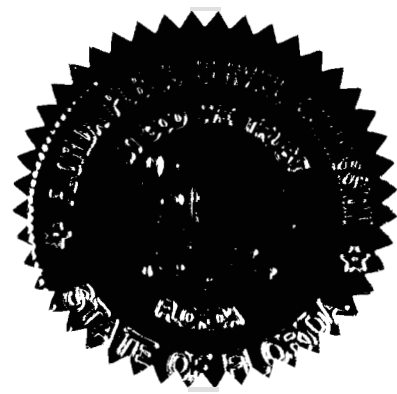


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030851-TP

In the Matter of

IMPLEMENTATION OF REQUIREMENTS  
ARISING FROM FEDERAL COMMUNICATIONS  
COMMISSION'S TRIENNIAL UNE REVIEW:  
LOCAL CIRCUIT SWITCHING FOR MASS  
MARKET CUSTOMERS.



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PROCEEDINGS:                   AGENDA CONFERENCE  
ITEM NO. 5

BEFORE:                         CHAIRMAN BRAULIO L. BAEZ  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER LILA A. JABER  
COMMISSIONER RUDOLPH "RUDY" BRADLEY  
COMMISSIONER CHARLES M. DAVIDSON

DATE:                            Tuesday, February 3, 2004

TIME:                            Commenced at 9:40 a.m.  
Concluded at 11:45 a.m.

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

DOCUMENT PREPARED BY  
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FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 SENATOR NANCY ARGENZIANO

3 SENATOR MIKE FASANO

4 SENATOR ANNA COWIN

5 NANCY WHITE, ESQUIRE, representing BellSouth  
6 Telecommunications, Inc.

7 KIMBERLY CASWELL, ESQUIRE, representing Verizon  
8 Florida, Inc.

9 JACK SHREVE, ESQUIRE, representing the Office of the  
10 Attorney General.

11 HAROLD McLEAN, representing the Office of Public  
12 Counsel.

13 MICHAEL TWOMEY, representing AARP.

14 JEREMY SUSAC, ESQUIRE, representing the Commission  
15 Staff.

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

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CHAIRMAN BAEZ: We are now on Item 5.

COMMISSIONER JABER: Mr. Chairman, just to be clear, I have been participating by phone. On all of those items that you approved, it was with my support.

CHAIRMAN BAEZ: I'm sorry, Commissioner Jaber.

COMMISSIONER JABER: It's no problem.

CHAIRMAN BAEZ: Yes, you are. And let the record reflect so.

COMMISSIONER JABER: Thank you.

MR. SUSAC: Commissioner, Item 5 is staff's recommendation to deny AARP's motion for reconsideration. Staff is prepared to answer any questions. All parties are present ready to speak. It should be noted at the outset that staff recommends that the Commission take up the motion for extension of time filed by BellSouth within the context of addressing Item 5.

CHAIRMAN BAEZ: And, Mr. Susac, how do you propose that we address -- should we address the motion for extension of time first, take it up in order?

MR. SUSAC: Yes, Chairman.

CHAIRMAN BAEZ: Okay. Can you introduce this motion for us, Mr. Susac?

MR. SUSAC: Essentially, BellSouth filed a motion for

1 an extension of time. The original motion was filed  
2 electronically on January 16th. However, the motion was  
3 never -- showed up on CMS or in records. However, three out of  
4 the four items on that e-mail distributed did show up on CMS.  
5 All parties were on the e-mail distribution, and most  
6 importantly, AARP was on the distribution list. Staff feels  
7 this is a harmless error due to the fact that AARP could not  
8 respond to the motion and staff's recommendation would not  
9 change if the motion was not granted by yourselves.

10 CHAIRMAN BAEZ: Do the parties wish to address the  
11 Commission on the motion? Mr. Twomey does, so I guess Ms.  
12 White will, too.

13 MS. WHITE: That's fine.

14 CHAIRMAN BAEZ: Okay. Commissioners, what is your  
15 pleasure, take oral argument on the motion? I would suggest  
16 it, I guess.

17 COMMISSIONER DEASON: I have no objection to doing  
18 so.

19 CHAIRMAN BAEZ: All right. Ms. White, this is  
20 probably going to be a long item, so if we can keep this motion  
21 to a minimum.

22 MS. WHITE: Yes, sir. As the staff said, we served  
23 all the parties electronically with our response to the AARP's  
24 motion for reconsideration. Somehow it did not make it to the  
25 Commission. I'm not -- I just don't understand how. We

1 haven't been able to track that down. Everything else we filed  
2 that day, you know, personally filed with the Commission made  
3 it there and made it on the website. When we became aware that  
4 this had not made it, we wanted to refile it. Did a motion for  
5 extension. We asked Mr. Twomey if he had any objection, and  
6 after we filed the motion he said he did have an objection. I  
7 don't believe any irreparable harm has been done, and we would  
8 ask that you accept our motion and grant it.

9 CHAIRMAN BAEZ: Mr. Twomey.

10 MR. TWOMEY: Yes, sir, Mr. Chairman and  
11 Commissioners. AARP takes the position that their motion for  
12 reconsideration is essentially unopposed. The company has not  
13 been at all shy, nor have any of the ILECs been shy in  
14 suggesting that AARP has not been specific enough in their  
15 pleadings to allege a substantial interest and proper standing  
16 in this case, and yet they failed to file a motion --

17 COMMISSIONER DEASON: I'm sorry, Mr. Twomey, I  
18 thought right now we were just on concerning the extension.

19 MR. TWOMEY: Yes, sir.

20 COMMISSIONER DEASON: Okay. You are addressing just  
21 the extension, not your standing?

22 MR. TWOMEY: Right.

23 COMMISSIONER DEASON: Okay. I'm sorry.

24 MR. TWOMEY: I'm just saying they have criticized  
25 AARP for lack of specificity, failure to plead properly, and so

1 forth, and yet they fail completely to file a document. I  
2 don't care about the rest of the e-mail business, and service  
3 copies, and that kind of thing. They had an obligation to file  
4 it with the clerk by a time certain. They failed to do that.

5 Now, AARP thinks you ought to hold their feet to the  
6 fire on this and deny it. They didn't get it in. They had  
7 seven days, I think it was, after the motion by AARP to file  
8 and they failed to do it.

9 CHAIRMAN BAEZ: Commissioners, questions?

10 COMMISSIONER DEASON: I have a question for Mr.  
11 Twomey. Do you disagree with staff's reasoning and position  
12 that there has been no harm, there has been no prejudice for  
13 anyone if we were to grant this extension?

14 MR. TWOMEY: Yes, sir, I do. They failed to  
15 accomplish a filing requirement. If you go to court, you  
16 don't -- you have got a time certain to do something by, you  
17 are required to do it. If you rule against them, they don't  
18 have their filing, we are unopposed. That, in my view, is a  
19 detriment to us.

20 COMMISSIONER DEASON: Do you agree that you could not  
21 have responded? Nevermind.

22 CHAIRMAN BAEZ: Ms. White, I saw you loading up to  
23 respond.

24 MS. WHITE: Yes, I'm sorry to interrupt. Even if you  
25 deny the motion for extension, we have the absolute right to

1 argue at this agenda against Mr. Twomey's motion for  
2 reconsideration. There hasn't been a hearing on this.  
3 Therefore, the parties are allowed to discuss and argue this at  
4 agenda. So, whether -- even if you deny the motion, we are  
5 still going to be allowed to argue. So he is just completely  
6 wrong.

7 COMMISSIONER JABER: Mr. Chairman, if I may, I can  
8 throw out a motion to move this along.

9 CHAIRMAN BAEZ: Go ahead, Commissioner Jaber.

10 COMMISSIONER JABER: For just pure common sense  
11 logistical reasons, the motion I would throw out is to go ahead  
12 and grant BellSouth's motion for extension of time. I'm  
13 interested in getting right to the substance of this item, and  
14 I am also comforted by the fact that the response was served on  
15 all the parties. That is not to say that BellSouth shouldn't  
16 be admonished for, you know, knowing, and checking up, and  
17 following up on whether their pleadings got filed or not. But  
18 somehow I think the situation is mitigated by the fact that the  
19 response was served on all the parties, so I'm ready to move  
20 forward.

21 I would move that BellSouth's motion be granted.

22 CHAIRMAN BAEZ: Thank you. Commissioner Jaber.  
23 There is a motion. Is there a second?

24 COMMISSIONER DEASON: Second.

25 CHAIRMAN BAEZ: A motion and a second. All those in

1 favor of approval of the motion for extension of time say aye.

2 COMMISSIONER JABER: Aye.

3 COMMISSIONER DEASON: Aye.

4 CHAIRMAN BAEZ: Aye. Show the motion approved. And  
5 now we move on to the body of the rec, correct? We are on  
6 Issue 1 officially.

7 MR. SUSAC: Issue 1 is should AARP's motion for  
8 reconsideration be granted. Staff's recommendation is no, AARP  
9 has not identified a point of fact or a point of law which was  
10 overlooked by the prehearing officer, or he failed to consider  
11 in rendering a decision. Therefore, the motion for  
12 reconsideration should be denied.

13 CHAIRMAN BAEZ: All right. Mr. Twomey, you are going  
14 to lead off on the motion.

15 MR. TWOMEY: Mr. Chairman, first of all, I want to  
16 thank you for granting time certain for the elected officials  
17 who have agreed to appear on behalf of AARP's support on this  
18 position. I would like to say just briefly as an introduction  
19 a few comments, and then allow the Senators to go next because  
20 they all need to return to the committee meetings, if that is  
21 okay.

22 A brief overview, Mr. Chairman, Commissioners, is  
23 that AARP would ask you to look at the reality of what is  
24 happening in this docket, what's going to happen at the  
25 Commission. What you have been asked to do by the FCC and what



1 you are charged with. The reality is that you are going to  
2 investigate whether competitive companies will be impaired  
3 without the availability or having access to UNE-P services  
4 from the incumbent LECs. If you find that they are so  
5 impaired, you will report that to the FCC, and the likelihood  
6 is there will be continued availability of UNE-Ps to the  
7 competitive companies. If you find no impairment in certain  
8 geographic areas, then the likelihood is that you will  
9 recommend that there be no continuation of the UNE-Ps.

10 The real world situation is that in your rather  
11 excellent 2003 competitive report to the Florida Legislature is  
12 that you say, again and again, that competition in the state to  
13 the extent that it has existed and to the extent that it has  
14 expanded over the last three years or more is due almost  
15 entirely to the availability of UNE-Ps to competitive  
16 companies.

17 Therefore, in this case, you will decide whether you  
18 will report to the FCC that there should be a continuation of  
19 an element that you found in your report, that you discussed  
20 with the Legislature, that you discussed in the rate case, that  
21 is essential to the possibilities of expanding competition in  
22 the local markets in the state.

23 The Legislature, the United States Congress, the  
24 telephone companies, this Commission in approving the rate  
25 increases in December of last year have repeatedly found that

1 competition is primarily in the interest of consumers. Not the  
2 competitive companies, but in the interest of consumers.  
3 Choice, potentially lower prices, and that kind of thing on a  
4 going-forward basis.

5 To suggest that 2.6 million consumers represented by  
6 the AARP don't have a seat at the table and a substantial  
7 interest in the outcome of what you are going to decide in the  
8 triennial review docket is just wrong.

9 Lastly, in terms of the pleading, AARP thinks this  
10 pleading is more than adequate to describe that concern about  
11 the continuation of UNE-Ps for competition and the impact it  
12 will have on them. That is particularly true if you take a  
13 look at the pleadings, rather austere pleadings that were  
14 provided by all the telecommunications companies. Some of them  
15 consisting of only a bare sentence, all of whom, I believe,  
16 were granted party status in this case. There shouldn't be a  
17 double standard in order to keep consumers out of this case in  
18 especially such a large body. And I would defer now to the  
19 Senators.

20 CHAIRMAN BAEZ: We have got three distinguished  
21 guests. I guess Senator Argenziano won the toss.

22 SENATOR ARGENZIANO: Are we on?

23 CHAIRMAN BAEZ: Welcome, Senator.

24 SENATOR ARGENZIANO: Thank you. It is good to be  
25 here this morning, even though Natural Resources has begun and

1 I need to get back there. You know, I come to you, I guess, as  
2 a legislator with a very large district and I hear from a lot  
3 of my constituents. And recently, I guess in the past several  
4 months, I have been in the statutes quite frequently regarding  
5 the PSC. And I keep going -- and every time I go back in what  
6 I see is that the PSC is an employee of the Legislature. So  
7 what I am here to tell you today, as one of the members of the  
8 Legislature, that I would hope that you do not create that  
9 double standard that Mr. Twomey was talking about.

10           You know, the consumer out there -- and I'm sure you  
11 hear it and you have heard it on your hearings around the state  
12 just as I have, and I hear it on a daily basis, is that they  
13 feel that the Legislature ramrodded legislation down their  
14 throats. They feel the PSC approved it. And I'm going to tell  
15 you as I hear it, because that is just how I am. And now they  
16 are being told that because, you know, the AARP can't have a  
17 seat at the table, they do not have a right to be here to hear  
18 about this competition that we all heard of, and everything we  
19 heard of. The magic word was the consumer, the consumer, the  
20 consumer, and it was competition, and it was competition, and  
21 how it was going to benefit the consumer. And now you are  
22 telling the consumer -- or you may be telling the consumer that  
23 they don't have a right at that table. And I'm really appalled  
24 at that thought, to be honest with you.

25           And this is not to go into the pros and cons of the

1 bill, this is saying how can you not let the consumer in on  
2 this conversation. That is all we heard. And if you talk  
3 about -- if you go back into the Legislature and you look at  
4 the transcripts, we were told that competition was a good thing  
5 for the consumer. And now if you do not allow the AARP into  
6 this, I think you are going to have an uproar in this state  
7 like you have never seen before, and I think it is rightfully  
8 so.

9 I think they have a right at the seat of the table.  
10 And, I mean, just go back into the whole heat of the debate, it  
11 really focused around competition. And now what I'm  
12 understanding when I am looking on the federal level and the  
13 state level, is that some of these companies who said we want  
14 competition, we want you in there, you know, we may have a  
15 monopoly here, we want you, which kind of, I thought, was  
16 strange to begin with, and I think a lot of consumers couldn't  
17 understand that, but now some of them are fighting  
18 competition. So we are sending a message to the people of the  
19 State of Florida that the Legislature, who employs the PSC, now  
20 won't even let the consumer sit at the table.

21 I think that's wrong, and I'm asking you today to  
22 really consider having the AARP represent the consumers. I  
23 think it is the right thing to do here, and I want you to  
24 consider that. I heard this thing about it is between  
25 businesses and competition. That doesn't wash with me, and I

1 don't think it washes with the consumers. It is still about  
2 competition which is supposed to directly benefit the consumer.  
3 So while you may have businesses talking about competition here  
4 amongst themselves, let's not exclude the consumer. And I'm  
5 hoping that is the thing that you do and you allow the AARP  
6 into this discussion.

7           And I won't elaborate. I'm not going to talk about  
8 what I think about the bill or anything else, I am just leaving  
9 you with this: The consumer has a right at the seat of this  
10 table. Otherwise the whole thing has been nothing but a sham.  
11 Thank you.

12           CHAIRMAN BAEZ: Thank you, Senator. Senator Fasano,  
13 welcome.

14           SENATOR FASANO: Good morning. And I guess for the  
15 good news, I'm not here regarding Aloha. (Laughter.)

16           CHAIRMAN BAEZ: That is good news.

17           SENATOR FASANO: Mr. Chairman, thank you for the  
18 opportunity of speaking before you this morning, Commissioners.  
19 And as my colleagues was behind me, I am here to urge you to  
20 reconsider the decision to keep AARP and its 3.4 million  
21 members out of this important case.

22           Of course, which I think they clearly have stated a  
23 sufficient substantial interest to warrant their participation  
24 along with the many telephone companies that are being allowed  
25 in this case. As you know, I opposed the local telephone rate

1 increases, I opposed the legislation that was approved by the  
2 legislature and then eventually approved by the Commission  
3 here, which we all know is the largest rate increase in the  
4 state's history. The largest.

5 A claimed result of those increases is that they  
6 would give -- a claimed result of those increases is that they  
7 would give potential competitors a greater economic incentive  
8 to compete in their more local telephone markets, and that such  
9 competition would be for the clear benefit of residential  
10 consumers. And, of course, that was the argument. That was  
11 the argument.

12 I understand that this case asked whether competitive  
13 telephone companies will be impaired in providing economic  
14 local service if they do not have continued access to leasing  
15 those portions of the incumbent company facilities known as  
16 UPs. What is it, UNE-Ps? UNE-Ps. I learned a new word this  
17 week.

18 Of course, that is if you tell the FCC that a  
19 geographic area will not be impaired by the absence of having  
20 UNE-Ps, then the competitive companies will not have access to  
21 them. If you find the area which will be impaired, on the  
22 other hand, then the incumbent companies must make them  
23 available. I am also aware that your recently published 2003  
24 report to the legislature on competition stresses the fact that  
25 the availability of cost-based UNE-Ps, especially in

1 BellSouth's areas, have been the single biggest factor in the  
2 expansion of the local service competition in the last three  
3 years or so. And, again, as Senator Argenziano and Mr. Twomey  
4 referred to, this was all about competition, wasn't it? It was  
5 supposed to benefit the consumer?

6 Your report seems to indicate that the competition  
7 will effectively be retarded, absent the continued availability  
8 of UNE-Ps in the markets of all incumbent companies. It seems  
9 undeniably that all the Floridian residential customers will  
10 have a strong and immediate interest. I understand that your  
11 findings on the point will go straight, straight to the FCC and  
12 there will be no second chance, no second chance for the  
13 residential customer to litigate this matter at this level.

14 Customers will not have a second chance. The  
15 consumers, the people of the state will not have a second  
16 chance in the outcome of this case and their voices, of course,  
17 should be heard. It strikes me that the Commission could only  
18 benefit by hearing from customers and consumers on this  
19 important issue. And it is clear, Commissioners, that AARP  
20 speaks strongly for as many, if not more residential customers  
21 as any other organization in Florida.

22 Let me stress that. In my district, Commissioners, I  
23 have 400,000 people that live in my district, 400,000 and  
24 growing. One-third of those people, the residents in my  
25 district, are 72 years and older. What better organization

1 than AARP to represent them at this table? The individual, the  
2 retiree who is on a fixed income who doesn't know, can't get up  
3 here to Tallahassee and speak on their behalf, for themselves,  
4 needs someone to speak on their behalf, and what better group  
5 than AARP.

6 As to the charge that AARP's petition was  
7 insufficient in its detail, I understand that expressed a valid  
8 concern in relation to what is going on here. More  
9 importantly, I have seen excerpts of the substantial interests  
10 stated by all the phone companies allowed, and I find that they  
11 are substantially less precise than the reasons offered by  
12 AARP.

13 Commissioners, there should be no double standard as  
14 indicated earlier. No double standard that requires  
15 substantially more precision and detail than accepted by  
16 telephone companies in this case. Absolutely not. So I would  
17 urge you, Commissioners, to do the correct thing and the fair  
18 thing. And that is all I'm asking you here to do today. The  
19 correct thing and the fair thing, to allow the consumer, the  
20 customers of this state, the people in my district to have  
21 someone at the table. And who better representing them than  
22 AARP. Mr. Chairman, Commissioners, I think you very much for  
23 allowing me to come before you today. God bless you.

24 CHAIRMAN BAEZ: Thank you, Senator. And, Senator  
25 Cowin, welcome.



1           SENATOR COWEN: Thank you very much, and I appreciate  
2 being here. Now, I don't normally come for telephone company  
3 or electric. I usually leave them alone. But I must say that  
4 the interest here is very similar, and my original interest  
5 with the Public Service Commission has always been consumer  
6 based. And before I start, I want to wish Commissioner Jaber a  
7 very good ultimate termination of her pregnancy and hope that  
8 these hearings don't accelerate her upcoming date. But  
9 congratulations to you.

10           COMMISSIONER JABER: Thank you very much. I think  
11 the Chairman shares your wishes. Thank you.

12           SENATOR COWEN: In past times, you know, I have been  
13 in communication with many of you over the series of  
14 discussions in the legislature of this very issue. And while I  
15 didn't support the original bill, it was a legislative bill  
16 that did pass, and you are an arm of the legislature. However,  
17 when it comes to the standing of large organizations, such as  
18 AARP, I think the Commission should look more than just the  
19 technical.

20           Obviously the telephone companies will be doing a  
21 very good job on their part in trying to propose a revenue  
22 neutral issue, but the reality is for the consumer the issue is  
23 not revenue neutral. While the issue for people on low income,  
24 people who are elderly, people in rural areas, the competition  
25 has great impact. And for those specific areas, they need to

1 have some sort of input from their group.

2 I think I want to thank you for -- at a suggestion  
3 that I had made before and the Commission took it up by going  
4 around the state on this very issue and getting feedback. That  
5 was a good thing that you did, because I think it showed a  
6 balance that you wanted to hear from the public.

7 Likewise, during these proceedings, while they may be  
8 technical in nature, I don't see any harm in involving a group  
9 that represents the consumer. Certainly we have the Public  
10 Counsel that can represent the consumer on the technical  
11 issues, but because your Commission meeting is up here in  
12 Tallahassee there needs to be a way, a political way of getting  
13 the information out. And if you are going to err in any way, I  
14 think it is incumbent on the Commission to actually make a  
15 decision based on doing everything in its power to make sure  
16 the consumers' voice is heard.

17 Right now, as a consumer, I think people look at the  
18 system right now as it is with you having three companies, and  
19 you have even outside companies that have been able to  
20 intervene, where you just have one little Public Counsel who is  
21 new -- in his new position right now and head position  
22 representing the consumer, it looks like more than one Goliath  
23 against a little man. And I think, for no other reason, even  
24 by just saying, hey, we are going to be extra fair, we all know  
25 probably what the outcome is going to be, because the

1 legislation was pretty clear. But the fact is is that there is  
2 a basis of competition. That was the discussion throughout the  
3 legislature. Oh, we have to have competition. We are going to  
4 put this in so that there will be competition of the rates.  
5 Then this is the time that you should let the consumers be  
6 heard in the form of AARP.

7           Being that there is no other major group that has  
8 mainly affected. I mean, you have consumers of all ages, but  
9 the reality, the one that are the most impacted, as I said, are  
10 the elderly, and those in rural communities, and those of  
11 limited income. So I think that they are willing and able,  
12 that the Commission certainly has within its power to override  
13 any technical discussions based on pure gut reaction. And I  
14 think within your powers you can find some rules or  
15 regulations, and certainly not without precedent, that  
16 consumers are represented by another group.

17           This is not setting a precedent. In fact, it would  
18 be setting a precedent the other way. And I urge you in your  
19 position right now to allow a consumer group to come and  
20 represent those consumers at the table, so at least the  
21 information can get out to the public. The only thing I could  
22 think of is what do you have -- not you, but what do the  
23 telephone companies have except but fear. If it is truly their  
24 interest, obviously they have to make money, but if it is truly  
25 their interest and not hurting the little guy in just trying to

1 truly be revenue neutral, those that are going to be impacted  
2 who are really not going to be revenue neutral, those that have  
3 just the local service are the ones that are really going to be  
4 impacted and they should have a seat. Thank you for hearing  
5 me, and I appreciate your consideration of this issue. I leave  
6 it to the able attorneys to debate. But I think from a  
7 political standpoint, but ultimately, you know, this is a  
8 political body, like everybody that we have appointed and  
9 elected, that we should yield on the basis of what is best for  
10 overall the State of Florida. And right in front of you, you  
11 do have a representation of 1.2 million people, so we do have a  
12 little bit of input. Thank you very much.

13 CHAIRMAN BAEZ: Thank you, Senator. I want to thank  
14 you for your comments and thank the other Senators for taking  
15 time out of their busy schedules to come down and talk to us  
16 today. We really appreciate it, and we are always happy to  
17 have you. Thank you. Mr. Twomey, have you concluded with your  
18 argument, or --

19 MR. TWOMEY: No, sir. In fact, Mr. Chairman, the  
20 Attorney General was scheduled to appear personally. I believe  
21 he was not able to get in on an aircraft this morning, and Mr.  
22 Shreve is here in his stead to speak on our behalf.

23 CHAIRMAN BAEZ: Mr. Shreve.

24 MR. SHREVE: Thank you, Mr. Chairman and  
25 Commissioners. And, Mr. Chairman, the Attorney General would

1 like to thank you personally for your consideration in  
2 accommodating him. He's so sorry that he wasn't able to get  
3 back in here, but you have seen what the weather is like.

4 CHAIRMAN BAEZ: Not at all.

5 MR. SHREVE: I agree with everything that the three  
6 Senators, Senator Argenziano, Senator Fasano, and Senator Cowin  
7 have said, so I will try to not to repeat that.

8 Over the years, I think this Commission has always  
9 leaned towards allowing intervention by customer groups, from  
10 one individual customer all the way up to large groups. I see  
11 this as setting a precedent going the other direction. I think  
12 there must be a misunderstanding here because there can be no  
13 argument that the customer group that we have here in AARP is  
14 representative across the state and does have a substantial  
15 interest in this hearing.

16 One point comes to mind with the Public Counsel's  
17 representation. Now, they, of course, have a legal automatic  
18 intervention. If you carry the logic of keeping the AARP out  
19 because they are representing customers or consumers, that is  
20 the same proof that the Public Counsel represents. So if he  
21 didn't have a legal or automatic intervention, then I suppose  
22 the Public Counsel would not be allowed in because he  
23 represents a consumer group, the consumers of the State of  
24 Florida.

25 I would urge you to go ahead and allow the AARP with

1 their representation, they are very clearly the largest  
2 consumer group in this state, intervention and let them be  
3 heard. Thank you very much.

4 CHAIRMAN BAEZ: Mr. Shreve, before you go, I have a  
5 question. The Attorney General has not intervened in this  
6 case, right?

7 MR. SHREVE: The Attorney General has not intervened  
8 in this case. These remarks are just to this one issue alone.

9 CHAIRMAN BAEZ: And no plans to intervene, I guess,  
10 at this point?

11 MR. SHREVE: I'm sorry?

12 CHAIRMAN BAEZ: You are not considering intervening  
13 at this point?

14 MR. SHREVE: That would be strictly up to the  
15 Attorney General. I haven't discussed that with him.

16 CHAIRMAN BAEZ: Okay.

17 MR. SHREVE: Thank you very much, Commissioners.

18 CHAIRMAN BAEZ: Mr. Twomey, you may continue.

19 MR. TWOMEY: Yes, sir, Mr. Chairman. Lastly, Public  
20 Counsel, Mr. McLean, is here to speak on our behalf.

21 CHAIRMAN BAEZ: Little old Mr. McLean.

22 COMMISSIONER DAVIDSON: Little David.

23 CHAIRMAN BAEZ: The Office of Public Counsel.

24 MR. McLEAN: Exactly. The little one in the words of  
25 our august Senator. I thought more -- I heard little, I really

1 heard skinny and chiseled, you know. Thank you, Senator.

2 CHAIRMAN BAEZ: We will need you all's  
3 interpretation, but --

4 MR. McLEAN: I know. It's in the eyes of the  
5 beholder, I assure you.

6 COMMISSIONER JABER: Mr. McLean, you are not  
7 insinuating you disagree with the Senator, are you now?

8 MR. McLEAN: Of course not, Madam Commissioner.

9 MR. SHREVE: Commissioner, I would have to disagree  
10 with the Senator. I don't think he is so little.

11 MR. McLEAN: Well, I'm sure Veronica is listening  
12 somewhere. I want to start with a story. In 1971, I signed up  
13 for law school at Florida State, and we trotted out to the  
14 Registrar's Office, got out there, and there was a pretty good  
15 line ahead of me, you know, and I worked my way up through the  
16 line and I got almost to the desk. And I heard an assistant  
17 registrar say to one of her friends, she said, you know, this  
18 would be a great place to work if it weren't for all the damn  
19 students.

20 It occurred to me when she said that that, Madam  
21 Assistant Registrar, if it weren't for all the students there  
22 wouldn't be a need for a registrar. And I have come here to  
23 tell you this morning that if it weren't for the good citizens  
24 in the AARP and their fellow citizens there wouldn't be any  
25 need for a Public Service Commission. It is, after all, your

1 polestar to serve the public interest.

2           Why is this battle among these titan companies not  
3 down in the court system? They have capable lawyers. We are  
4 somewhat capable. Everybody in this whole process has capable  
5 representation who could appear at the courthouse. Why ain't  
6 they down at the courthouse? Because the Legislature put them  
7 here. Over at the courthouse you only need to make sure that  
8 you don't run afoul of the public interest. In this forum, you  
9 have to make sure that you serve the public interest. That is  
10 your polestar. It is the drum to which you should march. And  
11 that is true in every case.

12           There are 3.4 million AARP members. I suggest to you  
13 that they have a right to suggest to you what the correct  
14 course in this case is. It is inconceivable to me that AARP  
15 has no standing to suggest what the public interest is. And  
16 that is true in this case, Commissioners, in every case you  
17 have ever heard, and in every case you will hear. It is the  
18 public interest, and they should have the right to suggest to  
19 you what that public interest is.

20           A few weeks ago you heard virtually endless testimony  
21 from the ILECs and from the intervenors how competition would  
22 serve customers' interest. In this triennial review case you  
23 will be designing much of the battlefield over which these  
24 companies, large and small, will vie for the customers'  
25 dollars. To suggest that the customers represented by the AARP



1 have no direct interest in that endeavor, that they lack  
2 standing, is to miserably misunderstand this agency's function  
3 and mission as miserably as that assistant registrar did back  
4 in 1971.

5 I want to say again, in my view the AARP has standing  
6 in this case, in every case this agency has ever heard, and in  
7 every case you ever will hear so long as your sole reason for  
8 existence is to determine the public interest and to serve it.

9 Commissioners, with all due respect, the patently  
10 absurd ruling of your prehearing officer represents an elitist  
11 abandonment of the reason for your very existence. This agency  
12 exists to serve the public interest, including if not  
13 especially the interests of the 3.4 million citizens of the  
14 state who comprise the AARP. You deny them a voice in the  
15 proceedings, and you deny the validity of your offices, nothing  
16 less.

17 I appear here as a friend of this agency, not its  
18 critic, not its chronic critic, but as its friend once a part  
19 of it and for 15 years in my professional life a part of it.  
20 This decision is sickening out there like a sore thumb.  
21 Confidence in this agency sometimes wanes. Recent events have  
22 shown that it is on the wane now perhaps. This decision is a  
23 sore thumb. It does not speak well to Public Counsel and its  
24 other agencies. I beseech you as your friend, and a friend to  
25 this agency, don't let this sore thumb fester into an Achilles'

1 heel. This agency deserves better than that. You folks have  
2 listened to customer groups, as it has been pointed out to you,  
3 for 30 years that I know of, and I certainly hope you are not  
4 going to abandon that. I urge you to reverse this blight on  
5 our Commission's lengthy and proud record of public service.  
6 And I thank you very much.

7 CHAIRMAN BAEZ: Thank you, Mr. McLean. Mr. Twomey.

8 MR. TWOMEY: Mr. Chairman, first I would like to  
9 thank all of those elected and appointed officials that  
10 appeared on behalf of AARP, and I will try to be relatively  
11 brief in going back and making a few additional points on the  
12 outline I gave you at the outset.

13 In the handout I gave you I went to some length to  
14 quote throughout portions of your competition report, which I  
15 would like to say to everyone listening, those that haven't  
16 read the report, those that are interested in understanding  
17 where telecommunications is in this state today and where it  
18 may be going, I would commend that report to their reading. It  
19 is an excellent report, and I enjoyed reading it.

20 But the thing that I have underlined in the many  
21 passages in there, I didn't underline everything, but I  
22 attempted to go through and find where this Commission through  
23 its report to the legislature has stated repeatedly that  
24 UNE-Ps, their availability to competitive companies, is  
25 essential to the promotion of competition. You will see in

1 there that, as your report says, not me saying it, your report  
2 says that BellSouth has over 666,000 competitive customers. It  
3 has more competitive customers by far than the other two large  
4 ILECs, which have in the range of 30 to 20,000 competitive  
5 residential customers. And it appears your report concludes  
6 that it is due almost entirely to the fact that BellSouth had  
7 established for it by this Commission and the FCC UNE-P rates  
8 cost-based lower than the rest of the ILECs and much earlier in  
9 the process, which has led to competitors naturally being drawn  
10 to BellSouth's largest rate zones.

11           You conclude over and over again that you have to  
12 have UNE-Ps. UNE-Ps are taking away competitive customers that  
13 were previously served by resale. You note in your report that  
14 UNE-Ps don't require capital expenditures by the competitor,  
15 whereas obviously facilities-based competition would.

16           The clear conclusion of your report is that if there  
17 are the continuation of UNE-Ps to customers competition will  
18 increase. It has increased dramatically in BellSouth's area in  
19 the last three years alone. Your conclusion is that  
20 competition will increase for the other two large ILECs, as  
21 well. Necessarily, if you find impairment, which is the  
22 purpose of this proceeding now, the triennial review  
23 proceeding, if you find impairment, that level of competition  
24 that has been ongoing and possibly will increase as a result of  
25 the rate increases that you approved when they become effective

1 might be enhanced. It will enhance competition for people  
2 around the state, consumers, residential consumers, including  
3 AARP's members.

4           On the other hand, if you find no impairment in  
5 certain geographic areas, there is a strong likelihood that  
6 UNE-Ps will no longer be available and that the rate of  
7 competition, or maybe even the increasing competition, or the  
8 existing competition may recede.

9           Now, as the Senators have said, and Mr. Shreve said,  
10 and Mr. McLean said, when we go back to the legislation on the  
11 rate increases, the testimony before this Commission by the  
12 companies in the rate cases, everything -- virtually everything  
13 promoting the rate increases was due to the fact, the claim  
14 that it would increase competition, which competition was for  
15 the primary benefit of consumers.

16           The outcome of what you are going to do in your  
17 fact-finding exercise in this docket for the FCC is a  
18 determination on geographic areas, whether they are large or  
19 small, on whether UNE-Ps should survive. That necessarily  
20 might not happen immediately. That necessarily, though, will  
21 result in affecting the level of competition that residential  
22 consumers in this state enjoy or might experience.

23           And while it is not immediate in the sense that you  
24 look at Agrico, it's the only time -- it is the only time that  
25 anybody has an opportunity to appear before you and make a case

1 that there is an impairment in this area, not here. UNE-Ps are  
2 important here, it will help us.

3 So, the reality is that your docket is going to  
4 necessarily effect, in relatively short term, the ability of  
5 the AT&Ts, and the MCIs, and the fourteen, or thirteen or  
6 fourteen other CLECs, many of them out-of-state companies that  
7 have been allowed to participate in this case.

8 Now, the AARP, we feel, adequately expressed that in  
9 the text of the petition. And I'm not going to go over that  
10 specifically, but I want to say to you when you look -- I have  
11 included, in the appendix to the handout I gave you, the  
12 substantial interest alleged by each of the telephone companies  
13 seeking intervention in this case. Some of them, I believe,  
14 are in the case twice in the sense that they are represented in  
15 their own right, and participants or members of a coalition.

16 BellSouth, who is one of our major protagonists here  
17 in trying to keep the AARP and others out, and who will I will  
18 say, along with Verizon, to bring this to the head, BellSouth  
19 and Verizon are attempting, in our view, in this case to  
20 effectively kill the very competition that they proposed to the  
21 legislature and this Commission they were trying to promote.  
22 To the extent that they can stop the availability of UNE-Ps to  
23 the competitive companies that are here now and might come in,  
24 they will have succeeded in reducing or killing competition.

25 BellSouth's only statement alleging interest

1 summarily says any decision made by the Commission in the  
2 context of this proceeding will necessarily affect the  
3 substantial interest of BellSouth and its business operations  
4 in the State of Florida. Period, end of story. Most of the  
5 rest of them are as conclusory and curt.

6           The cases cited in the order denying our intervention  
7 are in opposite and they are not applicable to this case.  
8 Agrico involved a competitor to a trucking company, as I  
9 recall. Some of the cases, Ameristeel involved an electric  
10 situation in which competition is not allowed and where there  
11 is precise service territories. The ophthalmologist case  
12 involved competing professional groups trying to mess with each  
13 others statutes, or business relations, or whatever.

14           None of them effectively involved a large consumer  
15 organization seeking to participate in a case such as this  
16 where it is absolutely clear that the outcome of your decision  
17 one way or the other is going to affect the continued  
18 availability of competition in this state.

19           I would respectfully suggest to you that we made our  
20 case. Commissioner Davidson, I think who is clearly a highly  
21 intelligent lawyer, took some of the more nit-picking  
22 pernicious elements claimed by BellSouth, and Verizon, and  
23 Sprint and looked at them in an honest, I think, but too  
24 technical sense as if he were writing or grading a law review  
25 article.

1           Could the AARP have, in retrospect, have written a  
2 more precise petition to intervene in knowing -- if it knew  
3 that it was going to be challenged? Of course. But I would  
4 suggest to you that we met the minimum requirements, and I  
5 would respectfully ask you to reverse Commissioner Davidson's  
6 order and allow this organization to participate in this case  
7 and give you whatever it can to benefit the process. Thank  
8 you.

9           CHAIRMAN BAEZ: Ms. White.

10           MS. WHITE: Thank you, Chairman. Nancy White for  
11 BellSouth Telecommunications. Let me start off by saying I  
12 definitely don't feel like a Goliath, not when you have three  
13 Senators, the Attorney General's Office, and the Office of  
14 Public Counsel all arguing on the AARP's behalf.

15           We do support the staff recommendation. I'm going to  
16 have to talk about this issue in two pieces. The first piece,  
17 and I think the more important piece, is the merits. Purely  
18 and simply, the merits of AARP's motion to intervene and the  
19 Prehearing Officer's decision to deny that intervention. The  
20 merits. For the last, almost, hour you really haven't heard  
21 anything about the merits, so let's talk about that for a few  
22 minutes.

23           Under this Commission's rule, Rule 25-22.039, the  
24 Florida Administrative Code, parties are allowed to intervene  
25 when they have a substantial interest in the proceeding. Now,

1 under Agrico Chemical Company versus the Department of  
2 Environmental Regulation, which we have cited in our papers,  
3 and which Mr. Twomey rejects out of hand, although the  
4 Commission has cited this case on innumerable instances, to  
5 have a substantial interest the AARP must show two things. It  
6 has got to show that it will suffer an injury in fact which is  
7 of sufficient immediacy, immediacy to entitle it to a hearing.  
8 And that injury, in fact, must be real, it must be immediate,  
9 it cannot be speculative, and it cannot be conjectural. Well,  
10 it sure isn't immediate, because Mr. Twomey has already  
11 admitted that in his argument to you today.

12           And it is definitely speculative, because he is  
13 saying if the Commission does -- maybe does X, Y, and Z in this  
14 proceeding then maybe competitors will do A, B, and C. That's  
15 pretty speculative. That is not real, it is not concrete.

16           The second thing the AARP has to show to have a  
17 substantial interest is that its substantial injury must be of  
18 a type -- must be of a type or nature which the proceeding is  
19 specifically designed to protect. Now, when an intervenor's  
20 standing is contested, the burden is on the intervenor to  
21 demonstrate that he has standing.

22           In this case, what's going on in this proceeding, the  
23 FCC has set a test. The test is if the Commission finds  
24 impairment based on these criteria, then this happens. If the  
25 Commission doesn't find an impairment based on these criteria,



1 then something else happens. It is this Commission's job to  
2 determine whether the test is met or not.

3           The Triennial Review Order issued by the FCC requires  
4 this Commission to ascertain whether requesting carriers,  
5 CLECs, not consumers, but CLECs are impaired by lack of access  
6 to certain UNEs. The AARP's intervention is based on whether  
7 ILECs -- and here I'm quoting from Paragraph 6 of their  
8 intervention -- are based on whether ILECs are providing UNEs  
9 at TELRIC, and whether there are impairments to competition  
10 resulting from ILECs not providing UNEs at TELRIC.

11           Well, the AARP could have written a book as its  
12 motion for intervention, petition for intervention on that  
13 subject, and it still wouldn't matter on the merits. No rates,  
14 no rates, retail or wholesale, are at issue in this proceeding.  
15 There is only the pure speculation on behalf of the AARP that a  
16 finding of no impairment would lead to higher retail rates or  
17 to less competition.

18           Under the Florida Society of Ophthalmology versus the  
19 State Board of Optometrists, an association must demonstrate  
20 that the interests sought to be protected in the proceeding can  
21 be distinguished from the interests of the general public. The  
22 court in that case held that not everyone having an interest in  
23 the outcome of a particular dispute is entitled to participate  
24 as a party in an administrative proceeding to resolve that  
25 dispute. Were that not so, every citizen could participate.

1 The Legislature must define and the courts must enforce certain  
2 limits on the public's right to participate.

3 Now, in this proceeding the interests of the general  
4 public are being represented by the Office of Public Counsel,  
5 which has intervened as a party and which has filed testimony.  
6 And, quite frankly, I would not speak of the Office of Public  
7 Counsel in terms of little, no matter Mr. McLean personally or  
8 myself. They do their job and they do it well. They are very,  
9 very competent adversaries. They represent every citizen in  
10 the State of Florida. They represent the old, they represent  
11 the young, they represent the rich, they represent the people  
12 on limited income, they represent the people in rural areas,  
13 they represent the people in urban areas. They even represent  
14 me. I live in Florida, so they are representing me in this  
15 case.

16 COMMISSIONER JABER: Ms. White, may I interrupt with  
17 just a quick question for you?

18 MS. WHITE: Sure.

19 COMMISSIONER JABER: We have had cases in the past  
20 where Public Counsel has intervened, but in addition to Public  
21 Counsel -- and it's my recollection -- you all can correct me  
22 if I'm wrong, but it is my recollection that that has been the  
23 case across industry, electric, water, and telephone, we have  
24 had OPC intervene, and yet a single customer also intervenes in  
25 a case and represents himself/herself. You know, I've got many

1 examples that come to my mind. Can you distinguish that  
2 situation and your position from what you are arguing now?

3 MS. WHITE: Absolutely, Commissioner Jaber. In most  
4 of the instances, or probably all of the instances that I'm  
5 recalling that you are talking about, that customer, that  
6 association, consumer association was specifically directly  
7 affected, directly affected by what this Commission was doing.  
8 It was a rate case. It was a person's complaint about their  
9 water bill, or the quality of water. I mean, there was a  
10 direct link, a direct effect between what the utility was  
11 asking them to do, what it was asking the Commission to do, and  
12 what would happen to that consumer.

13 COMMISSIONER JABER: Or an area code case or a  
14 slamming case.

15 MS. WHITE: Absolutely. Or a boundary change case.

16 COMMISSIONER JABER: Okay. So let's take your  
17 response a step further and put it in the framework of this  
18 situation. You have got a customer in, I don't know, Quincy,  
19 Florida, Mims, Florida, some of the more rural parts of the  
20 state, and he has contacted whatever ILEC that serves him or  
21 her, and has received, you know, a price on whatever package or  
22 service he is interested in. And then he contacts an AT&T,  
23 just for simplicity, because I don't know what competition is  
24 available in the most rural parts. That is what I think this  
25 proceeding is designed to allow us to learn about. And that

1 ALEC says to him, well, you know, we are not able to serve you  
2 right now because we can't get facilities. And I'm not passing  
3 judgment on whether that is right or wrong, but that customer  
4 hears from the ALEC, we are not able to serve you because we  
5 can't get those facilities from the ILEC. That customer is so  
6 bothered by that, that he wants to intervene in your process.  
7 Are you saying he is not directly affected?

8 MS. WHITE: I'm saying he is not directly affected.

9 COMMISSIONER JABER: Explain that to me.

10 MS. WHITE: The bottom line of that situation is  
11 there are other ways for -- there are many ways for a CLEC to  
12 serve a consumer. They can buy unbundled network elements,  
13 they can buy UNE-Ps, they can do resale, they can put in their  
14 own facilities, they can put in their own switch and just buy  
15 UNE loops. The basis of this particular proceeding is to  
16 mainly look at switching, loop and transport, and UNE-Ps. This  
17 proceeding isn't to take away all unbundled network elements  
18 from CLECs.

19 So, I mean, if that is a decision that the CLEC has  
20 made, so be it, but there are other ways they can serve that  
21 customer. I think that the scenario you are saying is too  
22 speculative to warrant intervention by the AARP.

23 COMMISSIONER DEASON: May I ask a follow-up question,  
24 Mr. Chairman?

25 CHAIRMAN BAEZ: Go ahead.

1           COMMISSIONER DEASON: Since we have interrupted your  
2 argument anyway.

3           MS. WHITE: Sure.

4           COMMISSIONER DEASON: One of your last statements was  
5 that no rates are at issue here.

6           MS. WHITE: That's correct.

7           COMMISSIONER DEASON: Okay. Well, what is the  
8 purpose of this proceeding?

9           MS. WHITE: And I think you just asked the \$64  
10 million question. And I don't even want to try to pretend to  
11 go into all the history of this, but essentially the issue of  
12 whether -- let me put it this way. The Telecommunications Act  
13 says that ILECs have to provide CLECs with unbundled network  
14 elements if they are impaired without them. That issue has  
15 bounced back and forth between the FCC and the D.C. Circuit  
16 Court of Appeals on what the heck that means at least twice.  
17 And, in fact, it is on appeal, the FCC's Triennial Review Order  
18 is on appeal to the D.C. Circuit right now.

19           The last time it came back, the Commission, the FCC  
20 made a decision as to what they think it meant and set up a  
21 test that said, okay, to be impaired, or to show impairment, or  
22 to show no impairment --

23           COMMISSIONER DEASON: Ms. White, let me interrupt for  
24 a second, because you are giving me a tutorial that I don't  
25 think I need.

1 MS. WHITE: Okay, sorry.

2 COMMISSIONER DEASON: No, that's fine. Let's look at  
3 it in a little bit broader perspective. Why are we even  
4 concerned to the question as to what UNEs have to be provided  
5 at what rates and what is or is not impaired? Why are we  
6 asking that question? Why is that going to be at issue in this  
7 proceeding? Why is that important? Isn't it because we have  
8 to make a determination as to how we are going to provide  
9 competition which this Legislature has indicated is in the  
10 public interest?

11 MS. WHITE: You are doing this proceeding because the  
12 FCC has essentially told you to do it.

13 COMMISSIONER DEASON: Wait. Now, you really -- you  
14 know, you hit my sore point there. We are not a field office  
15 of the FCC.

16 MS. WHITE: I understand.

17 COMMISSIONER DEASON: We are here -- and as these  
18 Senators have indicated, we are here, we are an arm of the  
19 Legislature, we get our authority from Chapter 364, Florida  
20 Statutes.

21 MS. WHITE: I absolutely agree.

22 COMMISSIONER DEASON: And the last time I checked, my  
23 check is signed by the Treasurer of the State of Florida, not  
24 the FCC Commissioners.

25 MS. WHITE: I absolutely agree. But in this

1 particular proceeding, the only reason you are having this  
2 particular proceeding that AARP wants to intervene in is  
3 because the FCC said, state commissions, we don't want to  
4 decide this issue; we want you to decide this issue.

5 COMMISSIONER DEASON: Well, where in Chapter 364 are  
6 we operating to decide these issues?

7 MS. WHITE: For this case?

8 COMMISSIONER DEASON: Yes.

9 MS. WHITE: Absolutely nowhere.

10 COMMISSIONER DEASON: So we are operating outside the  
11 purview of Chapter 364?

12 MS. WHITE: Absolutely.

13 COMMISSIONER DEASON: Mr. Melson, I want you to  
14 answer that question in a few minutes, please.

15 COMMISSIONER JABER: Chairman Baez, I have just one  
16 more follow-up. Because you all need to refresh my  
17 recollection. I don't think it is completely accurate, Ms.  
18 White, to say the FCC told us to do this. As I recall, the  
19 Florida Public Service Commission filed numerous comments, and  
20 many companies filed numerous comments when this was being  
21 considered at the FCC suggesting that state commissions had the  
22 expertise and the knowledge, and were close to the market  
23 analyses to make the best decision with regard to what  
24 elements, if any, should remain available. So I would really  
25 rather that the whole story get told.

1 MS. WHITE: No, and I don't dispute that at all,  
2 Commissioner. I'm just saying --

3 COMMISSIONER JABER: I appreciate that, Ms. White.  
4 And my second question is if you don't think we are operating  
5 under 364, do you think we are operating under Chapter 120.80?  
6 Specifically, I'm looking at it, and feel free to take whatever  
7 time you need to look at that. It is 120.80, Sub 13(d).

8 MS. WHITE: Yes, you are holding this proceeding  
9 under the Florida Administrative Procedures Act.

10 COMMISSIONER JABER: And what does that provision  
11 say, Ms. White?

12 MS. WHITE: I believe those provisions talk about  
13 hearings and how hearings should be run.

14 COMMISSIONER JABER: No, I don't think you are right.  
15 Why don't you take a minute -- and finish your -- I keep  
16 interrupting you. I want you to finish, and maybe we can come  
17 back to that point. But I could have sworn the Florida  
18 Legislature gave us the responsibility of implementing some  
19 parts of the Federal Telecommunications Act pursuant to Chapter  
20 120, and perhaps that is what we are doing today.

21 MS. WHITE: And, Commissioner Jaber, could you repeat  
22 that section for me, please?

23 COMMISSIONER JABER: Sure. It is 120.80. It looks  
24 like it is Paragraph 13(d).

25 COMMISSIONER DAVIDSON: And, Chairman, while she is



1 looking at that, if I may make just a comment. I appreciate  
2 Commissioner Jaber's comments, but I would also like for the  
3 record to reflect that not only were there some state  
4 commissions and commissioners that sought for this issue to be  
5 decided by the state, there were also a number of commissioners  
6 at both the state level and the FCC that sought an approach  
7 with more of a national framework so that you wouldn't have  
8 different fact patterns resulting in different results would be  
9 the more economically rational way to proceed. Ultimately I  
10 don't know that the FCC order reflected that belief, but I just  
11 wanted to make the record clear that the view Commissioner  
12 Jaber expressed was just one of competing views.

13 COMMISSIONER JABER: Yes, absolutely. That is a good  
14 point, Commissioner Davidson. And, Ms. White, the reason I  
15 bring that up is so often we talk about what the FCC has made  
16 us do. And Commission Davidson brings up a good point. That  
17 was thoroughly discussed, and the decision is what it is. And  
18 we are today having to implement pursuant to what Florida law  
19 allows us to do.

20 And the question as you have very articulatedly  
21 articulated has stated that it is really about the merits, and  
22 rather than get into this debate about what the FCC has made us  
23 or not made us do, I would very much want you to focus on what  
24 you think Florida law allows us to do in deciding intervention  
25 in this case.

1 MS. WHITE: And, thank you, Commissioner Jaber. And  
2 I don't want to belabor it, but let me just say that I  
3 absolutely agree that everybody and their brother did provide  
4 comments to the FCC about this proceeding, and all I meant to  
5 imply was the FCC issued an order that said, "States, please go  
6 and do X, Y, and Z," and that is all I meant to say on that.

7 COMMISSIONER JABER: Thank you.

8 CHAIRMAN BAEZ: Ms. White, if you can just hold on a  
9 second, I think there is a question to Mr. Melson which I think  
10 has received ample context now.

11 COMMISSIONER DEASON: And before Mr. Melson answers,  
12 can I follow up for just a moment? And I think --

13 CHAIRMAN BAEZ: By all means.

14 COMMISSIONER DEASON: -- Commissioner Bradley had a  
15 question. Okay. You know, Ms. White, the reason I asked you  
16 the question earlier, why are we doing this, now I understand  
17 that there is a long history and the FCC is involved, and I  
18 certainly agree with Commissioner Davidson, the part that he  
19 added about part of the rationale for the process that we are  
20 engaged in. But I wanted you to look at it a little bit more  
21 globally. And it seems to me, and I want to give you an  
22 opportunity to disagree. It seems to me that what we are here  
23 doing is trying to make decisions which are in the interest of  
24 consumers, because this legislature has indicated that it is in  
25 the public interest to promote competition.

1           And I would read for you from 364, not the FCC rules,  
2 but Chapter 364, Florida Statutes, when it concerns powers of  
3 the Commission and the legislative intent. In Paragraph 3 it  
4 says, "The Legislature finds that the competitive provisions of  
5 telecommunications services, including local exchange  
6 telecommunications service, is in the public interest and will  
7 provide customers with the freedom of choice, encourage the  
8 introduction of new telecommunications service, encourage  
9 technological innovation, and encourage investment in  
10 telecommunications infrastructure. That the Legislature  
11 further finds that the transition --" and that is what we are  
12 involved in here, is transition. This whole UNE question, and  
13 what impairment is, and what rates are going to apply, and what  
14 the costing standard is, all of this is involved in the  
15 transition. I think you would agree with that.

16           "The Legislature further finds that the transition  
17 from the monopoly provision of local exchange service to the  
18 competitive provision thereof will require appropriate  
19 regulatory oversight to protect consumers and provide for the  
20 development of fair and effective competition." And I would --  
21 it says to protect consumers. So what we are doing here, we  
22 are not litigating the rights of two telephone companies or a  
23 group of incumbent companies versus a group of competitors.

24           What we are deciding here is what is in the public  
25 interest. Because you said earlier, we no longer determine

1 rates. That is true. We don't have rate cases for telephone  
2 companies anymore like we do for electric or for water  
3 companies. We are dependent upon competition taking that  
4 place. We no longer have the authority to set your rates or to  
5 set your earnings level.

6           What do we depend upon? We depend upon competition.  
7 And part of that competition is the transition which the  
8 Legislature indicates and how we transition from the monopoly  
9 to a fully competitive market. And that is why we are engaged  
10 in these directives from the FCC in determining what should be  
11 the UNEs, what price standards should apply, whether there is  
12 or is not impairment.

13           The whole question is not because two companies  
14 disagree. The standard we have to apply is what is in the  
15 public interest. What is going to promote competition in a  
16 form that is going to promote the public interest and protect  
17 consumers. And it seems to me that is what our responsibility  
18 is.

19           Now, I will let Mr. Melson answer the question.

20           CHAIRMAN BAEZ: Thank you, Commissioner. Mr. Melson.

21           MR. MELSON: Commissioner Deason, in addition to the  
22 general sections you cited in Section 364.01, there are also  
23 specific provisions in 364.161 relating to the Commission's  
24 authority to require unbundling. While those provisions speak  
25 generally in terms of arbitration proceedings, when you read

1 them in conjunction with the general provisions, I think that  
2 gives you adequate state law authority to look at unbundled  
3 network elements generally.

4 Now, to the extent that the Federal Telecom Act says  
5 that you cannot act inconsistently with the federal law, I  
6 think you have to take into account whatever standards and  
7 guidelines the FCC has set down, but your ultimate base of  
8 authority is in Chapter 364 and the general provision in  
9 364.161.

10 COMMISSIONER DEASON: Then you would agree that the  
11 ultimate decision has to be what is in the public interest, and  
12 what promotes competition that is in the public interest and  
13 what promotes competition which helps protect consumers? Is  
14 that the requirement that we have to follow?

15 MR. MELSON: I think you have got to do that, to the  
16 extent that in doing that you do not act flatly inconsistently  
17 with the Federal Telecom Act.

18 COMMISSIONER DEASON: So we have to balance the two?

19 MR. MELSON: You have to balance the two. But  
20 clearly to the extent you have discretion in weighing things,  
21 you have got the charge from the Florida Legislature to act to  
22 promote competition and to ensure a reasonable transition.

23 COMMISSIONER DEASON: Thank you.

24 CHAIRMAN BAEZ: Commissioner Bradley, you had a  
25 question?

1           COMMISSIONER BRADLEY: Yes. A question of Mr.  
2 McLean. Mr. McLean, you made a statement earlier that  
3 confidence in the Public Service Commission is on the wane.  
4 Would you further elaborate?

5           MR. McLEAN: That is not an opinion that I  
6 particularly hold myself, because I hold the Commission in very  
7 highest esteem. I think that the Commission has received some  
8 adverse publicity in recent times, the gist of which was that  
9 the Commission is becoming less concerned with the welfare of  
10 the citizens which we all represent, and too concerned with the  
11 industry itself, the industries both electric and telephone.

12           I don't particularly hold that view myself, but I  
13 hate to see it grow because I care for this agency, and I care  
14 for the people that it is supposed to be looking out for. So,  
15 I hope -- as I said, I think this is -- it's like a sore thumb.  
16 It sticks up in the history of this Commission, and I hope you  
17 will strike it down.

18           COMMISSIONER BRADLEY: Yes. And I have to say that I  
19 agree with you, and I think that the credibility of this agency  
20 maybe has been damaged due to the overzealousness of some folks  
21 who have been representing special interests. And I'm  
22 disappointed in that, and I will further elaborate.

23           You know, it is my opinion that the mission of this  
24 body is to represent the concerns of all of the citizens of the  
25 State of Florida and every group that has a vested interest in

1 this process. And that includes the consumers, that includes  
2 the various utility companies, and our mission is to make a  
3 balanced decision. And I would most certainly agree that our  
4 reputation has been impugned due to the fact that we have had  
5 to wrestle with some very tough decisions.

6 And by all means, I realize that our mission is to  
7 follow the lead of the legislature. And when legislation is  
8 passed, and in the case of the access rate rebalancing bill,  
9 the legislature passed that piece of legislation and sent it  
10 over to the Public Service Commission and asked us to do due  
11 diligence, which we did. And I think that it is sort of unfair  
12 for some of the perceptions that have come about as a result of  
13 the fact that we did do due diligence, we held numerous  
14 hearings, we weighed all of the evidence, and we made a good  
15 decision based upon the Florida Statutes.

16 But my question is this: How do we, as the  
17 Commission, deal with the Florida Statute, but also clearly  
18 understand the political influences that are out there?

19 MR. McLEAN: Commissioner, I think there is a real  
20 easy answer that fits real well in this proceeding. Everybody  
21 who is affected by your decision, listen to them, and see what  
22 they have to say. They might have something important to say.  
23 They might provide you some guidance as to how you should serve  
24 the public interest. I think that is the elegance of the  
25 western democracy. We let people have their say and we make

1 their decisions based upon their input. We are free to reject  
2 what we don't think is correct, what we think lacks truth or  
3 veracity or validity. But we do let them speak. And this  
4 agency has almost without exception allowed people to speak  
5 before it and then resolve the contested issues as it saw fit.

6 I personally have a great deal of confidence in your  
7 capacity to do that. This decision, in my mind, looks like an  
8 anomaly. Let these 3.4 million people have their say through a  
9 lawyer of their choice. I represent Ms. White, and proud to do  
10 so. I also representative the Florida Competitive Carriers  
11 Association. I also represent the Florida Cable Association.  
12 I represent the Florida Power Industrial Users Group, and so  
13 forth. Each of those people have historically been able to  
14 make a lawyer choice of their own and send that person up here  
15 to argue before you.

16 AARP has done the same thing, and I think they have a  
17 clear right to do it. But maybe more important than that is to  
18 answer a question, how can you instill public confidence in  
19 what you do? A good point of beginning, which you have always  
20 observed, is to hear from everybody who wants to persuade you  
21 to do something or another.

22 You are immune from criticism if you hear from people  
23 and weigh what they have to say and make your decision. When  
24 you kick them out the door, at the door, you make a grave error  
25 in my judgment, and you erode public confidence in the process.



1           COMMISSIONER JABER: Mr. Chairman, I don't want to  
2 interrupt Commissioner Bradley, I don't know if he is done,  
3 since I can't see him, but I do want to just say that I  
4 interrupted Ms. White, who was trying to get us back to the  
5 reconsideration standard, and I apologize for that. You hit a  
6 sore spot me with me, as well. Like Commissioner Deason and  
7 Commissioner Bradley, who did a much better job driving home  
8 the point that we have independent state responsibilities, that  
9 is what I am reacting to. I don't like when we try to  
10 oversimplify the situation by saying this is what the FCC is  
11 making you all do. So, with that, I apologize for the  
12 interruption, but would just remind the Chairman that she was  
13 about to make the argument regarding reconsideration.

14           CHAIRMAN BAEZ: Thank you, Commissioner. You got a  
15 little bit of ahead of me. Commissioners, if you will indulge  
16 me for a moment, we did interrupt Ms. White. I don't know how  
17 far along on her argument she was, and we also have Ms. Caswell  
18 representing Verizon, also with a response. So if we can  
19 proceed.

20           MS. WHITE: Yes, thank you. And I will try to wrap  
21 it up. The merits are clear. The merits weigh in favor of  
22 what the prehearing officer decided. The AARP has not met the  
23 burden for a motion for reconsideration. In their motion they  
24 argue, they try to draw a parallel between this proceeding and  
25 the access reform proceeding. Nobody objected to the AARP's

1 participation in that docket because their members were  
2 directly really affected. That is not the case here.

3           The AARP argues it is being held to a higher standard  
4 than other parties. It's absurd. The AARP has no statutory  
5 right of intervention. If these senators want to change that,  
6 they are certainly in a position to do so. But as of today,  
7 the AARP does not have the statutory right of intervention like  
8 the OPC. They have to prove substantial interest, just as  
9 every other party has done. And they haven't done that. They  
10 just haven't done that.

11           As to the politics of this thing, I mean, I listened  
12 to 45 minutes of Senators, and the Attorney General's Office,  
13 and the OPC saying, you know, if you don't let them in then the  
14 consumer has no seat at the table. They are not in the  
15 conversation and you are excluding them. Well, that is just  
16 not true. You have got the OPC, who as I said, represents  
17 every citizen in the State of Florida. They do this by  
18 statute. The Legislature specifically created the Office of  
19 Public Counsel to do just that through Section 350.0611,  
20 Florida Statutes, which states, quote, "It shall be the duty of  
21 the Public Counsel to provide legal representation for the  
22 people of the state in proceedings before the Commission," end  
23 quote. That's the job. That is his job. They gave it to him.

24           The members of the AARP don't require special  
25 protection or additional protection. They require what

1 everybody else gets. That is the Office of Public Counsel.  
2 And in matters where they can prove a substantial interest,  
3 then they get to intervene. This is not that case.

4 We would ask you to uphold the PreHearing officer's  
5 order and to deny AARP's motion for reconsideration.

6 CHAIRMAN BAEZ: Thank you, Ms. White.

7 MS. WHITE: Thank you.

8 CHAIRMAN BAEZ: Ms. Caswell.

9 MS. CASWELL: I just want to say that Verizon concurs  
10 in Ms. White's remarks, and I would like to emphasize that Mr.  
11 Twomey has admitted that AARP has not met Agrico's standard for  
12 immediate injury to grounds standing. Nevertheless, AARP urges  
13 you to overlook technicalities and to make the most politically  
14 attractive decision. But as the Commission knows, it can't  
15 always make the most politically popular decision because it is  
16 bound by the law. And in this case the staff got that law  
17 exactly right in their recommendation.

18 AARP hasn't met the legal standard for intervention  
19 or the legal standard for reconsideration, so the motion for  
20 reconsideration must be denied. And I would like to add that  
21 in my long experience before this Commission, I am confident  
22 that AARP's members will be very ably represented by the Office  
23 of Public Counsel. Thank you.

24 COMMISSIONER DEASON: Thank you, Ms. Caswell.

25 Commissioners, do you have -- I know that we got started on

1 questions and comments.

2 COMMISSIONER BRADLEY: A question of Public Counsel.

3 CHAIRMAN BAEZ: Go ahead.

4 COMMISSIONER BRADLEY: Mr. McLean, if we allow AARP's  
5 intervention, is it your intent to not represent the members of  
6 the AARP group and to just focus on representing the other  
7 groups who are different from AARP?

8 MR. McLEAN: Well, Commissioner, I won't cast the  
9 interests of AARP to the four winds by any means. Of course, I  
10 will cooperate with their counsel in any way that I possibly  
11 can. But I believe that leaves somewhere around, in the  
12 neighborhood of 13 million citizens, including Ms. White, that  
13 I will have to represent. And I plan to that as professionally  
14 as I can.

15 COMMISSIONER BRADLEY: Is that a yes or no?

16 MR. McLEAN: That was a yes, I believe. Thank you,  
17 Commissioner.

18 COMMISSIONER BRADLEY: Mr. Twomey?

19 MR. TWOMEY: Yes, sir.

20 COMMISSIONER BRADLEY: Is it your opinion that Mr.  
21 McLean has the capacity and the ability to represent the  
22 concerns of AARP, or is it that the AARP has concerns that are  
23 different from what Mr. McLean's office might be able to  
24 represent?

25 MR. TWOMEY: I was sold with the statement Mr. McLean

1 made a moment ago that it has been the practice of this  
2 Commission for decades to allow interest groups to retain their  
3 own counsel and make their own decisions and presentations in a  
4 case. Mr. McLean, as you know, has been a personal friend for  
5 over two decades, and I have the highest regard for his  
6 professional skills and his exercise of his Office of Public  
7 Counsel.

8           The fact remains, and as he pointed out, that you  
9 should allow AARP and other interested groups that have an  
10 interest in these cases and want to try and assist you in  
11 coming to resolution in your fact-finding and legal efforts to  
12 make a case of their own. So that is not remotely a slap at  
13 Mr. McLean and the Office of Public Counsel, it is a desire on  
14 our part to represent our own interests, as well.

15           MR. McLEAN: Commissioner, may I add to that just  
16 briefly? Mr. Chairman, I'm sorry. Commissioner, we allow the  
17 criminally accused in this country to choose a lawyer of their  
18 choice. We don't ask whether that particular defendant doesn't  
19 have confidence in the public defender, or in some other  
20 lawyer, or whatever. But we allow the least fortunate in our  
21 midst, the criminally accused to choose a lawyer for themselves  
22 routinely.

23           I don't take the AARP's decision to represent their  
24 particular interests as any slap at my office, and I certainly  
25 don't see it that way. AARP is a good friend, and I hope to be

1 a friend to them. Thank you, sir.

2 COMMISSIONER JABER: Mr. Chairman, if Commissioner  
3 Bradley was done, I've got questions of Mr. Melson.

4 CHAIRMAN BAEZ: Commissioner Jaber, can you hold on a  
5 second?

6 COMMISSIONER JABER: Absolutely.

7 CHAIRMAN BAEZ: Although you didn't see it, there  
8 were people in front of you.

9 COMMISSIONER JABER: Sounds good.

10 CHAIRMAN BAEZ: Commissioner Deason.

11 COMMISSIONER DEASON: Thank you.

12 Commissioner Jaber, I'll be quick and we can get to  
13 your question.

14 COMMISSIONER JABER: Take your time.

15 COMMISSIONER DEASON: I have a question for Mr.  
16 Twomey.

17 MR. TWOMEY: Yes, sir.

18 COMMISSIONER DEASON: We are here on reconsideration  
19 and there is a standard that applies when we take up a question  
20 of reconsideration. And I'm sure I'm paraphrasing here, but it  
21 is something to the effect of a mistake of fact or law. You  
22 know that better than I. What is the mistake that has been  
23 made? Is it the mistake was that the Agrico test was  
24 misapplied in this situation, or what is your position as to  
25 why we should reconsider?

1 MR. TWOMEY: Let me find his order. Pardon me.  
2 Commissioner, the Prehearing Officer found that, first, AARP  
3 has not shown that its members will suffer an injury in fact of  
4 sufficient immediacy. And my argument there is in terms of an  
5 error of fact essentially, and also one of law, is that  
6 immediacy is a term that, depending upon what kind of a case  
7 you are dealing with, that could have a variance in the number  
8 of days, or weeks, or months that is involved.

9 I don't think the telephone companies in trying to  
10 keep us out have cited any case that says immediacy means the  
11 day after, three months hence, 60 days, 120. What I would  
12 suggest to you is, and where Commissioner Davidson I would  
13 submit erred, and honestly so, is saying that the fact that we  
14 are going to decide -- you are going to decide competitive  
15 issues, this UNE-P issue, and I will, in my rebuttal, adopt  
16 your eloquent comments in their totality.

17 The fact is that you are going to do that and this is  
18 the only place it is going to be done. The immediate reaction  
19 in terms of a day or a week may not be there, but the fact of  
20 the matter is that you will make a decision that decides  
21 whether the competitive companies can effectively compete in  
22 given geographic areas around the state. Now, that is going to  
23 necessarily flow from your decision depending upon what your  
24 decision is.

25 And like in a rate case, rate cases don't always

1 involve rates going up, even though they have been requested to  
2 go up. The importance of having intervention and party status  
3 even in a rate case is not necessarily to see that the rates go  
4 up, it is to be there and protect your case. So, the first  
5 thing is, I think, the immediacy point was too constrained.

6           Secondly, he says even if AARP's petition satisfied  
7 the first prong of Agrico, which it does not, AARP has not  
8 shown that the injury which it asserts its members will suffer  
9 is the type of injury which this proceeding is designed to  
10 protect, so as to entitle it to a hearing under 120.57.

11           You pointed out, Commissioner Deason, that the end  
12 result of what you're going to be doing in this case is not  
13 deciding the relative merits, necessarily, for the benefit of  
14 the competing telephone giants, or companies. Many of them are  
15 small. But that what you had to do was to result in the public  
16 interest, and certainly including some of the statutes that you  
17 have quoted involves the interest of the consumer, the  
18 customers of these companies. So I would submit to you that  
19 this proceeding involves the question of the success, the  
20 ongoing success, or perhaps the failure of competition in the  
21 local markets in this state, and that that issue is one that  
22 concerns the AARP and all consumers to the extent that it  
23 entitles them to a seat at the table here.

24           COMMISSIONER DEASON: Commissioner Jaber, you had a  
25 question.



1           COMMISSIONER JABER: Thank you, Mr. Chairman. Mr.  
2 Melson, it is really right in line with what Commissioner  
3 Deason asked Mr. Twomey. I am questioning whether in  
4 implementing the Telecommunications Act, federal or Florida,  
5 Agrico is even applicable. And let me tell you my concern and  
6 then ask a question. If Agrico is applicable and the reliance  
7 by the Prehearing Officer on that case and other cases is quite  
8 appropriate, and I haven't heard anything today that doesn't  
9 constitute reargument. I mean, just being very frank about  
10 that.

11           My concern, though, is that applying Agrico is  
12 probably too narrow in this situation. I don't think that  
13 rises to a mistake of fact or law. I'm wondering if the  
14 Commission has any discretion on its own motion to allow  
15 intervention because of 120.80, because of the provisions of  
16 364, and what was already articulated by Commissioner Deason  
17 and Commissioner Bradley.

18           So my question, Rick, is what discretion does the  
19 Commission have to allow some form of intervention on its own  
20 motion?

21           MR. MELSON: Let me try to answer a couple of parts  
22 of that. First, I think the Prehearing Officer was correct in  
23 applying Agrico. Agrico and that line of cases clearly applies  
24 to any determination as to whether a party meets the statutory  
25 standard for having a right to participate in a proceeding.

1           The order cited not only Agrico, it also cited some  
2 cases on associational standing in which those principles have  
3 been applied to associations similar to AARP. And as I read  
4 the Prehearing Officer's order, it is a correct application of  
5 the law.

6           As I have sat here this morning, I have gone back and  
7 looked at Chapter 120 and the definition of party, and there is  
8 a provision there that I have never, prior to this morning,  
9 paid attention to, and I'm not sure what research about it  
10 would reveal. But in 120.52, the definition of party, the  
11 subsection we have been arguing about is Subsection 12(b),  
12 which says, "Any other person whose substantial interest will  
13 be affected by proposed agency action and who makes an  
14 appearance." That is the standard -- that is the provision  
15 clearly governed by Agrico.

16           There is another section, "Any other person allowed  
17 by the agency to intervene or participant in the proceeding."  
18 To the best of my knowledge, none of the parties have cited to  
19 that in any of the petitions to intervene or any of the  
20 responses, but that section may very well give you the  
21 discretion to affirm the Prehearing Officer's order as being  
22 correct, and a correct analysis under 120.12(b), but to  
23 exercise some discretion as the agency and to allow them to  
24 intervene because of the particular types of responsibilities  
25 that you have under Chapter 364.

1           In terms of setting a precedent, I'm not sure that is  
2 a good precedent or a bad precedent. It seems to me it would  
3 be a much more damaging precedent to reconsider the general  
4 standard under 12(b) and to retreat at all from Agrico and that  
5 line of cases.

6           COMMISSIONER JABER: Okay. Now, if we -- obviously I  
7 don't know what the Commission will do, but if we choose to  
8 exercise that discretion, do you agree that AARP, if allowed to  
9 intervene, takes the case as it finds it?

10          MR. MELSON: Yes. Any intervenor always takes the  
11 case as they find it.

12          COMMISSIONER JABER: And obviously I don't know the  
13 schedule in this case, I don't have any of the procedural  
14 orders in front of me, but I think we are set to go to hearing  
15 the end of this month, and then the second part is the first  
16 week of March, if I'm not mistaken.

17          MR. MELSON: I believe their motion to intervene is  
18 only in the local switching docket, and frankly I'm not sure  
19 which of those hearing dates applies to that docket.

20          COMMISSIONER JABER: But, regardless, they would be  
21 bound by those hearing dates and whatever testimony has been  
22 filed, and whatever dates have been met. They take the case  
23 with those dates already being complied with.

24          MR. MELSON: Yes, ma'am. If dates for filing  
25 testimony have passed, then they are essentially -- their right

1 would be that, to cross-examine and to file any post-hearing  
2 filings.

3 CHAIRMAN BAEZ: Commissioner Bradley, if you will  
4 permit me a follow-up question really quick while we are on  
5 this subject. Mr. Melson, I hear you saying that the  
6 Commission certainly under 120, the definition of party, does  
7 create some sort of discretion for the Commission to allow  
8 intervention on its own motion and on grounds other than. Does  
9 that also create the discretion to limit intervention, or is  
10 intervention as a concept plenary, I mean to all issues?

11 MR. MELSON: That provision -- and let me read it to  
12 you, because, again, it is not one that I have done any  
13 research on. "Any other person allowed by the agency to  
14 intervene or participate in the proceeding as a party falls  
15 within the definition of party." There is a second sentence  
16 that says, "An agency may, by rule, authorize limited forms of  
17 participation in agency proceedings for persons who are not  
18 eligible to become parties."

19 We do not have a rule on limited participation. It  
20 seems to me, though, that under the more general language, if  
21 you allow them to intervene, it would seem to me you can impose  
22 reasonable limits on that participation.

23 CHAIRMAN BAEZ: Okay, thank you. Commissioner  
24 Bradley, you had a question?

25 COMMISSIONER BRADLEY: Well, I think I heard Mr.

1 Melson's interpretation of the Prehearing officer's ruling, and  
2 the fact there were no mistakes made by the Prehearing Officer  
3 in his ruling and in what he considered. I agree  
4 wholeheartedly with Mr. Melson's legal interpretation, but a  
5 question just to clarify a point. Did you say that by rule we  
6 do have the authority to give consideration to AARP's  
7 intervention?

8 MR. MELSON: If you look just at your rules and just  
9 at the case law under Agrico, I think the answer is no, AARP is  
10 not a proper party. If you look at the statutory definition of  
11 party, there is this other subsection that appears to authorize  
12 an agency to allow parties to intervene who would not otherwise  
13 qualify for party status. And I guess I'm suggesting that  
14 provision would give you the discretion on the Commission's own  
15 motion to allow AARP to participate, if you so chose, and to  
16 impose reasonable limits on that participation, if you felt  
17 those were appropriate.

18 COMMISSIONER BRADLEY: Can someone give me some  
19 ideas as to what those parameters might be in terms of limited  
20 participation?

21 MR. MELSON: Commissioner, that obviously would be a  
22 matter for you all to decide. Since an intervenor takes the  
23 case as they find it, I'm not sure there would be any  
24 restriction beyond that that would be necessary, because they  
25 would be governed by the schedule as it exists. Their

1 participation, if allowed, presumably would not bog down the  
2 proceeding. It would not engender time delay, but there might  
3 be other limits that someone wiser than I can think of.

4 COMMISSIONER BRADLEY: Well, let me ask Mr. Twomey  
5 that question. What would your interpretation be of what the  
6 parameters would be with respect to your participation, if we  
7 have decide that you should be allowed to intervene?

8 MR. TWOMEY: Well, first of all, let me say that AARP  
9 would be grateful for such a decision. I think, as Mr. Melson  
10 has pointed out effectively, and the AARP accepts this fact  
11 without reservation, there is not much more to limit us to, I  
12 think, that would be considered fair. We accept the time  
13 schedule. We accept the fact that testimony filing times have  
14 come and gone, and we will be limited to adopting -- as I  
15 recall the rules, we will be limited to adopting positions that  
16 other parties have taken and not even, I think, asserting our  
17 own positions. I may be wrong there, but effectively what I'm  
18 saying is I don't think there is -- I can't imagine what other  
19 type restrictions you would want to put on us if you let us in  
20 at this point in the case.

21 COMMISSIONER BRADLEY: The same question to Mr.  
22 McLean.

23 MR. McLEAN: Commissioner Bradley, I would put an egg  
24 timer on him, if I were you.

25 COMMISSIONER BRADLEY: Keep a what?

1           MR. McLEAN: I would put an egg timer, you know, one  
2 of those things that tell you when to quit boiling an egg. I  
3 would put that on him if it was up to me. Just kidding, I  
4 think.

5           CHAIRMAN BAEZ: Can we put that in the order?

6           MR. McLEAN: Don't put one on me. You know, I wanted  
7 to say do like you do when Public Counsel comes up with a good  
8 idea. Deny our petition and then do it on your own motion.  
9 That is the elegant solution here. It doesn't require you to  
10 reverse your good hearing officer, and it resolves the case in  
11 a way that I think is correct.

12           Restriction-wise, the AARP will be severely  
13 restricted by taking the case as you find it. That is a major  
14 restriction. I would suggest to you that any further  
15 restriction on what AARP can or cannot do will create an  
16 administrative nightmare for you to enforce, and it would be  
17 more trouble than letting AARP represent its position as it  
18 sees fit.

19           We have seen today a two-and-a-half hour debate, a  
20 three-hour debate almost, a two-hour debate, I'm sorry, on  
21 keeping them out. It wouldn't have been that much trouble to  
22 let them in. So I think you would be setting up that same  
23 scenario if you try to put restrictions on what they can and  
24 cannot do beyond those already imposed on them by law, you are  
25 going to create an administrative nightmare which is very

1 difficult to police.

2 COMMISSIONER BRADLEY: Ms. White.

3 MS. WHITE: Yes. I'm going to have to respond to  
4 this. I mean, if you look at 120.12(c), it says, "An agency  
5 may, by rule, authorize limited forms of participation." You  
6 have no rules in effect that cover this. The intervention rule  
7 that is in force on this Commission is 25-22.039, which says  
8 that to intervene you have got to show a substantial interest  
9 and pass the Agrico test. You have no rules in effect that say  
10 a party can intervene without showing a substantial interest if  
11 we vote they can and if they accept these limited requirements.  
12 You have no rules on that, so I don't see how you can use this  
13 statutory section to do that.

14 CHAIRMAN BAEZ: A question to Mr. Twomey and to the  
15 Parties. There has been -- this docket revolves around the  
16 term impairment, or the concept of impairment. And I'm hearing  
17 conflicting interpretations of the parties, or certainly the  
18 persons before us. Can you sort of elaborate on what you think  
19 impairment means, and in which direction does impairment flow  
20 as part of your answer?

21 MR. TWOMEY: I think the short answer, Mr. Chairman,  
22 is that the notion is that we want to see increased competition  
23 to the greatest extent possible, and that we don't want to see  
24 this Commission find essentially impairment in any area,  
25 whether it is large or small.



1           CHAIRMAN BAEZ: So do you understand impairment to  
2 refer --

3           MR. TWOMEY: I'm sorry, we want to see the impairment  
4 everywhere. I got that backwards.

5           CHAIRMAN BAEZ: I understand. So then do you agree  
6 that the term impairment refers to competitive providers and  
7 not to consumers? Is that accurate?

8           MR. TWOMEY: Yes, sir.

9           CHAIRMAN BAEZ: Okay. I don't think I need an answer  
10 from the companies. I think Mr. Twomey understands it the way  
11 I understand it.

12           I also have questions to -- Mr. Melson, you have  
13 researched interventions leading up to this, I'm pretty sure  
14 you haven't researched them all, but I will ask you just for my  
15 clarification, have parties like AARP ever intervened in other,  
16 you know, RTO-like dockets? And by that I mean dockets which,  
17 at least on the face of it, it can be argued concern -- at  
18 first blush concern providers, and we can argue back and forth.  
19 I'm not setting it as law, but we can argue back and forth  
20 whether it ultimately affects consumers, because I believe  
21 everything does. But in your research have associations,  
22 consumer associations of the like of AARP intervened or ever  
23 been granted intervention into dockets that, as I describe, at  
24 first blush largely concern providers?

25           MR. MELSON: Mr. Chairman, not to my knowledge. I

1 think in answer to a question by Commissioner Jaber, Ms. White  
2 correctly stated my recollection of those cases that where  
3 associations or individuals have intervened it typically is in  
4 a certificate case, or a rate case, or another case, a  
5 complaint case, a slamming case where that individual is  
6 either -- his rights are being determined or he is going to be  
7 directly and immediately affected.

8           This case is the first one that I'm really aware of  
9 that falls into the category you are describing. There may be  
10 another one out there, but I certainly don't recall it.

11           CHAIRMAN BAEZ: And can you refresh my memory, did  
12 AARP or another consumer group -- and that is, again, outside  
13 of the Office of Public Counsel -- intervene, for instance, in  
14 the RTO case and --

15           MR. MELSON: I don't know. I don't know.

16           CHAIRMAN BAEZ: Mr. Twomey, do you have any  
17 knowledge?

18           MR. TWOMEY: Yes, sir. My recollection is that I  
19 represented either Sugarmill Woods in that case or perhaps my  
20 parents.

21           CHAIRMAN BAEZ: On RTO?

22           MR. TWOMEY: Yes, sir. I think it was the RTO case.

23           CHAIRMAN BAEZ: Because I remember the rate review  
24 cases. I'm trying to remember.

25           MR. TWOMEY: Yes, sir, I'm confident that we were in

1 the RTO case, as well. And if I may just briefly, I want to --  
2 lest there be any misunderstanding, I don't think you  
3 misunderstood me, I want to make clear, though, to everybody  
4 that I agree with you on your interpretation of the impairment  
5 test on who it impacts in terms of how you have to make your  
6 decision and who it effects. What I want to make clear is that  
7 I was in no way saying that because the impairment test is  
8 measured against the competitors, that the AARP still doesn't  
9 believe it has a major and immediate being the flow-through  
10 necessary --

11 CHAIRMAN BAEZ: I'm not trying -- I didn't ask the  
12 question to try and pin it down in such a form, but I will ask  
13 you this, and I've got to tell you, these may be difficult  
14 questions or sound like -- I have had some difficulty with  
15 this, and certainly listening to the different positions has  
16 only made it more so. And I thought for a moment there, or I  
17 think for a moment there that general counsel provided a  
18 summary of light to resolve this.

19 That said, is there anything that would result in  
20 this docket, out of this particular proceeding that would limit  
21 a CLEC's ability, a competitive provider's ability to charge  
22 whatever they wanted to a consumer, including members of your  
23 client's association?

24 MR. TWOMEY: You mean attempt to charge?

25 CHAIRMAN BAEZ: Yes, that's fair --

1 MR. TWOMEY: Not that I am aware of. But in giving  
2 that answer I want to qualify it this way, Mr. Chairman. The  
3 issue we see as impacting us and having a substantial interest  
4 in is the availability of competition. I have to assume, since  
5 you all approved this, that you have all read or are familiar  
6 with the provisions and the statements contained in your  
7 excellent 2003 report on competition.

8 And I say that again because the reality is, the  
9 conclusions, the clear conclusions of your report to those that  
10 read it with any care at all is that most of the residential  
11 consumers in the State of Florida currently don't have access  
12 to competitive residential type service. Most of it that  
13 exists now, and it has been growing, exists in the more urban  
14 highly dense areas of BellSouth. You heard that from the AT&T  
15 witness in the access case that they were going to go into the  
16 Miami areas, and Lauderdale, and the larger areas.  
17 Notwithstanding that, the reality is that unless you are a poor  
18 credit risk and you want to pay 39.95 a month for a  
19 reconnection reseller, there aren't a lot of real competitive  
20 options for residential and small business, the mass markets  
21 that you are looking at in this docket, customers.

22 The history I saw that I was unaware of before, the  
23 two or three-year history report in your report about the  
24 growth in residential competition in BellSouth's area shows  
25 that it is based almost entirely on UNE-P availability. As I

1 said before, it is displacing, your report says, reseller  
2 services. I think 90,000 in the last year or two alone went  
3 from reseller to UNE-P. I say that because the marketplace,  
4 and the competitive companies say this in their testimony and  
5 their pleadings, the marketplace recognizes that if there is  
6 going to be a competitive company come in, they are going to  
7 have to have availability to UNE-P. And if you take that away  
8 by finding no impairment, then what goes with it is the  
9 opportunity for consumers in general and members of the AARP to  
10 enjoy the opportunity for enhanced competition.

11 CHAIRMAN BAEZ: I don't even want to go there.

12 MR. McLEAN: Chairman Baez.

13 CHAIRMAN BAEZ: I heard different arguments three  
14 months ago.

15 MR. McLEAN: May I respond to another part? First of  
16 all, I think you are applying a standard there, and Mr. Twomey  
17 meets that standard very well. But let me suggest to you that  
18 there are many examples where you do not apply that standard.  
19 The best analog for the situation that you have before you  
20 today, I think, is need determination, which is a titanic  
21 battle between the independent power producers on the one hand  
22 and the IOUs on the other, and you invariably let FIPUG into  
23 that fight. There is no direct link between what goes on in a  
24 need hearing and what the ultimate rates are to FIPUG or any  
25 other similar groups that you let in, but you have always let

1 them in.

2           And I want to suggest to you that one of the reasons  
3 that you let them in on just plain good sense and good public  
4 policy, but another reason is agencies do not get reversed for  
5 letting intervenors in, they get reversed for letting  
6 intervenors out. It is the notion that I mentioned before, let  
7 the people have their say, adjudicate their interests, and let  
8 the chips fall where they may.

9           CHAIRMAN BAEZ: Thank you, Mr. McLean.

10          COMMISSIONER JABER: Mr. Chairman.

11          CHAIRMAN BAEZ: Commissioner Jaber.

12          COMMISSIONER JABER: Again, I don't know if  
13 Commissioners have questions, but on that note it seems like an  
14 appropriate place to just disclose what I'm thinking about.

15                I don't think the Prehearing Officer made a mistake  
16 of fact or law that would warrant reconsideration. Having  
17 listened to Mr. Melson, and I don't think there is a lot of  
18 disagreement that Agrico is applicable, and if it is applicable  
19 then the standard was applied correctly by the prehearing  
20 officer, and all of these arguments were entertained by the  
21 Prehearing Officer.

22                But I go further, in acknowledging and upholding the  
23 Prehearing Officer's order, I would be interested in having a  
24 discussion on whether we want to entertain intervention on our  
25 own motion. And I appreciate what Ms. White was saying that we

1 don't have rules to limit intervention, but frankly I don't  
2 think we need to reach that point, either, because the statute  
3 trumps the rule and the statute seems to give us discretion to  
4 allow intervention.

5 I think just logistically, and having heard Mr.  
6 Twomey acknowledge that he would take the case as he finds it,  
7 and that AARP would not cause a delay or seek to do anything  
8 other than take the case as they find it, I'm willing to  
9 entertain a discussion and perhaps a motion to allow  
10 intervention on our own motion.

11 CHAIRMAN BAEZ: Commissioners, any questions or  
12 comments?

13 COMMISSIONER DEASON: I have a question for Mr.  
14 Melson in regard to that suggestion, and I think the  
15 Commissioner's position, I think, flows from a position you  
16 took earlier. If we were to follow that and allow intervention  
17 on our own motion or at our discretion, is that reversible  
18 error?

19 MR. MELSON: Probably not. On this one I probably  
20 would have to agree with Mr. McLean that there is more danger  
21 of reversible error, ordinarily, in keeping somebody out than  
22 letting them in. I don't think there is any danger of  
23 reversible error in keeping them out in this case, because they  
24 simply do not meet the standard. If you let them in, you will  
25 have a more fully developed record. You might get a court

1 decision that gives some guidance for the future as to how  
2 12(c) is to be interpreted, but a court could hardly remand and  
3 say would you have reached the same decision if you considered  
4 everything except the cross-examination questions Mr. Twomey  
5 asked. I mean, as a practical matter, I just don't see  
6 reversible error.

7 COMMISSIONER DEASON: And a follow-up question?

8 CHAIRMAN BAEZ: Please.

9 COMMISSIONER DEASON: You know, I have heard the  
10 Agrico case argued numerous, numerous times in different cases  
11 and different sets of circumstances, and to me it seems like a  
12 lot of it boils down to the eye of the beholder as to how you  
13 apply it. I know that the tests are very specific and it gives  
14 the impression it is black and white, but I don't think that it  
15 is. And I know we are here on reconsideration, and before we  
16 reconsider we need to be convinced that there was, in fact, an  
17 error in fact or law. And I have confidence that Commissioner  
18 Davidson was fully aware of the Agrico test, it was recited in  
19 his order, he laid out his rationale as to why he interpreted  
20 it the way he did. I think he probably has heard all of this  
21 argument now twice, when it was argued to start with and again  
22 here today. I mean, he probably has not heard anything new.

23 The problem I have, though, is that if I had been in  
24 his place and had been the Prehearing Officer -- and, Mr.  
25 Chairman, I'm not volunteering, by the way -- I may have



1 interpreted it differently just based upon the arguments  
2 presented. I don't know, I'm just saying sitting here today I  
3 possibly could have.

4 Now, if we do not reconsider this, if I find myself  
5 as a Prehearing Officer in some other case where there are  
6 similar circumstances, am I, as the Prehearing Officer in some  
7 future case, restricted by this interpretation of Agrico as it  
8 applied in this set of facts?

9 MR. MELSON: Commissioner, I think every case is  
10 going to be factually a little different, and I agree with you  
11 that Agrico is not the easiest of tests to apply. I don't  
12 believe there is any argument here that merits reconsideration  
13 of this order. If a different Prehearing Officer had applied  
14 Agrico and had come to a different conclusion, and that was up  
15 for reconsideration today, you would be applying the same test,  
16 was there a mistake of fact or law.

17 And when you get into a test that has some gray area,  
18 it is frankly difficult to prove a mistake of fact or law. I  
19 personally don't think this is a gray case, but I also don't  
20 think that by refusing to grant reconsideration you would be  
21 tying your hands as individual prehearing officers in future  
22 cases.

23 COMMISSIONER BRADLEY: Mr. Chairman.

24 CHAIRMAN BAEZ: Commissioner Bradley.

25 COMMISSIONER BRADLEY: While we are on the issue of

1 mistake of fact or law, and by all means, I don't feel that the  
2 Prehearing Officer made a mistake or made an error as it  
3 relates to facts of the law. Mr. Twomey, earlier did I  
4 understand you to say that in your opinion that is not the  
5 case, that the Prehearing Officer did make a mistake and there  
6 were some errors as it relates to the facts of the law?

7 MR. TWOMEY: Yes, sir, I did. That was the basis of  
8 our reconsideration, and I explained it earlier. And your  
9 general counsel doesn't agree with me, and your staff hasn't,  
10 but, yes, we believe that the Prehearing Officer should have  
11 gone our way, and that he made errors.

12 Now, that's it. I will tell you I would love, I  
13 would love to see the win/win situation perhaps first raised by  
14 Commissioner Jaber and urged upon you by Public Counsel McLean  
15 that the AARP get to participate in this case at the late date  
16 with all the qualifications that are attached to coming in  
17 late, and at the same time Commissioner Davidson is not  
18 overruled. I would love to see that.

19 COMMISSIONER BRADLEY: Mr. Chairman, I would just  
20 like to go on the record as to what my quandary is and where I  
21 am with respect to this. I disagree with Mr. Twomey, and I am  
22 only weighing my decision because of the fact that we have  
23 three Senators who are here today and asking us to give  
24 reconsideration due to some other facts and some other  
25 testimony that we have taken today. And that is the only

1 reason why, Mr. Twomey. If they were not here, then I think  
2 that, you know, my considerations might be entirely different.  
3 But it is because this is a legislative agency, and because we  
4 did have -- we do have two Senators who are still here, and  
5 another Senator who was here previously, and I have to tell  
6 you, I hold these individuals in very high esteem. And I'm  
7 trying to listen to what is being presented and just sort  
8 through the legal issues so that I can get to where I need to  
9 be in order to make a determination that would not be legally  
10 challengeable and one that would be in line with public policy.

11 CHAIRMAN BAEZ: Thank you, Commissioner Bradley.

12 Well, in efforts to disclose, I guess, since we are all -- I  
13 have a problem, I have a problem with reconsidering this. I  
14 don't think that the Prehearing Officer made any mistake of  
15 fact or law, and I also have a very grave concern of accepting  
16 any theory that says that since Public Counsel has automatic  
17 standing, then any consumer or consumer group automatically  
18 gets to piggyback along that. That is why this case concerns  
19 me, because there are circumstances when consumer groups on  
20 their own should have a right to participate, and this may well  
21 be one of them, but I am concerned about setting precedent.  
22 And I guess by talking about it perhaps we allayed my concerns  
23 if we can talk about it to our comfort.

24 I can't accept that theory of Public Counsel's  
25 automatic standing counting for every other one. I think that

1 Agrico applies in every instance, but I will accede to my  
2 general counsel's opinion and agree with him that I think we  
3 have alternative authority to be able to grant intervention on  
4 our own motion. So if anyone -- and I think Commissioner  
5 Davidson stepped out for a moment, but we are quickly moving to  
6 the point where we can entertain a motion. Commissioner Jaber,  
7 if you are still out there --

8 COMMISSIONER JABER: I am. Do you want me to throw  
9 out a motion?

10 CHAIRMAN BAEZ: Well, if you are comfortable with  
11 doing it. I'm not trying to twist anybody's arm.

12 COMMISSIONER JABER: No, no.

13 CHAIRMAN BAEZ: I think we have discussed this  
14 enough, don't you?

15 COMMISSIONER JABER: Absolutely. And I kind of threw  
16 it out, but wanted to allow for an opportunity to discuss it  
17 further. So my motion would be that we find that there has  
18 been no mistake of fact or law that rises to the level of  
19 granting AARP's motion for reconsideration. However, I think  
20 we should exercise our discretion to allow AARP's intervention  
21 with clear recognition and admonishment that AARP takes the  
22 case as they find it. And because of where we are in the  
23 procedural schedule, what I interpret that to mean is that they  
24 will have an opportunity to cross-examine, they will have an  
25 opportunity to file briefs, and whatever is on the schedule

1 going forward. But my motion would be to deny AARP's motion  
2 for reconsideration, but to allow intervention using our own  
3 discretion.

4 CHAIRMAN BAEZ: We have a motion to deny the motion  
5 for reconsideration and a further motion to grant intervention  
6 for AARP on the Commission's own motion. Is there a second?

7 COMMISSIONER DEASON: Second.

8 CHAIRMAN BAEZ: A motion and a second. All those in  
9 favor say aye.

10 COMMISSIONER DEASON: Aye.

11 CHAIRMAN BAEZ: Aye.

12 COMMISSIONER JABER: Aye.

13 CHAIRMAN BAEZ: Show the motion carrying. I think we  
14 have Issue 2. If anybody wants to take that one up, it is a  
15 slam dunk, I think.

16 I want to thank you all for coming. Thank you for  
17 participation, Ms. White, and Ms. Caswell, as well.

18 MR. TWOMEY: Mr. Chairman and Commissioners, thank  
19 you very much.

20 CHAIRMAN BAEZ: Issue 2, just so that we can close  
21 out this item.

22 COMMISSIONER DEASON: Move staff.

23 CHAIRMAN BAEZ: Showing no objection, Issue 2 is  
24 approved, as well.

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STATE OF FLORIDA       )  
  
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COUNTY OF LEON        )

CERTIFICATE OF REPORTER

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

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

DATED THIS 9th day of February, 2004.



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