

ORIGINAL

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MAR 23 PM 4:31  
Douglass A. Kreis (FL)  
Neil D. Overholtz (FL)  
R. Jason Richards (FL)  
Joshua A. Jones (FL)  
Russell H. Rein (NY, NJ)  
COMMISSION CLERK

March 16, 2005

05019A-TZ

**VIA CERTIFIED MAIL**

Florida Public Service Commission  
Division of Regulatory Compliance  
& Consumer Assistance  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399

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MAR 21 2005

Florida Public Service Commission  
Division of RCA

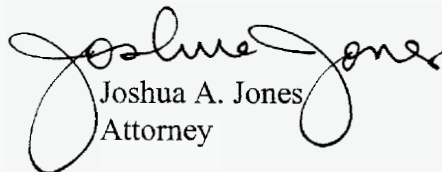
**RE: BellSouth General Subscriber Service Tariff**

Dear Commissioners:

On December 16, 2004, Judge Henry Harnage, Eleventh Judicial Circuit for Miami-Dade County, dismissed a class action complaint against BellSouth Telecommunications. His reasoning was based on failure to exhaust administrative remedies. Specifically, Judge Harnage states that the complaint should have first been filed with the Florida Public Service Commission.

Enclosed is a complaint brought by Miami-Dade County BellSouth customers against BellSouth for failure to properly account for and adjust payments made by customers pursuant to the BellSouth General Subscriber Service Tariff. Your assistance in resolving this matter is greatly appreciated.

Sincerely,

  
Joshua A. Jones  
Attorney

JAJ/kam

Enclosures

1855 Lakeland Drive, Ste. Q-230  
Jackson, Mississippi 39216  
Telephone: (877) 810-4808

499 Glades Road, Ste. 107  
Boca Raton, Florida 33431  
Telephone: (561) 347-1318  
Facsimile: (561) 347-3070

DOCUMENT NUMBER DATE  
02868 MAR 23 05

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: BELL SOUTH GENERAL )  
SUBSCRIBER SERVICE TARIFF )  
SECTION A.2.4.6 AND REQUEST )  
FOR RELIEF )  
\_\_\_\_\_ )

Docket no.: \_\_\_\_\_  
Filed March 16, 2005

COMPLAINT OF FLORIDA BELLSOUTH CUSTOMERS  
AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.  
AND REQUEST FOR RELIEF

Florida customers of BellSouth Telecommunications, Inc. ("BellSouth") who paid fees to BellSouth related to Miami-Dade County Ordinance § 21-44 ("Manhole Ordinance"), by and through their attorneys and pursuant to Sections 364.01, 364.015, 364.03, 364.035, 364.05, 364.08, 364.14, and 364.285 Florida Statutes, and Rules 25-22.036(2)-(3) and 25-22.032, Florida Administrative Code, hereby file this Complaint against BellSouth for enforcement of BellSouth General Subscriber Service Tariff, Section A.2.4.6 ("Tariff") and respectfully request the Florida Public Service Commission to order Bell South to comply with Section A.2.4.6 of its Tariff and to refund all fees collected in violation thereof.

**I. BACKGROUND**

1. This is a complaint in connection with BellSouth's charging customers a fee related to Miami-Dade County Ordinance §21-44, entitled "Manholes; safety requirements; penalty" in violation of Section A.2.4.6 of the Tariff. See Exhibit A.

2. Petitioners are customers of BellSouth who are charged for the services provided by BellSouth. Among the many fees and charges that BellSouth imposes on its

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customers, BellSouth charges an eleven-cent (\$.11) “Cost of Dade county Manhole ordinance #83-3” fee. BellSouth charges this fee pursuant to the BellSouth General Subscriber Service Tariff, Section A.2.4.6. *See* Exhibit B. The Tariff constitutes the contract between BellSouth and its customers. BellSouth, however, has violated the terms of Section A.2.4.6 of the Tariff, as more specifically pled below. Accordingly, BellSouth should be compelled to refund all “Cost of Dade County Manhole Ordinance #83-3” fees it has collected or, in the alternative, to refund the difference between the “Cost of Dade County Manhole Ordinance #83-3” fees collected and the amount permissible under Section A.2.4.6 of the Tariff.

3. This is a complaint brought on behalf of the petitioners identified below and all other Bellsouth customers who paid the “Cost of Dade County Manhole Ordinance #83-3” fee. The petitioners and the class of customers seek refunds as set forth above and an injunction that requires Bellsouth to comply with Section A.2.4.6 of the Tariff.

## **II. PARTIES**

4. Customers incorporate by reference as if fully set forth herein all allegations of paragraphs 1-3 above.

5. Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, have been customers of BellSouth since at least 1997 and continue to be customers during this complaint. They have previously served as representatives of a class of customers in a class action suit in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the matters pled

herein and now bring this complaint before the Commission as directed by the Eleventh Circuit Judge Henry Harnage. *See* Exhs. C and D.

6. Upon information and belief, BellSouth is, and has been, certified as a competitive local exchange carrier in Florida during the entire period of time covered by the activities in this complaint.

7. All correspondence regarding this complaint should be provided on behalf of all customers to:

Justin G. Witkin, Esquire  
Aylstock, Witkin & Sasser, P.L.C.  
55 Baybridge Drive  
Gulf Breeze, FL 32561  
850-916-7450

Lance Harke, P.A.  
Howard Bushman, Esquire  
Harke & Clasby LLP  
155 South Miami Avenue, Suite 600  
Miami, Florida 33130

8. The complete name and mailing address of the respondent to this complaint is:

BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee FL 32301-1556

### **III. JURISDICTION**

9. Customers incorporate by reference as if fully set forth herein all allegations of paragraphs 1-8 above.

10. The Commission has jurisdiction to hear this dispute, and authority to grant the requested relief, pursuant to Sections 364.01, 364.015, 364.03, 364.035, 364.05, 364.08, 364.14, and 364.285 Florida Statutes, and Rules 25-22.036(2)-(3) and 25-22.032, Florida Administrative Code and the BellSouth General Subscriber Service Tariff.

11. The dispute is ripe for resolution by the Commission. The Parties have attempted to resolve this dispute informally without success, and each month that BellSouth fails to eliminate charges associated with its General Subscriber Services Tariff adds to the damages Customers incur.

12. Customers brought a complaint before the Eleventh Judicial Circuit in and for Miami-Dade County, Florida alleging breach of contract and arguing application of the “filed rate” or “filed tariff” doctrine as applied by *MCI Telecommunications Corp. v. Best Telephone Company, Inc.*, 898 F. Supp. 868 (S.D. Fla. 1994). That complaint was abated by Circuit Court Judge Henry Harnage on December 16, 2004, and Judge Harnage stated:

It appears to the Court that the Florida Public Service Commission’s primary jurisdiction is an alternative and better forum to address plaintiffs’ claim that BellSouth has not complied with Section A.2.4.6 of its tariff filed with the Florida public Service Commission...pursuant to Fla. Stat. §364.285, the Florida Public Service Commission has the authority to provide the relief to the Plaintiffs and class sought in this lawsuit.

Exh. D ¶ 2.

13. This matter is therefore properly submitted to the Commission.

#### **IV. GENERAL ALLEGATION OF FACTS**

14. Customers incorporate by reference as if fully set forth herein all allegations of paragraphs 1-13 above.

15. Customers hereby incorporate by reference as if fully set forth herein all allegations in paragraphs 8-42 of Plaintiff's Corrected Amended Complaint And Demand For Jury Trial in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. *See* Exh. C.

16. In 1983, Miami-Dade County enacted an ordinance requiring certain safety measures be taken when work is done in an around manholes. That ordinance provides:

**Sec. 21-44. Manholes; safety requirements; penalty.**

(a) No person, firm or corporation shall cause any person to enter a Manhole being used for repairs, maintenance, installation or inspection of underground utilities unless the following requirements are fulfilled:

(1) A second person shall remain above grade at all times to provide surveillance of the Manhole and the person(s) below grade until the Manhole cover is in place and no person(s) remains below grade at or near the location of the Manhole.

(2) The person required herein to remain above grade shall be trained and shall be capable of providing first aid and emergency rescue procedures and shall be furnished with communication equipment to summon additional aid in the event of an emergency.

(3) The person providing aboveground surveillance shall keep animals and unauthorized persons away from the open Manhole.

(4) The person required herein to remain above grade may be assigned other duties provided such other duties do not interfere with the requirements of this section.

(b) Every violation of any provision of this section shall be punished by a fine not to exceed five hundred dollars (\$500.00) or imprisonment in the County Jail for a period not to exceed sixty (60) days or both such fine and imprisonment, in the discretion of the court. Each day of continued violation shall be considered as a separate offense.

17. Following the enactment of the Manhole Ordinance, Bellsouth sought to amend its Tariff to impose a fee on its customers for the costs it allegedly incurred in complying with the Ordinance.

18. Bellsouth's proposed amendment was approved by the Commission on or about March of 1983. The amendment provides as follows:

When the Company [Bellsouth] by virtue of its compliance with a municipal or county ordinance, incurs significant costs that would not otherwise normally be incurred, all such costs shall be billed, insofar as practical, pro rata, per exchange access line, to those subscribers receiving exchange service within the municipality or county as part of the price for exchange service.

An estimated monthly amount of such costs shall be billed to the affected subscribers each month and an adjustment to reconcile these estimates to the actual costs incurred for the six-month periods ending June 30 and December 31 of each year shall be applied.

*See* General Subscriber Service Tariffs, Section A.2.4.6, effective dates January 1, 1984, February 10, 1986, September 1, 1993, June 9, 1995, July 15, 1996, July 8, 1997, July 24, 1999, July 5, 2000, March 15, 2001, April 26, 2003, August 15, 2003 ("Tariff").

19. The amended Tariff allowed Bellsouth to pass on the costs it allegedly incurred in complying with the Manhole Ordinance to its Miami-Dade County customers, but required Bellsouth to perform semi-annual audits and reconcile the fees it imposed with the costs it actually incurred in complying with the Manhole Ordinance.

20. Since 1983, Bellsouth has imposed an \$0.11 per line charge on all its Miami-Dade County customers, both commercial and residential.

21. Since 1983, Bellsouth has failed to comply with its Tariff in that it has not conducted semi-annual audits to determine its actual costs of compliance with the

Manhole Ordinance nor has it taken steps to reconcile its actual costs of compliance with fees it has imposed on its customers.

22. Since 1983, Bellsouth's charges related to the Manhole Ordinance have been unlawful, in violation of its Tariff and § 364.05 and 364.08 Florida Statute

## **V. REQUEST FOR RELIEF**

23. The Tariff governs BellSouth's ability to charge the Manhole Fee, and BellSouth must comply with all provisions of the Tariff in order to charge the Manhole Fee.

24. Upon information and belief, BellSouth failed, and continues to fail, to comply with the provisions of the Tariff requiring BellSouth to conduct a semi-annual adjustment to reconcile the amounts collected by the Manhole Fee. The Tariff mandates that BellSouth must compare the costs required to comply with the Manhole Ordinance with the amounts collected and return any excess amounts collected back to its customers.

25. As a result of BellSouth's non-compliance with the Tariff, it has overcharged, and currently overcharges, customers for the Manhole Fee in violation of the Tariff.

26. The charge has been applied uniformly to all Miami-Dade County customers, making class-wide relief appropriate.

27. Customers request that an injunction be entered requiring BellSouth to comply with the Tariff by conducting the semi-annual adjustments to the Manhole Fee.

28. Customers seek refund of all fees collected in violation of the Tariff; specifically all fees collected by Bellsouth for the Manhole Fee since the time that



Bellsouth first violated its Tariff and/or a refund of the difference between the amounts charged by BellSouth for the Manhole Fee and the actual costs incurred by BellSouth to comply with the Manhole Ordinance, as required by the Tariff, plus interest thereon.

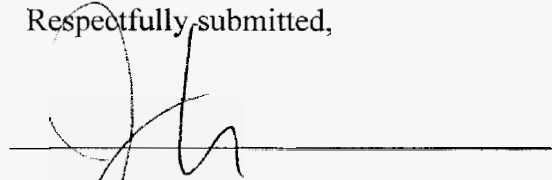
29. Customers request that BellSouth be enjoined from charging the Manhole Fee until it conducts proper semi-annual adjustments as required by the Tariff.

30. Customers have been forced to hire attorneys to prosecute this action and ask that they be awarded attorney fees and the costs of this action.

31. Customers request that the Commission impose any additional penalties that it deems appropriate in the exercise of its discretion.

**WHEREFORE**, Customers respectfully request that the Florida Public Service Commission enter an order enjoining BellSouth from charging the Manhole Fee until a proper semi-annual adjustment is conducted and requiring BellSouth to comply with the Tariff, and such other relief as the Commission deems just and proper under its statutory authority.

Respectfully submitted,

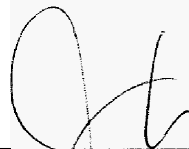


Justin G. Witkin, Esq.  
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Lance Harke, Esq.  
Fla. Bar No. 863599  
Howard M. Bushman, Esq.  
Florida Bar No. 0364230  
HARKE & CLASBY LLP  
155 South Miami Avenue, Suite 600  
Miami, Florida 33130  
Telephone: (305) 536-8220  
Telecopier: (305) 536-8229

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint has been furnished by United States mail, return receipt requested and postage prepaid to BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee FL 32301-1556, on this 16th day of March, 2005.



---

Justin G. Witkin, Esq.  
Fla. Bar No. 0109584  
Aylstock, Witkin & Sasser, P.L.C.  
55 Baybridge Drive  
Gulf Breeze, FL 32561  
Tel. 850-916-7450  
Fax 850-916-7449

# **EXHIBIT A**

BELLSOUTH  
TELECOMMUNICATIONS, INC.  
FLORIDA  
ISSUED: July 31, 2003  
BY: Joseph P. Lacher, President -FL  
Miami, Florida

## GENERAL SUBSCRIBER SERVICE TARIFF

Original Page 20.1

EFFECTIVE: August 15, 2003

**A2. GENERAL REGULATIONS****A2.4 Payment Arrangements and Credit Allowances (Cont'd)****A2.4.5 Provision for Certain Local Taxes and Fees**

(M)

When a municipality or political subdivision of the state charges the Company any license, occupational, franchise, inspection or other similar tax or fee, whether in a lump sum, or at a flat rate, or based on receipts, or based on poles, wires, conduits or other facilities, the aggregate amount of such taxes and fees will be billed, insofar as practical, pro rata to exchange subscribers receiving service in the municipality or political subdivision. (M)

**A2.4.6 Provision for Certain Local Ordinance Costs**

(M)

When the Company by virtue of its compliance with a municipal or county ordinance, incurs significant costs that would not otherwise normally be incurred, all such costs shall be billed, insofar as practical, pro rata, per exchange access line, to those subscribers receiving exchange service within the municipality or county as part of the price for exchange service. (M)

An estimated monthly amount of such costs shall be billed to the affected subscribers each month and an adjustment to reconcile these estimates to the actual costs incurred for the six month periods ending June 30 and December 31 of each year shall be applied. (M)

Charges for permits, licenses or fees required by governing authorities for installing any telephone wire in a building will be billed by the Company to the requesting party. (M)

**A2.4.7 Reserved for Future Use**

(M)

# **EXHIBIT B**

## **Miami-Dade County Ordinances**

### **Chapter 21, Article IV**

#### **Sec. 21-44. Manholes; safety requirements; penalty.**

(a) No person, firm or corporation shall cause any person to enter a manhole being used for repairs, maintenance, installation or inspection of underground utilities unless the following requirements are fulfilled:

(1) A second person shall remain abovegrade at all times to provide surveillance of the manhole and the person(s) belowgrade until the manhole cover is in place and no person(s) remains belowgrade at or near the location of the manhole.

(2) The person required herein to remain abovegrade shall be trained and shall be capable of providing first aid and emergency rescue procedures and shall be furnished with communication equipment to summon additional aid in the event of an emergency.

(3) The person providing aboveground surveillance shall keep animals and unauthorized persons away from the open manhole.

(4) The person required herein to remain abovegrade may be assigned other duties provided such other duties do not interfere with the requirements of this section.

(b) Every violation of any provision of this section shall be punished by a fine not to exceed five hundred dollars (\$500.00) or imprisonment in the County Jail for a period not to exceed sixty (60) days or both such fine and imprisonment, in the discretion of the court. Each day of continued violation shall be considered as a separate offense.

(Ord. No. 83-3, § 1, 2-1-83)

# **EXHIBIT C**

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

KARLA KAY HIGHTSHOE, an individual,  
on behalf of herself and all others similarly  
situated,

CONSOLIDATED  
CASE NOs.: 03-26623-CA-11  
03-16239-CA-11

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.  
a Georgia Corporation.

Defendant.

---

TIMOTHY MCCALL, and  
MANUEL A. GARCIA, individually; and  
BEST INVESTMENT REALTY, INC., a Florida  
corporation, on behalf of themselves and as  
Representatives of a Class of all other  
Similarly situated,

Plaintiffs,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,  
A Georgia corporation,

Defendant.

---

**CORRECTED AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff, Karla Kay Hightshoe, on behalf of herself and on behalf of a class of similarly  
situated persons throughout the State of Florida, alleges as follows:



CASE NO.: 03-26623 CA 11

**NATURE OF THE ACTION**

1. This is an action for breach of contract in connection with BellSouth Telecommunications, Inc.'s ("BellSouth") charging customers a fee related to Miami-Dade County Ordinance § 21-44, entitled "Manholes; safety requirements; penalty" ("Manhole Ordinance") that is greater than the amount permissible under the applicable tariff.
2. Plaintiff and class members are customers of BellSouth who are charged for the services provided by BellSouth. Among the many fees and charges that BellSouth imposes on its customers, BellSouth charges an eleven cent (\$.11) "Cost of Dade County Manhole ordinance #83-3" fee ("Manhole Fee"). BellSouth charges this fee pursuant to the Tariff. *See* ¶ 11 *infra*. The Tariff constitutes the contract between BellSouth and its customers. BellSouth, however, has violated the terms of the Tariff, as more specifically pled below. Accordingly, BellSouth should be compelled to reimburse all members of the class who have paid to BellSouth more than the permissible amount of the Manhole Fee since 1997.
3. This action is brought on behalf of Florida customers who paid the Manhole Fee from 1997 to the present, and seeks recovery of the difference between the amounts charged by BellSouth for the Manhole Fee and the actual costs incurred by BellSouth to comply with the Manhole Ordinance, as required by the Tariff.

**JURISDICTION**

4. This Court has jurisdiction over this action pursuant to Fla. Stat. § 26.012, because this is a civil case where damages exceed \$15,000.

CASE NO.: 03-26623 CA 11

5. Venue is proper in the Eleventh Circuit Court for Miami-Dade County, Florida, pursuant to Fla. Stat. § 47.051, because the cause of action accrued in Miami-Dade County, Florida, and because the defendant conducts substantial business in this county.

**PARTIES**

6. Plaintiff Hightshoe is a resident of Miami-Dade County, Florida and is otherwise *sui juris*. Defendant BellSouth is organized under the laws of the State of Georgia, and conducts substantial business throughout the United States, including Florida and within this County.

7. This Court has jurisdiction over BellSouth because it conducts substantial and not isolated business in this State and has offices open for business in this State and within this County.

**FACTUAL ALLEGATIONS**

8. BellSouth is one of the largest telephone companies in the southeastern United States. It services millions of customers, both residential and commercial, within the State of Florida and in Miami-Dade County.

9. As part of its focus on safety for persons who must work in its underground manholes, Miami-Dade County enacted the Manhole Ordinance. The Manhole Ordinance states the following:

**Sec. 21-44. Manholes; safety requirements; penalty.**

(a) No person, firm or corporation shall cause any person to enter a Manhole being used for repairs, maintenance, installation or inspection of underground utilities unless the following requirements are fulfilled:

CASE NO.: 03-26623 CA 11

(1) A second person shall remain above grade at all times to provide surveillance of the Manhole and the person(s) below grade until the Manhole cover is in place and **no person(s) remains below grade** at or near the location of the Manhole.

(2) The person required herein to remain above grade shall be trained and shall be capable of providing first aid and emergency rescue procedures and shall be furnished with communication equipment to summon additional aid in the event of an emergency.

(3) The person providing aboveground surveillance shall keep animals and unauthorized persons away from the open Manhole.

(4) The person required herein to remain above grade may be assigned other duties provided such other duties do not interfere with the requirements of this section.

(b) Every violation of any provision of this section shall be punished by a fine not to exceed five hundred dollars (\$500.00) or imprisonment in the County Jail for a period not to exceed sixty (60) days or both such fine and imprisonment, in the discretion of the court. Each day of continued violation shall be considered as a separate offense.

10. The Manhole Ordinance does not require BellSouth to make any actual payments to Miami-Dade County.

11. After enactment of the Manhole Ordinance, Bell South applied to the Florida Public Service Commission ("PSC") for the ability to charge a fee to customers to compensate BellSouth for the costs allegedly incurred to comply with the Manhole Ordinance. The application was made in the form of a tariff. Upon information and belief, the PSC approved BellSouth's tariff application in March of 1983. The pertinent portions of the approval read:

When the Company [Bellsouth] by virtue of its compliance with a municipal or county ordinance, incurs significant costs that would not otherwise normally be incurred, all such costs shall be billed, insofar as practical, pro rata, per exchange

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access line, to those subscribers receiving exchange service within the municipality or county as part of the price for exchange service.

An estimated monthly amount of such costs shall be billed to the affected subscribers each month and an adjustment to reconcile these estimates to the actual costs incurred for the six-month periods ending June 30 and December 31 of each year shall be applied.

*See General Subscriber Service Tariffs, Section A.2.4.6, effective dates January 1, 1984, February 10, 1986, September 1, 1993, June 9, 1995, July 15, 1996, July 8, 1997, July 24, 1999, July 5, 2000, March 15, 2001, April 26, 2003, August 15, 2003 ("Tariff"). Relevant sections of the Tariff are attached hereto as Exhibit A.*

12. Thus, in addition to collecting the amounts billed to customers to offset the costs of compliance with the Manhole Ordinance, the Tariff requires that Bell South conduct an audit and perform "an adjustment to reconcile . . . [its Manhole Fee with] . . . the actual costs incurred for the six-month periods ending June 30 and December 31 of each year . . ." *See id.* The Tariff therefore requires BellSouth, after performing the required audit, to apply an "adjustment" and return to its customers any amounts collected in excess of the actual costs incurred to comply with the Manhole Ordinance. *Id.*

13. The Tariff is the contract between the Plaintiff, class members, and BellSouth regarding the Manhole Fee and "exclusively controls the rights and liabilities of the parties as a matter of law." *MCI Telecommunications Corp. v. Best Telephone Company, Inc.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994). Furthermore, BellSouth is prohibited "from deviating in any way from its published tariffs." *See id.* at 873.

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14. After approval of the Tariff, BellSouth commenced charging the Manhole Fee to its customers who had telephone accounts with BellSouth within Miami-Dade County.

15. Bell South uniformly charges the Manhole Fee to all of its customers, regardless of whether their telephone accounts were for residential or commercial purposes.

16. The Manhole Fee appears on a customer's monthly phone bill as a line item that the customer must pay as part of the her local toll charges. The line item reads "Cost of Dade County manhole ordinance #83-3," or something substantially similar.

17. BellSouth affirmatively represents through this line item that the customer is to reimburse BellSouth for the costs it pays to Miami-Dade County in compliance with the Manhole Ordinance, as authorized by the Tariff.

18. As stated in the Tariff, BellSouth is permitted to estimate the approximate cost of the Manhole Fee and charge it accordingly. Since 1983, BellSouth assessed an eleven cent (\$0.11) fee to allegedly comply with the Manhole Ordinance.

19. However, as required by the Tariff, BellSouth must also conduct a semi-annual adjustment to reconcile the amounts collected by the Manhole Fee. The Tariff requires BellSouth to compare the costs required to comply with the Manhole Ordinance with the amounts collected, adjust the fee accordingly, and return any excess amounts collected back to its customers. See ¶ 11 *supra*.

20. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1983, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of

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1983 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

21. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1984, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1984 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

22. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1985, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1985 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

23. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1986, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1986 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

24. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1987, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of

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1987 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

25. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1988, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1988 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

26. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1989, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1989 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

27. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1990, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1990 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

28. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1991, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of

CASE NO.: 03-26623 CA 11

1991 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

29. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1992, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1992 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

30. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1993, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1993 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

31. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1994, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1994 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

32. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1995, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of



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1995 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

33. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1996, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1996 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

34. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1997, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1997 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

35. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1998, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 1998 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

36. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 1999, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of

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1999 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

37. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 2000, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 2000 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

38. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 2001, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 2001 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

39. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 2002, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of 2002 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

40. Upon information and belief, BellSouth failed to comply with the Tariff for the calendar year 2003, in that BellSouth failed to make any adjustments to reconcile its Manhole Fee to the actual costs incurred for the six-month periods ending June 30 and December 31 of

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2003 as required by the Tariff, and failed to return any excess amounts collected back to its consumers.

41. BellSouth's failure to comply with the Tariff has resulted in significant overcharges to the Plaintiff and the class.

42. Further, as a result of BellSouth's failure to conduct semi-annual adjustments to the Manhole Fee, and to return any excess amounts collected back to its customers, the Manhole Fee is an illegal charge for which disgorgement is proper.

#### **CLASS ACTION ALLEGATIONS**

43. This action is brought on behalf of Plaintiff individually and as a class action on behalf of all persons or entities within Florida who after November 7, 1997 (the "Class Period"), paid for the Manhole Fee (the "Class").

44. The class is composed of thousands of persons, the joinder of whom in one action is impractical. Disposition of their claims in a class action will provide substantial benefits to both the parties and the Court. The names and addresses of the members of the class are maintained by defendant. As a result, the class is ascertainable and manageable.

45. Plaintiff Hightshoe is a member of the class, as she paid the Manhole Fee charged by BellSouth during the class period. As with all of the class members, BellSouth failed to comply with the Tariff, resulting in significant overcharges to the Plaintiff and the class. BellSouth retained these charges as profit, in violation of the Tariff, and did not disclose this fact to Plaintiff or the class.

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46. No antagonism exists between the interests of the Plaintiff and the interests of the other class members. Plaintiff's counsel are experienced in class action litigation and are well qualified to conduct this litigation.

47. Plaintiff's claims are typical of the claims of the class members in that the putative class members likewise paid the Manhole Fee charged by BellSouth.

48. There are numerous common questions of law or fact in this action within the meaning of Florida Rule of Civil Procedure 1.220(a)(2), and they predominate over any questions affecting only individual class members within the meaning of Rule 1.220(b)(3).

49. Common questions of law or fact include, without limitation:

- Whether BellSouth complied with the Tariff by making the proper semi-annual adjustments;
- Whether BellSouth's non-compliance with the Tariff resulted in damages to the Plaintiff and class members;
- Whether the Manhole Fee collected by BellSouth reflects the actual costs incurred by BellSouth to comply with the Manhole Ordinance;
- Whether BellSouth breached its contract with its customers by failing to return to them any difference between the estimated amounts charged to them for compliance with the Manhole Ordinance, and the actual costs of compliance with the Manhole Ordinance.

50. Pursuant to Rule 1.220(b)(3), a class action is superior to the other available methods for the fair and efficient adjudication of the controversy because, among other things, it is desirable to concentrate the litigation of the class members' claims in one forum, as it will conserve party and judicial resources and facilitate the consistency of adjudications.

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51. Furthermore, as the damages suffered by individual class members may be relatively small, their interest in maintaining separate actions is questionable and the expense and burden of individual litigation makes it impracticable for them to seek individual redress for the wrongs done to them. Plaintiff knows of no difficulty that would be encountered in the management of this case that would preclude its maintenance as a class action.

**COUNT I- BREACH OF CONTRACT**

52. Plaintiff repeats and realleges the allegations contained in paragraphs 1-51 above, as if fully set forth herein.

53. The Tariff is the contract between Plaintiff, the class, and BellSouth regarding the Manhole Fee, and "exclusively controls the rights and liabilities of the parties as a matter of law." *MCI Telecommunications Corp., v. Best Telephone Company, Inc.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994). Furthermore, BellSouth is prohibited "from deviating in any way from its published tariffs." *See id.* at 873.

54. BellSouth applied for the Tariff and was approved to charge the Manhole Fee only under certain conditions. As provided by the Tariff, BellSouth was allowed to estimate the approximate cost of the Manhole Fee and charge it accordingly, but only under certain conditions. BellSouth consistently assessed an eleven cent (\$0.11) fee to comply with the Manhole Ordinance during the class period.

55. However, the Tariff also requires BellSouth to conduct a semi-annual adjustment to reconcile the amounts collected by the Manhole Fee. Specifically, BellSouth must compare the costs required to comply with the Manhole Ordinance with the amounts collected and return

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any excess amount collected back to its consumers. Upon information and belief, BellSouth failed to comply with the Tariff, and has continued to overcharge customers for the Manhole Fee in violation of the Tariff.

56. As a result, Plaintiff and the class have been damaged by BellSouth's breach, and are entitled to reimbursement for the amounts overcharged, plus interest, as well as other damages to be proven at trial.

**WHEREFORE**, Plaintiff and class members demand an award against BellSouth for the amounts equal to the amount each class member was overcharged by BellSouth as a result of its breach of the Tariff, plus interest, and such other relief as this Court deems just and proper.

**COUNT II- INJUNCTIVE RELIEF**

57. Plaintiff repeats and realleges the allegations contained in paragraphs 1-51 above, as if fully set forth herein.

58. The Tariff governs BellSouth's ability to charge the Manhole Fee, and BellSouth must comply with all provisions of the Tariff in order to charge the Manhole Fee.

59. Upon information and belief, BellSouth failed, and continues to fail, to comply with the provisions of the Tariff requiring BellSouth to conduct a semi-annual adjustment to reconcile the amounts collected by the Manhole Fee. The Tariff mandates that BellSouth must compare the costs required to comply with the Manhole Ordinance with the amounts collected and return any excess amounts collected back to its customers.

60. As a result of BellSouth's non-compliance with the Tariff, it has overcharged, and currently overcharges, customers for the Manhole Fee in violation of the Tariff.

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61. Plaintiff and class members request that an injunction be entered requiring BellSouth to comply with the Tariff by conducting the semi-annual adjustments to the Manhole Fee.

62. Further, BellSouth should be enjoined from charging the Manhole Fee until it conducts the proper semi-annual adjustments as required by the Tariff.

WHEREFORE, Plaintiff and class members respectfully request that this Court enter an order enjoining BellSouth from charging the Manhole Fee until a proper semi-annual adjustment is conducted and requiring BellSouth to comply with the Tariff, and such other relief as the Court deem just and proper.

**JURY DEMAND**

63. Plaintiff and class members demand a trial by jury of all issues so triable.

Dated: February 26, 2004.

Respectfully submitted,



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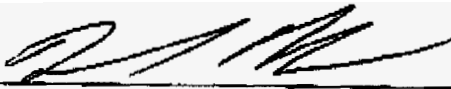
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served via facsimile and U.S. Mail this 28<sup>th</sup> day of February, 2004 to:

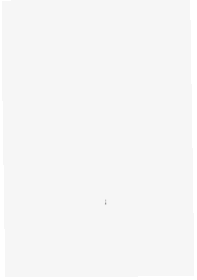
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# **EXHIBIT D**

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA  
GENERAL JURISDICTION DIVISION

KARLA KAY HIGHTSHOE, an  
individual, on behalf of herself  
and all others similarly situated,

Plaintiffs,

Case No.: 03-26623-CA11

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,  
a Georgia Corporation,

Defendant.

---

TIMOTHY MCCALL, and MANUEL A.  
GARCIA, individually; and BEST  
INVESTMENT REALTY, INC.,  
a Florida corporation, on behalf of themselves  
and as Representatives of a Class of all other  
Similarly Situated,

Plaintiffs,

Case No.: 03-16239-CA11

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.,  
a Georgia Corporation,

Defendant.

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**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE  
CONSOLIDATED AMENDED COMPLAINT AND ABATING THE ACTION**

THIS MATTER came before the Court on November 3, 2004, and December  
13, 2004, and having heard argument of counsel and being otherwise fully advised  
in the premises, it is

ORDERED and ADJUDGED that:

1. Defendant's Motion to Dismiss the Consolidated Amended Complaint  
be and the same is hereby GRANTED. The Court has reviewed the  
submissions of the parties and entertained extensive oral argument. It

appears to the Court that the Florida Public Service Commission's primary jurisdiction is an alternative and better forum to address Plaintiffs' claim that BellSouth has not complied with Section A.2.4.6 of its tariff filed with the Florida Public Service Commission. It also appears to the Court that pursuant to Fla. Stat. § 364.285, the Florida Public Service Commission has the authority to provide the relief to the Plaintiffs and class sought in this lawsuit.

2. Plaintiffs' Consolidated Amended Complaint is hereby ABATED pending submission of Plaintiffs' claims to the Florida Public Service Commission.

DONE and ORDERED, in Chambers, Miami-Dade County, Florida, this \_\_\_\_\_ day of \_\_\_\_\_, 2004. **Conformed Copy**

\_\_\_\_\_  
Henry H. Harnage  
Circuit Court Judge

DEC 16 2004  
HENRY H. HARNAGE  
Circuit Court Judge

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