:</b> Terry McCauley		

Please give us a brief description of your organization and how it is going to use the Internet:

<b>Web development fees:</b> 4,335.00 <b>Application setup:</b> 75.00       <b>Total One Time Web Developments Fee:</b> 4,410.00			See Attachment for Cost Overview One Time Fee  Monthly Hosting Fee
--	--	--	---

<input type="checkbox"/> Check / Money Order <input type="checkbox"/> MasterCard / Visa <input type="checkbox"/> American Express <input type="checkbox"/> Discover	<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service below:   
Card number:	Exp. Date:

ORIGINAL

52

RVenner@Exis.net



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Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itribe.net

## iTRiBE Web Services Contract

2/4/98

<b>Basic Information:</b>		<b>Purchase Order Information:</b>	
Organization:		P.O. #:	
Name/Title:	<u>Bob Venner</u>	Contact:	
Address:	<u>16 Rudee Ave</u>		
City / State / Zip:	<u>Virginia Beach, Va. 23451</u>	Domain Name Requested:	
Phone:	<u>757-422-4780</u>	First:	<u>DISCOVERVA.COM</u>
Fax:		Second:	
		Third:	
Administrative Contact:		Email:	
Technical Contact:			
iTRiBE Contract:			

Please give us a brief description of your organization and how it is going to use the Internet:

One-Time Services	One-Time Fee	
Domain Name registration	<u>100*</u>	<input checked="" type="checkbox"/> Paid Direct to internic
Online Promotion		<input type="checkbox"/>

Monthly/Recurring Services	Monthly Fee	Setup Fee	
Primary DNS for Virtual Hosting			<input checked="" type="checkbox"/>
Virtual Web Server	<u>65</u>	<u>75</u>	<input checked="" type="checkbox"/>
Virtual FTP Server			<input type="checkbox"/>
Primary DNS/Web/FTP Bundle			<input type="checkbox"/>
Electronic Mailing List			<input type="checkbox"/>
Virtual Pop Mail Server			<input type="checkbox"/>
<b>Total:</b>	<u>30</u>		

Data delivered per month	Monthly Fee	Maximum number of e-mails per month
0 - 500Mb	<u>no charge</u>	10,000
501Mb - 1Gb	\$75	20,000
1.01Gb - 2Gb	\$150	40,000
2.01Gb - 3.5Gb	\$225	80,000

\*First month service is \$75

<b>Service Date and Length:</b>	
Service start date:	<u>2/6/98</u> month to month
Length of service:	<input type="checkbox"/> 6 mos. <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input checked="" type="checkbox"/> 3 years <input type="checkbox"/> 5 years
<b>Payment method:</b>	

Initials:

iTRiBE Web Services Contract 2.2.1.1. Page 1/3  
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ITRIBE

Fax: 8044469061

Feb 19 '97 11:36

P. 05/07



1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-8080 (ofc)  
(757) 446-8061 (fax)  
http://www.tribe.net

## Web Services Contract

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<b>Organization:</b> <u>R.J. Brunelli &amp; Co.</u>		<b>Purchase Order Information:</b>	
<b>Name/Title:</b> <u>Richard J. Brunelli, Pres.</u>		<b>P.O. #:</b> <u>Ron Deluca</u>	
<b>Address:</b> <u>400 Perrine Road</u>		<b>Contact:</b> _____	
<b>City / State / Zip:</b> <u>Old Bridge, NJ 08857</u>		<b>Domain Name Requested:</b>	
<b>Phone:</b> <u>908-935-0633</u>		<b>First:</b> <u>njretailrealty.com</u>	
<b>Fax:</b> <u>908-935-0529</u>		<b>Second:</b> _____	
<b>Administrative Contact:</b> <u>Sue Kilpatrick</u>		<b>Third:</b> _____	
<b>Technical Contact:</b> <u>Ron Deluca</u>		<b>Email:</b> <u>bristol@usa.net</u>	
<b>ITRIBE Contract:</b> <u>Sarah Fohl</u>			

Please give us a brief description of your organization and how it is going to use the Internet:

<b>Service start date:</b> <u>2/15/97</u>		<b>6 Month Special Pricing - Realty Resources</b>	
<b>Length of service:</b> <input type="checkbox"/> 1 Year <input type="checkbox"/> 2 years <input type="checkbox"/> 3 years <input type="checkbox"/> 5 years <input type="checkbox"/> Other			
<input type="checkbox"/> Check / Money Order		<input type="checkbox"/> Visa	
<input type="checkbox"/> MasterCard		<input type="checkbox"/> American Express	
<input type="checkbox"/> Discover		<input type="checkbox"/> If submitting a purchase order, enter the name of the person authorizing this service:	
<b>Card number:</b> _____		<b>Exp. Date:</b> _____	

<b>Domain Name registration</b>		<input type="checkbox"/>
<b>Online Promotion</b>		<input type="checkbox"/>
<b>Membership Pricing Service</b>		
<b>Primary DNS for Virtual Hosting</b>	waived	waived
<b>Virtual Web Server</b>		<input type="checkbox"/> This is a Realty Resources Special Hosting Agreement. Access fees below are waived for the six month agreement.
<b>UltraCare Extended Service</b>		<input type="checkbox"/>
<b>Virtual FTP Server</b>		<input type="checkbox"/>
<b>Primary DNS/Web/FTP Bundle</b>	\$25.00	\$50.00
<b>Electronic Mailing List</b>		<input checked="" type="checkbox"/>
<b>Virtual Mail Server</b>		<input type="checkbox"/>
<b>Virtual IRC room</b>		<input type="checkbox"/>
<b>Virtual Calendar (NetCall)</b>		<input type="checkbox"/>
<b>Total:</b>		- \$ 25.00 .. \$ 50.00

ORIGINAL

ITRIBE Web Services Contract (Rev 3.0) Page 1/3  
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# Work Order

## iTRiBE Interactive Dealer Solutions

iTRiBE Incorporated, (iTRiBE) a Virginia corporation, will provide web and/or inventory Internet technology services for the auto dealership(s) described herein as:

Company **CASEY AUTO GROUP** retains iTRiBE for production of a **WEB SITE AND INVENTORY POSTING & HOSTING** for the period of **24 months** to begin upon web site completion of approximately 8 weeks from receipt of graphics and text for web site beginning **Dec. 15, 1998** and to end on **Dec. 14, 2000**. — *See addendum.* ckp

1) Dealer and Franchise(s): BMW, Audi, Honda, Chevrolet, Mazda, Jeep, Toyota, GMC Truck, Oldsmobile, Pontiac, Subaru and Volkswagen.

2) Address: 812 Diligence Road, Newport News, VA, Sta 116 23606

3) Company point of contact(s): Cindy Phillips, Marketing Director.

MIS System Administrator: \_\_\_\_\_ System Type: Dial In/already set up.

Monthly total new and used cars: \_\_\_\_\_ Modem Number: \_\_\_\_\_

Log-in: \_\_\_\_\_ Password: \_\_\_\_\_ Weekly or Daily Updates: Daily

4) Franchise(s) Number of: Franchise(s) Number of:

\_\_\_\_\_

5) Phone: (757) 591-1038 FAX: (757) 591-1070

6) Web Development project description: WEB SITE PACKAGE (SPECIFY) Premium Package See Attached Description.

7) URL (Domain Name) Requested (order of preference): 1) caseyauto.com

The auto dealer agrees to pay web site set-up fee of \$ 3,750.00, monthly site hosting and inventory processing and posting fee of \$825.00 and URL registration of \$150.00 per URL requested (for 2 years, only necessary if unable to move URL from Tribune ownership). Approved web site layout and specifications to be attached as a separate Addendum to this agreement. Once this agreement is signed and received iTRiBE dealer is invoiced for full development fee and first month of hosting. iTRiBE will begin work on the web site once materials, content and approved site plan is received. Additional changes to the client's web site after initial approval of site billed at \$65 per hour or at a pre-negotiated rate for projects/changes estimated to be in excess of \$500. iTRiBE is not responsible for delays in completion caused by client's failure to deliver requested materials.

*Plus 20% Email Accounts*

iTRiBE agrees to the following:

1. Consulting on lead management and advertising
2. List Web site on at least 10 search engines
3. No rate increases if client agrees to renew 90 days prior to contract expiration
4. Clients has the right to a single URL and or separate URL's for each store
5. iTRiBE agrees to do 2 hours of non-programming changes a month (graphics and text must be provided).

*See addendum*

The undersigned agree to the fees and terms above.

Authorized Representative of Client and Date

Mr. Art Casey, President Casey Auto Group  
Print Client Name

iTRiBE President and Date

Jayme D. Vincenzi  
iTRiBE Automotive Sales Manager and Date

*12/2/98*

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1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-9060  
http://www.itribe.net

# iTRiBE Web Services Contract

<b>Basic Information</b>		<b>Date:</b> Wednesday, April 01, 1998
<b>Organization:</b>	United States Navy	<b>Purchase Order Information:</b>
<b>Name/Title:</b>	Chaplain Service	
<b>Address:</b>	9591 Maryland Avenue	<b>P.O. #:</b>
<b>City / State / Zip:</b>	Norfolk, Virginia 23511-2993	<b>Contact:</b>
<b>Phone:</b>	(757) 444-7665	<b>Domain Name Requested:</b>
<b>Fax:</b>	(757) 445-1006	
<b>Administrative Contact:</b>		
<b>Technical Contact:</b>	Keith Adams	<b>First:</b>
<b>iTRiBE Contract:</b>	George Felts	<b>Second:</b>
		<b>Third:</b>
		<b>Email:</b>

Please give us a brief description of your organization and how it is going to use the Internet:

One Time Services:		One Time Fee	
Domain Name registration	100		[ ]
Online Promotion			[ ]

Monthly Recurring Services:	Monthly Fee*	Setup	
Primary DNS for Virtual Hosting			[ ]
Virtual Web Server	1200	500	[ ] Server rental including:
Virtual FTP Server			[ ] 4 GIG Hard Drive
Primary DNS/Web/FTP Bundle			[ ] 64 MEG RAM
Electronic Mailing List			[ ] Operating System
Virtual Pop Mail Server			[ ] Unlimited Email service up to 8times Per month
<b>Total:</b>	<b>1200</b>	<b>500</b>	

Data delivered per month	Monthly Fee*	Approximate number of accesses per day
0 - 500Mb	no charge	10,000
501Mb - 1Gb	\$75	20,000
1.01Gb - 2Gb	\$150	40,000
2.01Gb - 3.5Gb	\$225	80,000

\*First month service is \$75

<b>Service Date and Length:</b>	
<b>Service start date:</b>	April 1, 1998
<b>Length of service:</b>	[ ] 6 mos. [X] 1 Year [ ] 2 years [ ] 3 years [ ] 5 years
<b>Payment method:</b>	

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Initial: AK  
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Received Jul-26-98 16:17  
iTRiBE

from 8044469061 - DIA  
Fax: 8044469061

Jul 6 '98 15:19 P.02/05

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370 World Trade Center  
Norfolk, Virginia 23510  
(757) 445-8050  
http://www.itrbe.net

## iTRiBE Web Services Contract

<b>Organization:</b> Dave Evans and Associates <b>Name/Title:</b> John Miller <b>Address:</b> 223 E. City Hall Ave.  <b>City / State / Zip:</b> Norfolk, Virginia 23510 <b>Phone:</b> 757.314.3100 <b>Fax:</b> 314.7101		<b>Purchase Order Information:</b> <b>P.O. #:</b> <b>Contact:</b>  <b>Domain Name Requested:</b> <b>First:</b> <b>Second:</b> <b>Third:</b>  <b>Email:</b>	
<b>Administrative Contact:</b> <b>Technical Contact:</b> <b>iTRiBE Contact:</b> Rodney Howell			

Please give us a brief description of your organization and how it is going to use the Internet:

Service	Price	Quantity	Total
Domain Name registration		<input type="checkbox"/>	
Online Promotion		<input type="checkbox"/>	
<b>Virtual Hosting Services</b>			
Primary DNS for Virtual Hosting		<input type="checkbox"/>	
Virtual Web Server		<input type="checkbox"/>	
Virtual FTP Server		<input type="checkbox"/>	
Primary DNS/Web/FTP Bundle		<input type="checkbox"/>	
Electronic Mailing List		<input type="checkbox"/>	
Virtual Pop Mail Server	60.00	100.00	
<b>Total:</b>	<b>360.00</b>	<b>\$100.00</b>	

Storage	Price	Quantity	Total
0 - 500Mb	no charge	10,000	
501Mb - 1Gb	\$75	20,000	
1.01Gb - 2Gb	\$150	40,000	
2.01Gb - 3.5Gb	\$225	80,000	

^ First month service is \$75

Service start date: \_\_\_\_\_

Length of service: ☐ 12 mos. ☒ 1 Year ☐ 2 years ☐ 3 years ☐ 5 years

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Norfolk, Virginia 23510  
(757) 446-9060  
<http://www.itribe.net>

# iTRiBE Web Services Contract

<b>Basic Information</b>		<b>Date:</b> Wednesday, August 12, 1998
<b>Organization:</b>	Electrical Supplies	<b>Purchase Order Information:</b>
<b>Name/Title:</b>	Phil Hagan	
<b>Address</b>	3796 Progress Road	<b>P.O. #:</b>
		<b>Contact:</b>
<b>City / State / Zip</b>	Norfolk, VA 23502	<b>Domain Name Requested:</b>
<b>Phone:</b>	757.855.3031	
<b>Fax:</b>	757.857.5607	
<b>Administrative Contact:</b>		<b>First:</b>
<b>Technical Contact:</b>		<b>Second:</b>
<b>iTRiBE Contract:</b>	Rodney Howell	<b>Third:</b>
		<b>Email:</b>

Please give us a brief description of your organization and how it is going to use the Internet:

<b>One Time Services:</b>		<b>One Time Fee</b>	
Domain Name registration			[ ]
Online Promotion			[ ]
<b>Monthly Recurring Services:</b>	<b>Monthly Fee*</b>	<b>Setup</b>	
Primary DNS for Virtual Hosting			[ ]
Virtual Web Server	60.00	75.00	[x]
Virtual FTP Server			[ ]
2 dial-up ISDN accounts @ 24.95			[ ]
Dial-up Account			[ ]
6 e-mail accounts @ \$2.00			[ ]
<b>Total:</b>	60.00	75.00	

<b>Service Date and Length:</b>	
<b>Service start date:</b> _____	
<b>Length of service:</b> [x] 1 Year [ ] 2 years [ ] 3 years [ ] 5 years	
<b>Payment method:</b>	
[ ] Check / Money Order	[ ] If submitting a purchase order, enter the name of the person authorizing this service below:
[ ] MasterCard / Visa	
[ ] American Express	
[ ] Discover	
<b>Card number:</b> _____	<b>Exp. Date:</b> _____

Initial: \_\_\_\_\_

AUG-28-1997 18:56

Aug 28 '97 11:53

P.02/05

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1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 448-9080  
<http://www.itrbe.net>

# ITRiBE Web Services Contract

<b>Organization:</b> Ibox International <b>Name/Title:</b> Pope Woodward <b>Address:</b> _____ <b>City / State / Zip:</b> _____ <b>Phone:</b> 757.422.6800 <b>Fax:</b> 757.422.8480		<b>Purchase Order Information:</b> <b>P.O. #:</b> _____ <b>Contact:</b> _____ <b>Domain Name Requested:</b> <b>First:</b> <a href="http://www.ibox-intl.com">www.ibox-intl.com</a> <b>Second:</b> _____ <b>Thrd:</b> _____ <b>Email:</b> _____	
<b>Administrative Contact:</b> Pope Woodward <b>Technical Contact:</b> _____ <b>ITRiBE Contract:</b> Terry McCauley			

Please give us a brief description of your organization and how it is going to use the Internet

Domain Name registration				
	50.00		[ ]	
			[ ]	
Design & hosting of custom website				
100.00	8,000.00		[ ]	
			[ ]	
			[ ]	
			[ ]	
			[ ]	
			[ ]	
			[ ]	
Total:		100.00 8,050.00		

Size Del. / month	Monthly Fee	App & # of access per day
0 - 500Mb	no charge	10,000
501Mb - 1Gb	\$75	20,000
1.01Gb - 2Gb	\$150	40,000
2.01Gb - 3.5Gb	\$225	80,000
First month service is 375		

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Norfolk, Virginia 23510  
(757) 448-8080  
<http://www.itrbe.net>

*Credit Series 2000*

## iTRiBE Web Services Contract

<b>Organization:</b> <u>INDI</u> <b>Name/Title:</b> <u>President</u> <b>Address:</b> <u>317 Burch Wood Park Dr. Ste 100</u>  <b>City / State / Zip:</b> <u>Virginia Beach, VA 23452</u> <b>Phone:</b> <u>340-7559</u> <b>Fax:</b> <u>340-7877</u>		<b>Purchase Order Information:</b> <b>P.O. #:</b> <u>021998fp</u> <b>Contact:</b> <u>Frank Palmieri</u>  <b>Domain Name Requested:</b> <b>First:</b> <u>INDIS - used for</u> <b>Second:</b> <u>INDI.NET - used for</u> <b>Third:</b> <u>INDIS.NET</u>  <b>Email:</b> _____	
<b>Administrative Contact:</b> <u>Frank Palmieri indi@series2000.com</u> <b>Technical Contact:</b> <u>Elgin Groen</u> <b>iTRiBE Contract:</b> <u>Pete Cousin</u>			

Please give us a brief description of your organization and how it is going to use the Internet:

Domain Name registration	Chgd by Internet	\$100	[ ]
Online Promotion			[ ]
Primary DNS for Virtual Hosting	\$60	\$75	[ ]
Virtual Web Server			[ ]
Virtual FTP Server			[ ]
Primary DNS/Web/FTP Bundle			[ ]
Electronic Mailing List			[ ]
Virtual Pop Mail Server			[ ]
<b>Total:</b>	<b>\$60</b>	<b>\$75</b>	<b>Total Due: \$155.00</b>

0 - 500Mb	no charge	10,000
501Mb - 1Gb	\$75	20,000
1.01Gb - 2Gb	\$150	40,000
2.01Gb - 3.5Gb	\$225	80,000

\*First month service is \$75

**Service start date:** \_\_\_\_\_

**Length of service:** [ ] 6 mos. [X] 1 Year [ ] 2 years [ ] 3 years [ ] 5 years

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1700 World Trade Center  
Norfolk, Virginia 23510  
(757) 446-8080  
http://www.tribe.net

# iTRiBE Web Services Contract

<b>Organization:</b> <u>Insight Therapies</u>		<b>Purchase Order Information:</b>	
<b>Name/Title:</b> <u>Ed Davidson</u>		<b>P.O. #:</b> <u>052197ED</u>	
<b>Address:</b> <u>129 W. Virginia Beach Blvd, Suite 105</u>		<b>Contact:</b> <u>Ed Davidson</u>	
<b>City / State / Zip:</b> <u>Norfolk VA 23510</u>		<b>Domain Name Requested:</b>	
<b>Phone:</b> <u>757-627-2382</u>		<b>First:</b> <u>inther.com</u>	
<b>Fax:</b> <u>757-627-2382</u>		<b>Second:</b> <u>therapy.com</u>	
		<b>Third:</b> <u>inthere.com</u>	
<b>Administrative Contact:</b> _____		<b>Email:</b> _____	
<b>Technical Contact:</b> _____			
<b>iTRiBE Contract:</b> _____			

Please give us a brief description of your organization and how it is going to use the Internet:

Domain Name registration	\$50.00	<input checked="" type="checkbox"/>
Online Promotion		<input type="checkbox"/>
Primary DNS for Virtual Hosting		<input type="checkbox"/>
Virtual Web Server		<input type="checkbox"/>
Virtual FTP Server	10	<input checked="" type="checkbox"/>
Primary DNS/Web/FTP Bundle		<input type="checkbox"/>
Electronic Mailing List		<input type="checkbox"/>
Virtual Pop Mail Server		<input type="checkbox"/>
<b>Total:</b>	<b>\$0.00</b>	

0 - 500Mb	no charge	10,000
501Mb - 1Gb	\$75	20,000
1.01Gb - 2Gb	\$150	40,000
2.01Gb - 3.5Gb	\$225	80,000

\* First month service is \$75

**Service start date:** 05/14/97

**Length of service:** ☐ 6 mos. ☐ 1 Year ☒ 2 years ☐ 3 years ☐ 5 years

☐ Check / Money Order ☒ If submitting a purchase order, enter the name of the person authorizing this service below:  
☐ MasterCard / Visa

ORIGINAL

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Re: iTRiBE, Inc. v. Decipher, Inc. -- Law No.: L99-1311

Gentlemen:

I have concluded that there is no need for further briefing, argument or transcripts of the testimony.

I have reviewed my trial notes, the applicable case law, considered all of the evidence, including parole evidence, which each party urged me to consider in order to construe the meaning of the contract between the parties. That evidence which was offered by the defendant/counterclaimant which I accepted as an offer of proof to vouch the record for the defendant, has been, after further consideration, accepted in evidence as parole evidence.

Following arguments of counsel, I have a detailed recollection of what I consider to be the operative facts including documents and diagrams.

I have listened carefully to the arguments of exceptionally capable and well prepared attorneys.

Considering all of the above I have concluded, as the finder of facts, that iTRiBE has proven by a preponderance of the evidence that the contract was negotiated by technologically proficient specialists who understood precisely what was asked for and agreed to by the parties; that if the contract had any facial ambiguity it was understood by the representative of each of the parties in the context of the requirements of both Decipher and iTRiBE, and then signed by authorized representatives of each party.

I find as a fact that the service and maintenance provided by iTRiBE to Decipher with respect to all matters "downstream" was furnished within the standard "7 x 24," or within a reasonable time consistent with the nature of the problem and their prior course of dealing.

I further find as a fact Decipher has failed to prove that they did not receive the 5 Mb that they bargained for. One of Decipher's witnesses conceded that there was software available at a cost of approximately \$500.00 which Decipher could have installed to constantly monitor the drawdowns that they were receiving at any given time or in the alternative they could have contracted with Bell Atlantic to hire engineers and metering equipment for not more than \$2,000.00 to accomplish the same purpose. In addition, if Decipher had raised the issue before unilaterally terminating the contract, then iTRiBE witnesses testified they would have run the

Am

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tests themselves even if they had to shut down service for all customers for not more than 30 minutes, after notifying all of their customers.

I find as a fact that the testimony of Mr. Eddleman, the Executive Vice President, was seriously impeached by his prior deposition testimony.

However, in response to a question by the Court:

"Did you ever in your wildest dreams think you would require 45 Mb?"

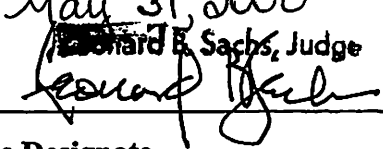
He responded immediately "No."

Mrs. Eddleman, in response to an inquiry by the Court, stated that she (they) had never put in writing any complaint about service or maintenance until they wrote the letter (π-4) telling iTRiBE that they were terminating their service and signing up with MCI, a tier one ISP, which in internal e-mail Mr. Eddleman said would be prestigious and influential with "Lucas" and presumably others from whom they have a license for the games which are the core of their business.

For all of the foregoing reasons I hold that plaintiff has proven its case by a preponderance of the evidence; the defendant's evidence fails to defeat the plaintiff's claim for breach of contract; and that the evidence offered by Decipher in support of their Counterclaim fails to support their position.

In summary, as Mr. Dorans argued, all of the defendant's evidence was hypothetical evidence attempting to ward off an otherwise certain judgment against them for damages.

WHEREFORE, it is Adjudged and Ordered that the defendant Decipher has breached their contract with iTRiBE, and that damages will be calculated and awarded according to the terms of the contract, together with interest from the date of judgment, to all of which the Court notes the objection and exception of the defendant, Decipher.

May 31, 2000  
Richard B. Sachs, Judge  
  
\_\_\_\_\_  
Judge Designate

Leonard B. Sachs, Judge

546 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

iTRiBE, Inc.

Plaintiff

v.

At Law No.: L99-1311

DECIPHER, INC.

Defendant

### JUDGMENT ORDER

This cause came to be heard by the Court, the parties having waived a trial by jury, and accordingly the Court heard the evidence *ore tenus*, on May 23 and May 24 and heard the argument of counsel on May 25 and reviewed the post trial memoranda from the parties and after due deliberation, the Court doth

ORDER, ADJUDGE and DECREE that the plaintiff, iTRiBE, shall recover on its claim against Decipher the principal sum of \$60,680.00 and court costs in the amount of \$208.00. It is further

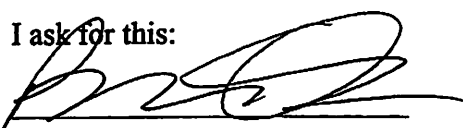
ORDERED, ADJUDGED AND DECREED that as to claim of Decipher on its counterclaim, the Court finds in favor of iTRiBE and said counterclaim is dismissed.

It is Further Ordered that Decipher receive a credit against this judgment in the amount of \$7,500 as a sanction for the repeated failure of iTRiBE to comply with the rules of discovery; for the same reason, the Court denies the request of the plaintiff for attorney's fees and interest without making a finding as to their contractual right to recover the same. To all the above findings, the Court notes the objection of Decipher, and further notes the objection of iTRiBE to the denial of its request for attorney's fees and prejudgment interest and the award of sanctions.

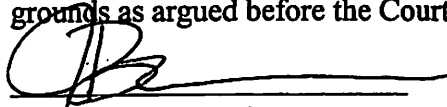
ENTERED:

Leonard B. Sachs, Judge

I ask for this:

  
Barry Dorans, Esquire  
Counsel for the Plaintiff

Seen and objected to on the  
grounds as argued before the Court

cor   
John Farmer, Esquire  
Counsel for the Defendant



**I. Assignments of Error**

- A. The Circuit Court erred by holding that Decipher, Inc. (“Decipher,” the defendant and counterclaim plaintiff) conceded that an undisputed breach of contract by iTRiBE, Inc. (“iTRiBE,” the plaintiff and counterclaim defendant) was immaterial. Decipher made no such concession; the Circuit Court patently misunderstood an answer to a single question. iTRiBE’s breach of contract was material.
- B. The Circuit Court erred as a matter of law by holding that Decipher breached its contract with iTRiBE for Internet connectivity by not performing specific tests on its and iTRiBE’s computer hardware prior to terminating its contract with iTRiBE. No such duty to test existed.
- C. The Circuit Court erred as a matter of law in admitting hearsay evidence of scientific tests performed by others who did not testify at trial. No hearsay exception existed to authorize admission of them. Without these tests, the Circuit Court’s judgment for iTRiBE and against Decipher on each party’s breach of contract claim was clearly erroneous.