

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

DOCKET NO. 050194-TL
ORDER NO. PSC-06-0685-PAA-TL
ISSUED: August 8, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

NOTICE OF PROPOSED AGENCY ACTION ORDER
REQUIRING BELL SOUTH TELECOMMUNICATIONS, INC. TO RECONCILE
FEE ASSOCIATED WITH MIAMI-DADE COUNTY ORDINANCE #83-3

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Case Background

On March 23, 2005, a Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief ("Complaint") was filed by Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, as well as on behalf of all other BellSouth customers who have paid the Miami-Dade County Ordinance #83-3 ("Manhole Ordinance") fee, (collectively as the "Petitioners").¹

¹ Prior to filing the Complaint, the Petitioners served as representatives of a class of BellSouth customers in a class action suit before Judge Henry Harnage in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the same matters brought by the Complaint. See Hightshoe, et al. v. BellSouth Telecommunications, Inc., Case No. 03-26623-CA11. Judge Harnage dismissed the Petitioners' class action suit for failure to exhaust administrative remedies.

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The Complaint alleges that BellSouth has violated the terms of Section A.2.4.6 of its General Subscriber Service Tariff (“Tariff”) since 1983, when a fee was first established to recoup BellSouth’s costs associated with complying with the Manhole Ordinance. Pursuant to the Manhole Ordinance, while anyone is working below ground level, at or near a manhole, another person must provide above-ground surveillance. The Complaint requests that this Commission enforce the Tariff, and order BellSouth to comply with its Tariff, and to refund all fees collected in violation of the terms of the Tariff.²

On April 18, 2005, BellSouth filed its Motion to Dismiss (“Motion”) the Complaint on the following four bases: (1) the individual customers lack standing to initiate a proceeding, (2) there is no statutory authority for this Commission to hear a class action suit, (3) this Commission has no authority to grant injunctive relief, and (4) this Commission has no authority to award attorney’s fees. On April 28, 2005, the Petitioners filed their Response to BellSouth’s Motion to Dismiss (“Response”) in which they requested that the Motion be denied. Alternatively, the Petitioners suggested that this Commission enter an order acknowledging that the matters in the Complaint are and were properly before the Circuit Court.

By Order No. PSC-05-0762-PCO-TL, issued July 25, 2005, we granted in part and denied in part BellSouth’s Motion to Dismiss the Petitioners’ Complaint. We found that the Petitioners have standing to bring the subject matter of the Complaint before this body and to seek a refund of any charges collected in violation of the Tariff. However, the claim for attorney’s fees was stricken since this Commission lacks the subject matter jurisdiction to grant such a claim. In addition, the request for injunctive relief was not addressed at that time, as additional information was necessary in order to proceed in an appropriate and efficient manner. We directed our staff to investigate this matter, provide the results of its investigation, and advise this Commission on its findings.³

II. Analysis

The Petitioners maintain that semi-annual audits are required under the Tariff, and 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.” (Complaint, ¶¶ 21, 24) Further, according to the Petitioners, this “return” is to be in the form of a refund of all fees collected by BellSouth in violation of the Tariff, plus interest. (Complaint, ¶ 28) In its Motion to Dismiss, BellSouth stated that the use of the word “reconcile” in the Tariff does not

² BellSouth General Subscriber Service Tariff, Section A.2.4.6 states:

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.

³ As part of its investigation, our staff has served BellSouth with three sets of discovery.

imply that a refund or audit is required. (Motion, p. 5) The tariff language in question appears in Section A2.4.6 of BellSouth's General Subscriber Service Tariff and provides:

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** (emphasis added).

It appears that the term "reconcile" does indicate that the costs required to comply with the Manhole Ordinance are to be compared with the amounts collected, at the end of each six-month period. Once the comparison is made, however, the language indicates that the overage/underage in amounts collected is to be considered in establishing the appropriate fee for the next six months. This conclusion stems from the words "adjustment," "reconcile," and "applied," which suggest that the process is accounting in nature. There is a question as to whether BellSouth actually considered the overage/underage in establishing the fee for each subsequent six-month period. Due to the passage of time and the unavailability of data for earlier periods, it is difficult to perform an analysis for each six-month period since the inception of the fee. Moreover, as will be discussed below, there is a plausible basis for using 1998 as a starting point, to determine whether there is a cumulative overage or underage in collections as of the end of 2005.

During the period 1983-1997, BellSouth operated under rate-of-return regulation. In addition, from 1988 to 1997, BellSouth was operating under a sharing plan whereby earnings above certain rate-of-return levels were refunded, all or in part, to customers. In response to Staff's First Set of Interrogatories, No. 1, BellSouth stated in part:

... "Refunds and Sharing Amounts" for the years 1993 through 1997 arising from the Commission's Order No. PSC-94-0172-FOF-TL also included the [Ordinance-related] revenues and expenses as booked. Therefore, they were included in calculation of achieved Rates of Return (on Equity) that resulted in sharing refunds to BellSouth customers during three of those five years. In 1997, BellSouth earned the maximum allowed by the PSC order and refunded all earnings above that level. Due to reaching this earnings cap on 1997 earnings, BellSouth reset the cumulative under/over balance to zero at the beginning of 1998, thereby forgoing recovery of past un-recovered costs incurred in complying with the Ordinance. (July 15, 2005, Item No. 1, Page 4 of 7)

While BellSouth's calculations show there was a cumulative under-recovery at the end of 1997, the supporting data necessary to confirm this result is not available, and there is a question as to the appropriate method for calculating overhead expenses. Nonetheless, based on how BellSouth was regulated over the 1983-1997 period, any over-recovery of company expenses was addressed, in theory, at the aggregate level. Consequently, it is unnecessary to evaluate whether there was over-recovery specific to the Manhole Ordinance fee. In fact, to do so might be construed as double counting for certain years. This treatment may not be ideal for all years in the period, since BellSouth may have over-recovered with respect to the Manhole Ordinance fee,

but not on an overall basis in certain years. However, the reverse situation is also possible – BellSouth may have under-recovered with respect to the Manhole Ordinance fee, but not on an overall basis in certain years. On balance, and in consideration of data limitations, we find that BellSouth’s approach of setting the cumulative under/over balance to zero at the beginning of 1998 is reasonable.

History of Fee Changes

BellSouth often adjusted the fee during the period 1987 through 1993, with the highest fee charged being \$.17 and the lowest fee charged being \$.01. Before and after this period, however, BellSouth rarely changed the fee. In response to our staff’s discovery request to provide the fee for each six-month period, BellSouth provided the following fee history:

1983	\$.15
June 1987	\$.08
January 1988	\$.12
February 1988	\$.13
August 1988	\$.14
February 1989	\$.17
February 1990	\$.09
August 1990	\$.01
February 1991	\$.08
August 1991	\$.12
January 1992	\$.12
August 1992	\$.09
February 1993	\$.06
August 1993	\$.11
1998 – December 2003	\$.11
January 2004 to present	\$.08

(July 15, 2005, Item No. 1, Page 7 of 7)

BellSouth also provided the following explanation of the company’s decision making process used to determine if the fee should be changed.

The cumulative balance, along with the six-month trend in recovery, would be the primary information utilized in a decision to change the pass-on charge on customer bills. BellSouth would also take into account the Information Technology (“IT”) costs and the increased cost associated with customer inquiries that accompany an increase if the company was in an under-recovered position. If the trends indicated that a cumulative under-recovery was being steadily and materially reduced, the pass-on charge would not be increased. (July 15, 2005, Item No. 1, Page 5 of 7)

The history of fee changes and BellSouth's explanation of its decision making process are difficult to reconcile. The history suggests that BellSouth was reviewing financial data at six-month intervals and adjusting the fee, as indicated by the data, during 1987 – 1993. Thereafter, the fee was not changed for ten years, which seems puzzling except possibly for BellSouth's explanation that its decision making process relied on data trending. Even accepting BellSouth's explanation, the decision making process does not seem consistent over time.

Regardless of how the overhead loadings are computed and the resulting cumulative overage or underage in collections as of the end of 2005, the history of fee changes indicates that, at a minimum, the Tariff was not administered in a consistent manner. However, data limitations prevent a finding of whether or not BellSouth violated the Tariff.

Overhead Loadings

Overhead calculations inherently generate questions due to the aggregate nature of the loading factors used. In this case, a loading factor is multiplied by the amount of vouchered security guard expense to determine overhead expense. BellSouth has presented two different methods for developing loading factors. A loading factor is essentially a ratio; the two methods use the same numerator, but a different denominator. Under BellSouth's "original" method, the loading factor was developed by dividing total corporate operations expense by total operations expense (less depreciation and amortization). Under BellSouth's "revised" method, the loading factor was developed by dividing total corporate operations expense by BellSouth salaries and wages. Due to the smaller denominator used in the "revised" method, the resulting loading factor is higher. In discovery, BellSouth reported that the "revised" method of developing loading factors is consistent with the method used from 1983-1996.

It is our understanding that the "original" method is in general use company-wide today. For purposes of the Manhole Ordinance fee, BellSouth apparently used the "original" method from 1998 through 2003, before concluding that this method was incorrect for this application and adopting the "revised" method. BellSouth contends that the "original" method understated the overhead costs as compared to historical calculations made from 1983 through 1996. According to BellSouth, use of the "revised" method and all known revisions to correctly identify revenues and expenses provides the company's "best determination of the expenses associated with the Dade County Manhole ordinance and its recovery through billing to Dade County customers." (September 13, 2005, Item No. 9, Page 3 of 7)

In theory, how the loading factor is applied should be consistent with how the loading factor is developed, i.e., the loading factor should be applied only to those items included in the denominator of the factor. Accordingly, the "original" method is conceptually sound since the loading factor is applied to vouchered security guard expense, which appears to be clearly included within the total operations expense base.

Under the "revised" method, however, there arguably is an inconsistency between how the loading factor is developed and how the factor is applied. Vouchered expense is not included in the *BellSouth* salaries and wages base, yet the resulting loading factor is applied to vouchered

expense. By its very definition, the loading factor should only be applied to *BellSouth* salaries and wages. BellSouth alleges that voucher expense for security guards is “equivalent” to BellSouth salaries and wages. While the security guards substitute for BellSouth employees, the two are not equivalent in this context. In order to be equivalent for this purpose, the denominator of the loading factor would need to be defined as salaries and wages for BellSouth employees and vouchered expense for contract labor. The “revised” method is consistent with the method used during 1983-1996, and there is merit to having a uniform approach over time.

Determining the amount of a cumulative overage or underage in collections as of the end of 2005 turns on how the overhead loadings are computed. We note that the fee remained unchanged at \$.11 throughout the 1998-2003 period and was reduced to \$.08 in January 2004. This rate reduction suggests that BellSouth believed there was a cumulative over-recovery at the end of 2003.

Cumulative Overage/Underage in Collections

We find that some level of overhead loadings should apply, since BellSouth clearly incurs administrative costs in order to comply with the Manhole Ordinance. From a practical standpoint, there are three available approaches for overhead loadings: the “original” method, the “revised” method, or a combination based on which method was actually used for which years.

BellSouth’s data through the end of 2005 produces four sets of results: one under the “original” method of developing loading factors; a second under the “revised” method; and a third and fourth using the “original” method for 1998-2003 and the “revised” method for 2004-2005. In the first three scenarios, the cumulative under/over balance was set to zero at the beginning of 1998. The fourth scenario employs the same overhead loading methods used in the third scenario, but the cumulative under/over balance was not set to zero at the beginning of 1998, and the cumulative balance was reset at the beginning of 2004. As a result the cumulative overage/underage amounts under the third and fourth scenarios are quite different. In addition, the revenue and expense data used in the fourth scenario is, according to BellSouth, the data actually used for purposes of conducting six-month reviews. In contrast, the revenue and expense data used in the first three scenarios incorporate various corrections made by BellSouth.

One approach is to treat any cumulative overage as an accounting adjustment flowing from the reconciliation process. While accounting adjustments are usually made at book value, there is merit, in this instance, to calculate the cumulative overage/underage with interest. This approach helps to ensure that the benefit to BellSouth from any over collection and use of these funds flows back to Miami-Dade County ratepayers in the form of a lower future Manhole Ordinance fee, than would otherwise apply.

For the period 1998-2005, interest was computed monthly and applied to the monthly overage/underage in amounts collected to determine the cumulative overage/underage with interest through the end of 2005. Interest calculations were made using the thirty (30) day commercial paper rate for high grade, unsecured notes, regularly published in the Wall Street

Journal. This is the same interest rate used for refunds ordered by this Commission (see Rule 25-4.114(4)(a), Florida Administrative Code), and we find that the same rate is appropriate in the current context. As a further point of clarification, we find that interest should only be considered in the context of calculating the cumulative overage/underage amount; accruing interest would not be appropriate in the context of future six-month reconciliations. This approach of applying interest on a one-time basis helps to address any concern that the Tariff may not have been administered as intended for a lengthy period of time. The cumulative overage/underage amounts using each of these four scenarios are shown in Attachment A, attached hereto and incorporated herein.

A uniform method of handling overhead loadings helps to ensure that the various corporate overhead allocations sum to the whole. Based on the cumulative overage developed using the original method, which we find is the conceptually preferred method among the options discussed, and the long periods of over-recovery under the first, second, and third options, it appears that BellSouth did not perform the required semi-annual reconciliations and adjustments during all or part of the period 1998 through 2005.

We hereby require BellSouth to set the cumulative overage/underage in collections as of year-end 2005, and furthermore, we specify how overhead loadings, reconciliations and adjustments are to be performed in the future, under the Tariff.

Disposition of Cumulative Overage in Collections

The Petitioners are seeking a refund of all fees collected by BellSouth in violation of the Tariff, plus interest. Rule 25-4.114(5), Florida Administrative Code, addresses the method of refund distribution. This portion of the rule provides that for customers still on the system, the refund is to be handled as a bill credit. For those customers no longer on the system, the company is to mail a refund check to the last known address, except that no refund of less than one dollar need be made. In this case, with the cumulative overage being calculated over an eight-year period, there are likely to be many affected customers who are no longer on the system. As a result, refunds that are not claimed or not required could be a significant issue. Providing proportionately higher bill credits only to existing customers who received service during the period at issue would ensure all monies are returned, but would ignore a portion of the affected customers. Relying on prospective rate relief and not providing refunds has the drawback that the customer base going forward will differ from the customer base over the period during which there was an overage in collections.

The prudent course is to treat the cumulative overage as an accounting adjustment flowing from the reconciliation process required by the Tariff. Although both over inclusive and under inclusive vis-à-vis the set of affected customers, this approach is appropriate and reasonable given the small per line amounts at issue. While the number of BellSouth access lines in the Miami exchange varied over the 1998-2005 period, 1.0 – 1.1 million lines is a rough average. We find that with a cumulative overage, including interest, of \$469,176, the average per line amount would be less than \$.50. Accordingly, since the per line credit or refund would

be less than \$.50, and a significant number of affected customers may no longer be receiving service from BellSouth, no customer credit or refund is required.

III. Decision

We find that no customer credit or refund is required, absent a finding of whether BellSouth violated Section A.2.4.6 of its General Subscriber Service Tariff. Instead, we find that BellSouth shall set the cumulative overage in collections, with interest, as of year-end 2005 at \$469,176. Also, BellSouth shall consider this overage and any overage/underage for February 1, 2006 through August 1, 2006, in setting the Manhole Ordinance Fee to be assessed for the period beginning August 1, 2006. Moreover, we find that pursuant to existing Section A.2.4.6 of its General Subscriber Service Tariff, BellSouth shall perform reconciliations for each future six-month period and apply the overage/underage in collections as an accounting adjustment, to determine the appropriate fee. Finally, we find that in the future, overhead loadings shall be computed using the same method in general use by BellSouth (i.e., the "original" method).

This Order shall become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this proposed agency action files a protest that identifies with specificity the issues in dispute, in the form provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of this Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute shall be deemed stipulated. This docket shall be closed upon issuance of a Consummating Order.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that no customer credit or refund is required, absent a finding of whether BellSouth Telecommunications, Inc. violated Section A.2.4.6 of its General Subscriber Service Tariff. It is further

ORDERED that the cumulative overage in collections, with interest, as of year-end 2005 shall be set at \$469,176. It is further

ORDERED that BellSouth Telecommunications, Inc. shall consider this overage and any overage/underage for February 1, 2006 through August 1, 2006, in setting the Manhole Ordinance Fee to be assessed for the period beginning August 1, 2006. It is further

ORDERED that BellSouth Telecommunications, Inc. shall perform reconciliations for each future six-month period and apply the overage/underage in collections as an accounting adjustment, to determine the appropriate fee. It is further


ORDERED that future overhead loadings shall be computed using the original method. It is further

ORDERED that this Order shall become final and effective upon issuance of a Consummating Order, unless a person whose substantial interests are affected by this proposed agency action files a protest that identifies with specificity the issues in dispute, in the form

provided by Rule 28-106.201, Florida Administrative Code, within 21 days of the issuance of this Order. As provided by Section 120.80(13)(b), Florida Statutes, any issues not in dispute shall be deemed stipulated. It is further

ORDERED that this docket shall be closed upon issuance of a Consummating Order.

By ORDER of the Florida Public Service Commission this 8th day of August, 2006.



BLANCA S. BAYO, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 29, 2006.

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In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Dade County Manhole Data
 Revenue less Expense, 1998 – 2005
 Per Six Months¹

	Option 1	Option 2	Option 3	Option 4
1/98 – 6/98	(\$40,141)	(\$87,433)	(\$40,141)	\$178,260
7/98 – 12/98	\$51,942	\$20,562	\$51,942	\$239,290
1/99 – 6/99	\$302,763	\$263,433	\$302,763	\$308,574
7/99 – 12/99	\$91,805	\$21,985	\$91,805	\$84,187
1/00 – 6/00	\$169,128	\$127,499	\$169,128	\$161,434
7/00 – 12/00	\$246,741	\$206,326	\$246,741	\$246,843
1/01 – 6/01	(\$95,093)	(\$180,791)	(\$95,093)	(\$125,195)
7/01 – 12/01	\$190,650	\$124,650	\$190,650	\$191,297
1/02 – 6/02	(\$61,928)	(\$171,152)	(\$61,928)	(\$62,091)
7/02 – 12/02	(\$70,974)	(\$138,679)	(\$70,974)	(\$78,149)
1/03 – 6/03	\$49,319	(\$30,112)	\$49,319	\$56,245
7/03 – 12/03	\$153,152	\$89,343	\$153,152	\$38,132
1/04 – 6/04	(\$87,093)	(\$145,266)	(\$145,266)	(\$145,266)
7/04 – 12/04	(\$235,910)	(\$298,728)	(\$298,728)	(\$298,728)
1/05 – 6/05	\$84,448	\$45,701	\$45,701	\$45,701
7/05 – 12/05	(\$428,401)	(\$507,544)	(\$507,544)	(\$507,544)

Option 1 = "Original" Method

Option 2 = "Revised" Method

Option 3 = "Original" Method 1998 – 2003 / "Revised" Method 2004 – 2005

Option 4 = Option 3, excluding corrections with 1998 beginning balance not set to zero, and 2004 beginning balance reset

¹ Excludes Interest.

Dade County Manhole Data
 Revenue less Expense, 1998 – 2005
 Cumulative¹

	Option 1	Option 2	Option 3	Option 4
01/01/1998 Balance	Ø	Ø	Ø	(\$1,170,369)
1/98 – 6/98	(\$40,141)	(\$87,433)	(\$40,141)	(\$992,109)
7/98 – 12/98	\$11,801	(\$66,872)	\$11,801	(\$752,818)
1/99 – 6/99	\$314,565	\$196,562	\$314,565	(\$444,245)
7/99 – 12/99	\$406,370	\$218,547	\$406,370	(\$360,058)
1/00 – 6/00	\$575,498	\$346,046	\$575,498	(\$198,623)
7/00 – 12/00	\$822,239	\$552,371	\$822,239	\$48,219
1/01 – 6/01	\$727,146	\$371,580	\$727,146	(\$76,976)
7/01 – 12/01	\$917,796	\$496,230	\$917,796	\$114,321
1/02 – 6/02	\$855,868	\$325,078	\$855,868	\$52,230
7/02 – 12/02	\$784,894	\$186,399	\$784,894	(\$25,919)
1/03 – 6/03	\$834,213	\$156,287	\$834,213	\$30,325
7/03 – 12/03	\$987,364	\$245,629	\$987,364	\$68,458
1/04 – 6/04	\$900,272	\$100,364	\$842,098	\$100,364
7/04 – 12/04	\$664,362	(\$198,364)	\$543,370	(\$198,364)
1/05 – 6/05	\$748,809	(\$152,663)	\$589,071	(\$152,663)
7/05 – 12/05	\$320,408	(\$660,207)	\$81,527	(\$660,207)

Option 1 = "Original" Method

Option 2 = "Revised" Method

Option 3 = "Original" Method 1998 – 2003 / "Revised" Method 2004 – 2005

Option 4 = Option 3, excluding corrections with 1998 beginning balance not set to zero, and 2004 beginning balance reset

¹ Excludes Interest.