

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY VERIZON FLORIDA INC.
TO REFORM INTRASTATE NETWORK ACCESS
AND BASIC LOCAL TELECOMMUNICATIONS
RATES IN ACCORDANCE WITH SECTION
364.164, FLORIDA STATUTES.

DOCKET NO. 030867-TL

PETITION BY SPRINT-FLORIDA,
INCORPORATED TO REDUCE INTRASTATE
SWITCHED NETWORK ACCESS RATES TO
INTERSTATE PARITY IN REVENUE-NEUTRAL
MANNER PURSUANT TO SECTION
364.164(1), FLORIDA STATUTES.

DOCKET NO. 030868-TL

PETITION FOR IMPLEMENTATION OF
SECTION 364.164, FLORIDA STATUTES,
BY REBALANCING RATES IN A
REVENUE-NEUTRAL MANNER THROUGH
DECREASES IN INTRASTATE SWITCHED
ACCESS CHARGES WITH OFFSETTING
RATE ADJUSTMENTS FOR BASIC SERVICES,
BY BELLSOUTH TELECOMMUNICATIONS, INC.

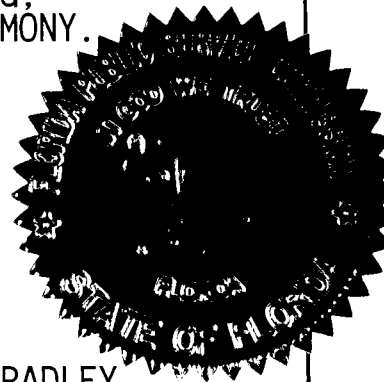
DOCKET NO. 030869-TL

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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 4A

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

DATE: November 03, 2003



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FPSC-COMMISSION CLERK

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TIME: Commenced at 9:50 a.m.
Concluded at 11:25 a.m.

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

REPORTED BY: TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736

1 PARTICIPATING:

2 CHARLES BECK, ESQUIRE, representing the Office of
3 Public Counsel.

4 RICHARD CHAPKIS, ESQUIRE, representing Verizon
5 Florida, Inc.

6 JOHN FONS, ESQUIRE, representing Sprint-Florida,
7 Inc.

8 NANCY WHITE, ESQUIRE, representing BellSouth
9 Telecommunications, Inc.

10 DONNA McNULTY, ESQUIRE, representing MCI WorldCom
11 Communications, Inc.

12 TRACY HATCH, ESQUIRE, representing AT&T of the
13 Southern States.

14 MICHAEL B. TWOMEY, ESQUIRE, representing the
15 American Association of Retired Persons.

16 BETH KEATING, ESQUIRE, representing the Commission
17 Staff.

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P R O C E E D I N G S

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2 CHAIRMAN JABER: Item 4A.

3 MS. KEATING: Commissioners, Item 4A is staff's
4 recommendation on AARP's motion to dismiss the petitions in the
5 access charge reduction dockets. Staff is recommending that
6 the motion to dismiss be denied. As you can see, we have a
7 number of parties here to speak on this item, and staff is
8 available to address any questions you may have.

9 CHAIRMAN JABER: Thank you, Ms. Keating. We'll give
10 Mr. Twomey an opportunity to get back to the table.

11 Mr. Twomey, this was a motion filed by AARP, so we'll
12 let you go first with regard to your presentation, and then in
13 terms of responses, I'll just start right back here, Mr. Fons,
14 with you.

15 MR. TWOMEY: Thank you, Madam Chairman,
16 Commissioners, good morning. Mike Twomey on behalf of the
17 AARP. Commissioners, this is obviously an important issue, and
18 at the threshold, I would submit to you, is the question
19 whether the rule, referring to the motion to dismiss for
20 failing to join indispensable parties, is applicable to the
21 Commission or not. The AARP says that it is, the companies say
22 that it isn't. Your staff in its recommendation at the bottom
23 of Page 11 in the footnote says that it is, at least that's how
24 I read it. So unless you want to try and decide that before I
25 finish my comments, which I would urge you not to do, I'm going

1 to proceed with the assumption that the rule is applicable for
2 purposes of your consideration of my motion today.

3 CHAIRMAN JABER: Mr. Twomey, I'm sorry to interrupt
4 you. You said Page 11 of staff's recommendation, footnote --

5 MR. TWOMEY: At least as I printed it out for me it
6 was Footnote 1.

7 CHAIRMAN JABER: Oh, okay. Commissioners, on my copy
8 it's Page 12, Footnote 1 --

9 MR. TWOMEY: I'm sorry.

10 CHAIRMAN JABER: -- recognizing the ILECs' arguments;
11 is that it?

12 MR. TWOMEY: Yes, ma'am.

13 CHAIRMAN JABER: Okay. Go ahead.

14 MR. TWOMEY: Assuming for purposes of my argument
15 that the rule is applicable here, then we have to decide -- the
16 Commission has to decide what parties are necessary for the
17 Commission to, in the words of your additional language in your
18 staff's recommendation, to make a complete and efficient
19 determination of the equities and rights and liabilities of the
20 other parties. And in turn to do that, we have to stop and
21 think a minute: What are the fundamental issues before the
22 Commission in these petitions by these three companies; that
23 is, what are they asking for, whose rights and obligations are
24 affected by what they want.

25 And we all know that they are asking to increase

1 their local rates by a combined total of \$355.5 million
2 maximum. And we also know, or we should know, that this is not
3 just a straight rebalancing legislation, a rebalancing
4 petition. That failed in 1997 or '98, whenever it was, just
5 saying we're going to raise rates, local rates by the number of
6 dollars to bring down access fees to the interstate levels.
7 That went out the window politically and legislatively because
8 it was too one-sided in the way it addressed the concerns of
9 all consumers.

10 And consequently, they came back -- the companies
11 came back and they wrote, they collectively wrote a bill that
12 on the surface at least they promoted it as saying it benefited
13 consumers as well. They had to have that politically in order
14 to get it through. So they said repeatedly in some of the
15 language used, not all of it, of course, but some of it is in
16 the handout that I've given you this morning.

17 And the companies said to the legislators, they said,
18 it's revenue neutral, not just to the companies, but it's going
19 to be potentially revenue neutral to the consumers as well
20 because they are going to have the possibility of breaking even
21 or even winning on their total monthly bill as a result of the
22 in-state access fees being reduced. And because the law will
23 require that those access fee reductions have to be flowed
24 through to the consumer, they might come out ahead as a result
25 of making their calls at lower rates or making more calls at

1 lower rates. And they sold that effectively because it was
2 repeated time and time again by the various legislators who
3 were the supporters of the legislation. And it passed.

4 And then the companies came here and in their
5 petitions, and especially in the testimony of their various
6 witnesses, they've repeated that mantra that the consumers
7 might win. It might be revenue neutral for them. They're not
8 all just going to be losers as a result of their rates going up
9 from 35 to 90 percent. They may have an opportunity to save as
10 a consequence of making their telephone calls, if they do,
11 in-state at lower access rate levels.

12 And what the AARP is saying to you now,
13 Commissioners, is, is that's impossible to tell from the
14 petitions before you and the evidence presented by the
15 companies because they don't know and they don't pretend to
16 know and they don't pretend to tell you-all or their customers
17 what the resulting in-state rates are going to be for toll as a
18 result of the flow-through because they don't know. They don't
19 know.

20 The long distance companies are going to come in
21 later, your staff in the next item says, you know, requirement
22 to come in within 44 days after you make your decision in this
23 case. And the AARP is saying that's too late because we've
24 taken the position that the statute would allow the IXCs to
25 come in and potentially give 99 percent of the flow-through

1 benefits to their big business programs and 1 percent only to
2 the residential consumers, the programs that would typically go
3 to residential, and that that would meet the requirements of
4 the law.

5 COMMISSIONER DEASON: Let me ask you a question. I'm
6 sorry. Is it your opinion, just legal opinion that this
7 statute as written would allow the IXC's to allocate 1 percent
8 to residential customers and 99 percent to business customers?

9 MR. TWOMEY: Yes, sir. And it's something that I
10 challenged the Legislature with at the time saying, set a
11 percentage, set a proportion. If you want residential to have
12 half of it, say so in the law. And it merely says,
13 Commissioner Deason, that you shall have to -- as I read it,
14 you shall have to approve those requests from the IXC's as long
15 as they give some to their -- some of the reductions to their
16 residential and some to their business. And I -- certainly
17 it's extreme, but I think they could do anything they wanted to
18 as long as they could show they gave some to the residential.

19 COMMISSIONER DEASON: Well, I'm having difficulty,
20 and maybe you're going to get to that, and if you can address
21 it now or later, I'd appreciate it. I'm having trouble
22 following your logic that if that's something that is within
23 their discretion, permitted by the law, it's not something
24 that's within our discretion to set that, why then are they
25 indispensable parties?

1 MR. TWOMEY: Well, that's a good question, and the
2 answer is this, Commissioner Deason. I don't necessarily care
3 for purposes of this case what the IXCs do. The importance of
4 what they do, however, to this case is, is the assertion of
5 these companies that my clients and every other residential
6 customer in the state might be able to benefit as an offset to
7 the huge rate increases, local rate increases, savings in
8 in-state toll calls and we can't know that.

9 If we knew what the rates were for in-state
10 reductions for programs that AT&T is going to offer their
11 typical residential person -- you know, you pay \$4.95, you get
12 "X." And if a residential consumer made a certain number of
13 minutes or hours of calls per month, they could look at that
14 and they could say, okay, they were right. In my case, with
15 the Legislature and in their testimony before you now, I can
16 break even and overcome the \$3.68 that BellSouth proposes to
17 charge. But without knowing what those in-state reductions
18 are, you can't possibly make that judgment, and that's why
19 they're indispensable.

20 And what the AARP is saying is, is that these
21 people -- these companies, the LECs that are before you now and
22 the IXCs and the cable people had no trouble whatsoever getting
23 together and agreeing upon legislation that they wrote and
24 presented to the Legislature; they should be in here now. You
25 can't make the decision and we can't know if my clients and

1 every other consumer in this state has the possibility of
2 saving on in-state toll calls unless and until we know what
3 those toll rates are going to be. And the IXCs shouldn't be
4 allowed to sit out there and wait until you decide this case
5 and come in and make their decision then.

6 What we're saying is, is that if they don't want to
7 come in now -- and two of them have filed motions to intervene,
8 which the AARP is going to oppose unless they bring in their
9 tariffs. If they can't come in now and show their cards to the
10 millions of residential consumers in this state, then you
11 should deny these petitions, you should dismiss them, and let
12 them sit out there and wait for their access fee reductions
13 until such time as they all get together.

14 COMMISSIONER DEASON: Madam Chairman. Mr. Twomey, I
15 agree with you that it would be much preferable if we had all
16 that information in front of us. It's a difficulty that I'm
17 having to deal with as we prepare for these hearings. But it
18 goes back to the motion to dismiss is these are indispensable
19 parties, and you said that they can file what they want to.
20 You just want to see it ahead of time. But if what they file
21 has no bearing on this Commission's discretion as to whether we
22 approve or disapprove the ILEC petitions, well, then doesn't
23 this information just become a nicety and is not a basis for us
24 to approve or disapprove?

25 MR. TWOMEY: No, sir, because it's not just a nicety.

1 It is our argument and it's the argument of Public Counsel and
2 has been consistently throughout that this business of them
3 saying, you have to give them this money, it's a done deal,
4 just because they come in and say, raising rates is going to
5 make necessarily -- an economic theory going to make
6 competition enhanced, that doesn't cut it. Public Counsel
7 doesn't believe that, AARP doesn't believe that.

8 The Legislature said throughout, Commissioners, and
9 it's included in the language I have before you, that it was
10 being put to you because you had the expertise, and they said
11 repeatedly, you would have sweeping discretion in order to
12 decide whether their constituents, their residential customers
13 would benefit, would benefit. Said it repeatedly. Customers
14 have to benefit. How can they benefit? The AARP and the
15 Public Counsel has said, you have to show they have a
16 possibility of achieving net financial benefits, which means in
17 their own assertions, their own language used at the
18 Legislature that they have to have at least the possibility of
19 coming out even, if not better, on their total monthly bill,
20 that is, to offset large increases in local rates by reductions
21 in toll.

22 COMMISSIONER BAEZ: Is that, Mr. Twomey --

23 MR. TWOMEY: Yes, sir.

24 COMMISSIONER BAEZ: I'm sorry. Is that the standard,
25 or is that just your position?

1 MR. TWOMEY: Is that the standard of the statute?

2 COMMISSIONER BAEZ: Uh-huh.

3 MR. TWOMEY: It's our position. I would submit to
4 you that nobody yet knows what it is. It certainly, in our
5 view, isn't what the companies say it is.

6 COMMISSIONER BAEZ: And then here's my trouble. If
7 you're arguing that that is, in fact, the definition of
8 benefit, okay, and I think reasonable minds can disagree on
9 that, but that's something that we all have to sort of
10 determine and discuss what "benefit" really constitutes; then
11 it seems to me that under your definition then perhaps they're
12 indispensable, but that just makes them indispensable to you.
13 It doesn't necessarily make them indispensable to the
14 Commission.

15 Do you see what I -- because by -- and this is the
16 way I'm interpreting it. If the Commission today says, the
17 IXCs' participation is -- they have to be joined as
18 indispensable parties, then, in essence, we're accepting the
19 premise that benefit can only be defined on a dollar-for-dollar
20 basis, as you suggest. Do you see that that's taking a step on
21 down the line perhaps in a forum at this point where it's
22 probably not appropriate?

23 MR. TWOMEY: I see your point and I concede
24 100 percent. If you think it's insufficient and you think that
25 it's unimportant that consumers not have any possibility at all

1 of benefiting by the reductions in the in-state toll rates,
2 then you should vote against us.

3 COMMISSIONER BAEZ: I think you're twisting the
4 words. That's not what I said. I think that that discussion
5 or the determination of what constitutes a benefit, whether it
6 be quantifiable or qualifiable, is still an issue for the
7 Commission to decide, but claiming to have indispensable
8 parties sort of tips the decision, it prejudices that
9 discussion, it prejudices that issue.

10 MR. TWOMEY: Well, no, sir, I don't think so. What
11 it will do is it will make it possible for you to make that
12 determination.

13 COMMISSIONER BAEZ: And I don't disagree with you
14 there. I think I would join Commissioner Deason's comments
15 earlier, and I think Commissioner Davidson said it in a hearing
16 down in Fort Lauderdale, as I recall, and I agree with them. I
17 think that there may be a missing piece to the puzzle in all of
18 this, but the fact that it would be more convenient or that it
19 may be a more complete record or that it may help us and make a
20 better and more informed decision is a long way from calling
21 someone an indispensable party and having that. I think that's
22 a step --

23 COMMISSIONER DAVIDSON: And I'll jump in here. I
24 share that view. I think your initial sort of response to the
25 Commissioner somewhat mischaracterized what the point he was

1 making, as I understood it, about the benefit. And I think we
2 have all said that how this is going to be flowed through is an
3 important piece of the case. What I'm trying to focus on today
4 are the legal parameters surrounding the very specific legal
5 issue of whether someone is an indispensable party. It may
6 ultimately be that not having the certain information, it may
7 be very significant to the case, it may be determined not to be
8 significant, but that's a different matter than the particular
9 legal issue of within our regulatory authority, the applicable
10 rules, precedent what we do, whether someone is an
11 indispensable party and whether we can proceed to hear the case
12 without them, noting that there are two outcomes, either the
13 petitions will be granted or they will be denied.

14 MR. TWOMEY: Yes, sir. And again, I didn't mean to
15 mischaracterize Commissioner Baez's remarks. It's how you view
16 this. The AARP doesn't view this as a jigsaw puzzle in which
17 the missing in-state toll data, which could easily be done -- I
18 mean, what are these people hiding from out there? It's not
19 just a piece of the puzzle that has 100 pieces or 20. The AARP
20 views it as being one-half of the equation.

21 As Chairman Jaber said in relation to the previous
22 item you discussed, I wrote it down, she said, the savings are
23 just as important as the costs. The savings are just as
24 important as the costs. And in this case from the consumers'
25 perspective, from the residential consumers who take the bulk

1 of these increases, the vast majority of these increases, if
2 you grant these petitions, the savings are just as important as
3 the costs, and the costs are the only thing that are known to
4 them. It's not just a piece of the puzzle. It's one-half of
5 the equation, Commissioners.

6 We know what the costs are to these people. They
7 have been delineated with specificity down to the penny per
8 month of what's going to happen to the members of the AARP and
9 the other consumers. Specificity beyond belief, we know that.
10 The proffered savings for these people are not there. It's
11 one-half of the equation.

12 COMMISSIONER DEASON: Madam Chair, I need to follow
13 up to a previous question I had. Mr. Twomey, I'm glad that you
14 said that this information would not be a nicety. I don't
15 think it is a nicety. I think it's important information to
16 have. But my question goes to the discretion this Commission
17 has under the statute. You already indicated that we, in your
18 opinion, we do not have the discretion to mandate what the rate
19 structure is going to be for the IXCs or to mandate what
20 percentage goes to which customer class.

21 Having said that, if we get this information, if we
22 declare these parties indispensable and we get this
23 information, what do we do with it? What discretion do we have
24 once we get that information as it pertains to the incumbent
25 LECs' petitions which are pending?

1 MR. TWOMEY: Okay. Good question. It's an excellent
2 question; it's a fundamental question. What you do then,
3 Commissioner Deason, is you look and you say, okay, AT&T, who
4 might be out there, AT&T proposes to give 68 percent of the
5 access fee reductions to their residential customers, and there
6 might be some testimony that says, a typical residential
7 customer makes "X" number of calls, municipal calls per month
8 or whatever, and that by looking at these reductions flowing
9 through one could argue for or against the proposition that
10 they might have a net savings on their monthly bill.

11 And then as opposed to the situation, the worst-case
12 scenario that I'd like to trot out, which is legally possible,
13 in my view, that says that AT&T is going to give all the
14 benefits, 99 percent, to their big business customers who might
15 make most of the in-state calls on a day-to-day basis and that
16 consequently the reductions for their flow-through for
17 residential consumers might be one-tenth of one penny per
18 minute. And we could make the case then that consumers have no
19 ability to break even at all.

20 If we made that case persuasively, having the
21 necessary and essential information that we require, then you
22 could possibly say, well, consumers can't benefit as indicated
23 by legislative intent, and they get their petitions denied.
24 They don't get any rate increases, and if they don't get any
25 rate increases, guess what? The IXCs don't have an opportunity

1 to petition for anything because these petitions are a
2 first step and the necessary step to the IXC's coming in.

3 COMMISSIONER DEASON: So you're saying it goes to the
4 question of benefit, and someone has the burden to demonstrate
5 benefit. Do you assume that? Do you agree with that?

6 MR. TWOMEY: Yes, sir.

7 COMMISSIONER DEASON: Whose burden is that?

8 MR. TWOMEY: I believe since they're in here asking
9 for \$355.5 million a year that the benefit falls upon them.

10 COMMISSIONER DEASON: And it's their burden to do
11 that --

12 MR. TWOMEY: It's their burden, yes.

13 COMMISSIONER DEASON: -- and you're saying that for
14 them to meet their burden, we need this information, so
15 therefore, these parties are indispensable.

16 MR. TWOMEY: That's essentially it. And you can
17 say -- and I think Commissioner Baez is leaning towards this
18 and maybe Commissioner Davidson as well. You can say, okay,
19 let's go through this whole business of the next public
20 hearing, and let's go through three days of hearing, and then,
21 you know, have me make the case, and Public Counsel perhaps,
22 that they didn't prove their case. And I'm just suggesting --
23 and then they get dismissed or denied.

24 I'm saying it would be a much fairer process, and
25 it's essential, in our view, that you get the information up

1 front. Make them bring in the other side of the equation, and
2 let's have all this on the table before you go through three
3 days of hearings.

4 COMMISSIONER DEASON: Well, Mr. Twomey, doesn't then
5 that get back to what we're here for is a motion to dismiss?

6 MR. TWOMEY: Yes, sir.

7 COMMISSIONER DEASON: What you just said goes to the
8 availability of relevant information which can be used by a
9 party to carry their burden and make a showing. That's not the
10 fact that -- that's not a reason to dismiss their cases.

11 If they don't meet their burden, they just get denied
12 after the hearing. We don't dismiss their case beforehand
13 because we're indicating that the information is needed -- may
14 be needed, but it's part of their burden. It's not something
15 that is lacking at the point to where we throw them out at this
16 point. And that's why I'm trying to understand why this rises
17 to the level of a motion to dismiss.

18 COMMISSIONER DAVIDSON: And if I could ask a
19 follow-up, I mean, on this question. Is it the information
20 that's indispensable or the parties? And I believe I heard you
21 say it's the information. You don't really care about the
22 parties, but it's the information.

23 MR. TWOMEY: Well, you can only get it, I would
24 assume, from the parties, I mean, unless they filed separately.

25 COMMISSIONER DAVIDSON: And it's their burden, as

1 Commissioner Deason just elicited, to provide that information
2 through whatever means available, including, I would assume,
3 discovery and third-party discovery.

4 COMMISSIONER BAEZ: Yeah. And I have that question
5 too. What are the other means available to get -- if it is
6 about the information? And I think it seems pretty clear that
7 that's what all this is about. What are the alternatives? I
8 mean, how do you get at that information, or is it that you're
9 saying the only way that staff could obtain it or that anyone
10 else could compel that information to get before the Commission
11 is to join -- it's an either/or? Is that what you're saying?

12 MR. TWOMEY: I'm saying exactly that. And I will
13 repeat that just because not having the information may be a
14 basis later for denying their petitions and the relief
15 requested doesn't mean that it's not a basis for granting a
16 motion to dismiss at this point. We are saying to you that the
17 information is crucial, and the only way you get it is through
18 the IXCs being in the case. And the IXCs being in the case, as
19 two of them have now petitioned to join, alone isn't
20 sufficient. We have to have their tariffs. We have to know
21 how they plan to utilize those huge access fee reductions
22 before you can decide whether consumers benefit. And so all
23 we're saying is even though it may come later, we believe that
24 it's completely legally appropriate at this time for them to be
25 in the case or that the case shouldn't go forward.

1 CHAIRMAN JABER: Go ahead, Mr. Twomey.

2 MR. TWOMEY: That's essentially it, Commissioners.
3 These people need to be in the case. We need to have the
4 information of their tariffs. As I said before, having the
5 IXCs file their tariffs, which you're going to have to approve
6 as a matter of right unless they're careless enough to give
7 100 percent to either residential or business, it's entirely
8 insufficient. And the fact, as suggested by your staff, that
9 it's a different section of the statute doesn't mean that it's
10 not appropriate for consideration here.

11 As we said before, and I've said repeatedly, that
12 information is essential. The IXCs' presence in this case is
13 essential. And you ought to shortstop it right now, kick the
14 cases out, and make them come forward with their long distance
15 compatriots and get all the cards on the table so that you can
16 make a decision whether or not the rights and the savings
17 attributable to the residential customers are there or not.
18 It's just that simple, I think.

19 CHAIRMAN JABER: Question.

20 COMMISSIONER DAVIDSON: Chairman, I had a question of
21 staff before the other parties argue.

22 CHAIRMAN JABER: Go ahead.

23 COMMISSIONER DAVIDSON: With regard to Footnote 1,
24 could you explain -- could you basically explain the text,
25 specifically, the Commission having taken a somewhat different

1 view. What does that mean? What different views have we
2 taken? What were the circumstances? And how are those
3 circumstances comparable to or different from the motion before
4 us?

5 MS. KEATING: They're comparable to the extent that
6 the Commission has on various occasions been asked to join
7 other parties as indispensable parties. And when the
8 Commission considered those proposals, they did refer to the
9 rule. In those cases, though, no one raised the issue of
10 whether or not the rule was applicable in an administrative
11 context. So all that staff was intending to say by this
12 footnote was that the Commission has used the rule in the past
13 in addressing requests to join indispensable parties.

14 COMMISSIONER DAVIDSON: Thank you, Ms. Keating. I'm
15 still a little bit confused. So is it staff's position that
16 the rule is applicable in administrative proceedings or not
17 applicable or it's -- this is a case of first impression? And
18 if it is a case of first impression, how do we distinguish the
19 past instances when the Commission has relied on the rule?

20 MS. KEATING: As far as I can tell, this is the
21 first instance where the Commission's ability to use the rule
22 has directly been questioned. That being said, staff's
23 perspective is, is that it may not be directly applicable in an
24 administrative proceeding but that it certainly at a minimum
25 can be used as a guideline. And the reason staff believes that

1 is that in directing the Commission to take an action under a
2 statute, if the Legislature intended that certain information
3 and certain parties be part of that proceeding, then surely it
4 would have given the Commission the authority to join the
5 necessary persons or entities in that proceeding. And to that
6 extent, I think that the rule can be used at a minimum as a
7 guideline. And if that's the case, then I also believe that
8 the case law interpreting that rule would also be applicable
9 such that the Commission can join a party if that party's
10 participation is absolutely necessary to the complete and full
11 determination of the proceeding.

12 COMMISSIONER DAVIDSON: A couple of follow-ups,
13 Chairman. Does staff agree that the information being
14 discussed by Mr. Twomey, the type of information is relevant to
15 the proceeding notwithstanding staff's position on the motion
16 to dismiss for failure to join an indispensable party?

17 MS. KEATING: Honestly, Commissioner, we have tried
18 not to address that question just because we believe that that
19 is one of the big questions that's pending before the
20 Commission as to whether the information is relevant. But I
21 think that --

22 COMMISSIONER DAVIDSON: And that's a fair response.
23 Let me ask you then, if the information is ultimately relevant
24 or important to our inquiry, does staff agree that it is the
25 petitioners' burden to bring forth that information?

1 MS. KEATING: Yes, Commissioner, I believe so. And
2 let me also point out that I think both yourself and
3 Commission Baez hit on a point that third-party discovery is
4 available.

5 COMMISSIONER DAVIDSON: How would third-party
6 discovery operate in the context of this case to result in the
7 production of the information sought by Mr. Twomey?

8 MS. KEATING: I believe any party that saw necessary
9 or appropriate to present such information can call depositions
10 of appropriate persons and can also subpoena documents.

11 CHAIRMAN JABER: May I interrupt,
12 Commissioner Davidson?

13 COMMISSIONER DAVIDSON: Go ahead.

14 CHAIRMAN JABER: How do they get it into the record?
15 Not that we should care. It is their burden. But how do they
16 get it into the record?

17 MS. KEATING: I believe they can also call witnesses.
18 And our general counsel, if he wants to correct --

19 CHAIRMAN JABER: So they can call an adverse witness,
20 hostile witness --

21 MS. KEATING: Absolutely.

22 CHAIRMAN JABER: -- and no one is going to object to
23 that?

24 MS. KEATING: They may object, but then that's their
25 burden to determine how best to present that into the record.

1 CHAIRMAN JABER: You know what else is important? It
2 should matter what the Commissioners need to make an informed
3 decision.

4 MS. KEATING: Absolutely, Commissioner, absolutely.

5 COMMISSIONER DEASON: Madam Chairman, I have a
6 question --

7 CHAIRMAN JABER: Commissioner Deason.

8 COMMISSIONER DEASON: -- for the incumbent telephone
9 companies before they make their argument and maybe they can
10 address it during their argument. And I would ask this
11 question to the IXCs if they were here --

12 CHAIRMAN JABER: If they were here.

13 COMMISSIONER DEASON: -- but they're not parties.

14 CHAIRMAN JABER: No.

15 COMMISSIONER DEASON: So I have to address it to the
16 next best group of folks and that's the folks at my far left of
17 the table.

18 CHAIRMAN JABER: But it should be noted that they are
19 here, and I hope that they've listened.

20 COMMISSIONER DEASON: They're here in the back of the
21 room. The question is this. I would assume that the IXCs want
22 access charges reduced, and if they do want those access
23 charges reduced and it's your burden to demonstrate there are
24 benefits before the access charges can be reduced, why aren't
25 the IXCs volunteering, as they're doing right now, to come up

1 to intervene in the case, file along with you and say, you know
2 Commission? These are the benefits that customers in Florida
3 are going to see, and we promise you, these are the way we're
4 going to distribute these benefits, and this is going to be a
5 great benefit to consumers. This is going to stimulate
6 intrastate telephone calls. Our revenues are going to be
7 enhanced. Customers will no longer be befuddled with the fact
8 that interstate rates are higher than intrastate rates. We may
9 be even able to consolidate our rate structures so there's not
10 a difference anymore between the two and that will simplify
11 things. It will make it administratively easier for us as
12 competitors. They should be up here volunteering this
13 information. We shouldn't be coercing them to come up here and
14 tell us what they plan to do. That's what I want somebody to
15 address.

16 CHAIRMAN JABER: Ms. McNulty had her hand up.

17 MS. McNULTY: Yes. Commissioner Deason, I'd like to
18 address that. On October 27th AT&T and MCI filed petitions to
19 intervene. On Friday, October 31st the due date for intervenor
20 testimony, AT&T and MCI jointly sponsored a witness and
21 testimony, and also AT&T produced it's own testimony. So
22 testimony has been filed in the docket.

23 COMMISSIONER DEASON: And what does that testimony
24 say?

25 MS. McNULTY: I think it addressed the points that

1 you raised.

2 COMMISSIONER DEASON: Are there specific rates and
3 plans that are being put forth to demonstrate how these
4 benefits are going to be flowed through to the customers?

5 MR. HATCH: Commissioner Deason, the testimony --
6 this is Tracy Hatch appearing on behalf of AT&T. As
7 Ms. McNulty noted, we have intervened in this docket. Now,
8 it's not clear we're going to end up parties because the
9 parties that Mr. Twomey is saying are indispensable is also
10 opposing their intervention, but we'll see how that plays out.

11 As to your question about what rates specifically
12 will be reduced, we don't know that. We don't know what we can
13 reduce or how until we know what dollars in terms of access
14 reductions and the timing of those reductions are going to take
15 place. Then and only then will we know how to structure the
16 rates that we're going to reduce and how they're going to be
17 reduced.

18 COMMISSIONER DEASON: Can't you sponsor a structure,
19 a concept, a philosophy as this is how we're going to do it,
20 and once we get all of the nuts and bolts of this plan in
21 place, then we'll put meat on the bones, but, Commission, this
22 is how we generally plan to do it?

23 MR. HATCH: In practical terms and the detail that
24 you're asking for, no, because the competitive market doesn't
25 allow you to do that. The competitive market is dynamic and it

1 changes day to day and minute to minute. And so when we make
2 those decisions, it will be the market as we see it at the time
3 we have to commit. So committing two, three, four months in
4 advance simply isn't practical.

5 CHAIRMAN JABER: You can't make a commitment --
6 Mr. Twomey, I see your hand, but Commissioner Baez has a
7 question next. You can't make a commitment that the
8 flow-through reductions would correlate to whatever local rate
9 increases there might be?

10 MR. HATCH: Oh, certainly, we could -- you're saying
11 if there is, you know, a \$10 million access reduction, would
12 there be a \$10 million flow-through? The answer to that is
13 yes. The statute requires that.

14 CHAIRMAN JABER: And the proportion between
15 residential and commercial is a commitment you can't make
16 today?

17 MR. HATCH: Not without looking at a dynamic
18 competitive marketplace. No, ma'am, you can't do that.

19 CHAIRMAN JABER: Then as a decision-maker, how can I
20 make a commitment to the consumer that among the many benefits
21 they may receive is a direct flow-through in their long
22 distance rate?

23 MR. HATCH: You can make that commitment. What you
24 cannot make a commitment is every individual ratepayer receive
25 an equal and proportionate reduction in access because that's

1 not possible either. Mechanically that won't work because the
2 dollars won't do that.

3 More importantly, as new services come and old
4 services go, those commitments change daily on a dynamic basis
5 based on market behavior. More importantly, understand this,
6 every residential customer of AT&T will see a flow-through
7 benefit regardless of whether they make any toll calls or not
8 because we have to eliminate the in-state connection fee. So
9 at the very least, they get that. The only question then
10 becomes what further benefits they might get.

11 COMMISSIONER DEASON: How long are you going to
12 eliminate that fee? You are making the commitment as to how
13 long that fee would be not used. Are you saying we'll wait a
14 month or two and we'll see how the competitive market shakes
15 out and we may reinstitute it?

16 MR. HATCH: That fee will be gone at least as long as
17 the duration of all these access reductions take.

18 COMMISSIONER DAVIDSON: State that again, please.

19 MR. HATCH: The in-state connection fee is required
20 to be removed no later than 2006.

21 CHAIRMAN JABER: Mr. Twomey, you need to just sit
22 there.

23 Mr. Hatch, finish --

24 MR. HATCH: And by that point, it will be eliminated.

25 Now --

1 COMMISSIONER DAVIDSON: No. You gave a very specific
2 answer to Commissioner Deason's question for how long, and if
3 you could repeat the statement. Do we have a court reporter
4 here perhaps? Well, it's probably not good to just ask her to
5 repeat it because she'll --

6 MR. HATCH: The answer to your question,
7 Commissioner Davidson, is whatever schedule we choose to
8 eliminate it over, it will be gone for at least that long and
9 into time for as long as the access reductions take. Bear in
10 mind, if the access reductions aren't enough to eliminate the
11 fee, the fee stays in some proportion. That's part of the
12 statute as well.

13 CHAIRMAN JABER: Commissioner Baez.

14 COMMISSIONER BAEZ: Mr. Hatch, going back to
15 something you said at the beginning of your comments. You made
16 a statement to the tune of, we don't know what the dollars are
17 going to be or what the timing is going to be.

18 MR. HATCH: Correct.

19 COMMISSIONER BAEZ: Am I mistaken in assuming that
20 the petitions that have been filed by the ILECs have, in fact,
21 said it is so much and the reductions -- I mean, there has to
22 be some finiteness to these petitions and I thought that there
23 was. I mean, we've been throwing numbers, not we, but, you
24 know, parties have been -- there are numbers out there.
25 They're well known to everyone; they are relatively large. We

1 all know that. And I think that they are relatively discussed
2 in detail as part of the petitions that are before us. So what
3 part of it don't we know? What part of it don't you know as to
4 the timing and the size of the reductions and so on? Because
5 it's also my understanding that this is an up-or-down vote.
6 This is not something that the Commission can say, you know
7 what? 350 million seems like too much, but maybe 200 is okay.
8 We don't have that kind of discretion under the law. It's an
9 approval or a denial straight up or down; is that correct?

10 MR. HATCH: Assuming for purposes of your question,
11 the answer to that is correct. I think what you're looking at
12 is because we know what they're asking for, we know what we
13 have to do. The answer is we don't know what the timing is
14 going to be. We don't know whether the timing is going to be
15 as they have requested or, as I understand, staff has made a
16 proposal that the timing should be extended out.

17 COMMISSIONER BAEZ: Is there something about that
18 concept of timing that we haven't discussed here? Because I
19 think we have already had a motion to dismiss because the
20 timing was off, that it was spread over two years instead of
21 three, and we've had all of that kind of discussion. Is there
22 some other timing issues that are involved that we're not aware
23 of or at least that I'm not aware of?

24 MR. HATCH: There are timing issues involved in the
25 case such that at the end of the day whatever timing issues

1 there are have to be resolved by that case. I think the
2 initial discussion was it didn't take -- it took less than the
3 two-year minimum period.

4 COMMISSIONER BAEZ: Right.

5 MR. HATCH: I'm assuming that's now been fixed with
6 the refiling. You will know whatever timing issues are on the
7 table in the case, and at the end of the case, those timing
8 issues will be resolved.

9 COMMISSIONER BAEZ: Now, going back to something that
10 the Chairman had asked in terms of what do you know you can do
11 and what don't you know that you can do. Based on the detail
12 that the ILECs have included in their petitions, isn't there a
13 pro forma kind of -- you know, a pro forma structure, pro forma
14 reductions or schedule of reductions that can be offered up to
15 help this case? I mean, I hope that anybody that walks out of
16 here has it very, very clear in their mind that while the
17 question of Mr. Twomey's motion to dismiss is still up there,
18 and I'm not sure I'm -- let's just say this, that the idea
19 should get through to everybody that there are holes, that
20 there are missing parts to this whether we agree that it's a
21 puzzle or not, Mr. Twomey.

22 MR. HATCH: I would take issue only with one thing,
23 Commissioner Baez. I don't think there are any real holes
24 here. Whatever the Commission determines is the amount of the
25 access reductions, we have to flow those through as a matter of

1 statute. We have no choice in that. We have no discretion in
2 that.

3 COMMISSIONER BAEZ: And I'm sorry to harp on this,
4 but, Mr. Hatch, you keep saying things like, whatever the
5 numbers are. The numbers are there before everybody. I mean,
6 there is a plan that we are considering that I'm assuming again
7 should have enough definitiveness so that I know what the
8 access reductions are going to be, and therefore, you should
9 know what the access reductions are going to be in the event
10 that they get approved.

11 MR. HATCH: Well, I understand your frustration. Let
12 me take issue with that piece just a little bit. You have two
13 versions of BellSouth reductions. We don't know how those are
14 going to work out, so it's going to be one or the other. So
15 we're guessing with that. There is a version that Verizon has
16 put forward that, frankly, we disagree with certainly in part
17 and that would affect the total numbers.

18 Now, setting all those technical issues aside, until
19 we get to the point of they have filed their tariffs that says,
20 here's the individual access rate elements that I'm going to
21 reduce based on my total units of consumption, here's the total
22 dollars that generates, until I get that number I can't start
23 beginning to plan how I'm going to really do this because how I
24 consume switched access is based on my own consumption of
25 individual switched access rate elements. And so there could

1 be a lot of variability in how they flow through the dollars
2 based on which element they reduce.

3 Remember, it's not just a single rate. It's a whole
4 laundry list of rates, and they all interact in different ways.
5 And so when they start reducing the individual elements, then I
6 look at my consumption of those individual elements after I
7 receive their new prices, and then I start calculating what
8 that is in dollars to me. That's how I do it.

9 COMMISSIONER BAEZ: Thank you for that explanation.

10 CHAIRMAN JABER: What if you take issue with how they
11 reduce those specific elements? When would you have an
12 opportunity to bring that issue to the forefront?

13 MR. HATCH: At the time they would file their initial
14 tariffs, I think, is when we would bring that up. The question
15 is, is -- I don't know is that we would have a disagreement as
16 long as the dollars work out, but we have to know what that is.
17 We might and if we have --

18 CHAIRMAN JABER: But you might have a disagreement.

19 MR. HATCH: We might. And if we have to fight it
20 out, then we'll duke that out. I mean, that's a fight for a
21 later day if there is going to be one.

22 CHAIRMAN JABER: So, again, and what makes all of
23 this awkward is with the caveat that if these petitions are
24 granted, what makes what you just said difficult to comprehend
25 is the state could be in a position where this Commission in

1 its wisdom grants the petitions, there's a local rate increase
2 on the horizon, and you're disputing how much that flow-through
3 amount should be because you disagree with how the specific
4 components of the access charges were reduced. What do we do
5 with that?

6 MR. HATCH: At the end of the day,
7 Commissioner Jaber, I don't think that's likely, frankly. But
8 if you assume worst-case scenario that it happens, at the end
9 of the day when you audit us for flow-through, which you will,
10 we will have to have flowed through all the benefits from
11 whatever reductions we get.

12 CHAIRMAN JABER: Why do you think it's unlikely?

13 MR. HATCH: Because typically how they're going to do
14 their rate reductions would be on a fairly consistent
15 predictable manner, I believe. I believe that to be the case.
16 More importantly --

17 CHAIRMAN JABER: Didn't you have to reach that
18 agreement before you all supported the bill? See, here's
19 the --

20 MR. HATCH: Frankly, ma'am, no.

21 CHAIRMAN JABER: Well, then I'm very disappointed in
22 a company your size not making those calculations before you
23 came out in front of God and everybody and supported a bill.

24 COMMISSIONER DAVIDSON: Chairman, I have a follow-up
25 to one of your comments.

1 CHAIRMAN JABER: Commissioner Davidson.

2 COMMISSIONER DAVIDSON: I was in the Ready
3 Infrastructure Council the first time this bill came through,
4 and we all monitored the progress on this bill closely this
5 go-around. And so agreeing with what the Chairman has said,
6 you all were there supporting the bill, arguing where the
7 benefits would go, and my understanding of how members of the
8 Legislature viewed this was that in one area there may be an
9 additional burden on consumers and another area there may be
10 additional benefit, but it's all going to be from the consumer
11 standpoint of revenue neutral.

12 Mr. Twomey's point throughout these proceedings that
13 it appears most of the burden is going to residential and small
14 business customers and there's the possibility that all of the
15 benefit -- most of the benefit will go to business customers
16 is, from my standpoint as I sit here today, based on where we
17 are in the case, not an irrelevant question, not an irrelevant
18 focus. I'm not saying I agree with it. I'm saying it's not
19 irrelevant from my standpoint.

20 The Chairman asked you a question earlier and
21 Commissioner Baez followed up. Can't you give us at least sort
22 of a pro forma big idea picture of how you would do this? And
23 it may be from a business standpoint you're just not prepared
24 to do that, and if that's the answer, that's the answer. But I
25 know I'm going to be interested in knowing and understanding

1 that every individual consumer is not going to have equal
2 benefit and burden, and we're focussed on the statewide pool of
3 consumers. I'm still going to be interested in knowing if this
4 percent of the residential customers is likely to have a
5 burden, what percent of residential customers on the long
6 distance side is likely to have a benefit. I mean, I am going
7 to the extent possible trying to compare apples to apples,
8 oranges to oranges. And I want to know, is 90 percent of the
9 burden going to individuals and 90 percent of the benefit going
10 to business? That's a relevant inquiry.

11 Can't you based on what information is out there at
12 least, not today, perhaps not in the next few days, but
13 sometime in the foreseeable future, give us some parameters
14 that if this is going to be how this petition, BellSouth
15 version one or BellSouth version two, is implemented, this
16 right now subject to change is roughly what we would do? We
17 would anticipate passing on some 10 to 30 percent of these
18 access charge reductions to residential and 70 to 90 percent to
19 business. That type of generality, can we get that?

20 MR. HATCH: Your question is, could we? Yes. But
21 the problem --

22 COMMISSIONER DAVIDSON: Could we and will we?

23 MR. HATCH: The problem becomes,
24 Commissioner Davidson, that nobody in a competitive marketplace
25 is going to tip their hand three months in advance. That is a

1 real issue. Is AT&T looking at how they're going to do this
2 today? Absolutely. Are they laying plans as to where and how
3 much is going to go where? Yes, they are. Are we going to
4 publicly disclose specifically how we're going to do that? The
5 answer is I suspect probably not from a competitive marketing
6 perspective because while all of the folks you see sitting here
7 are all long distance competitors now, and none of us, I don't
8 think, are going to be willing to say, here's what I'm going to
9 do three months from now, because then they're starting to form
10 their own competitive responses with plenty of lead time to do
11 that.

12 COMMISSIONER DEASON: Madam Chairman, let me --

13 CHAIRMAN JABER: Commissioner Deason. And then,
14 Commissioner, if it's all right with the body, we're going to
15 move forward and come back to the arguments.

16 COMMISSIONER DEASON: Is your company willing to make
17 the commitment that while competitive forces are at play and
18 you have to respond, that you would commit that there would not
19 be any intrastate rates higher than comparable interstate
20 rates?

21 MR. HATCH: I don't believe so, Commissioner Deason,
22 simply because the parameters of your question are
23 extraordinarily broad to suggest that there's any intrastate
24 rate higher or lower than an interstate rate is just not going
25 to work. It's not practical.

1 COMMISSIONER DEASON: The whole idea of this -- of
2 these petitions is to get parity interstate and intrastate.
3 And we know that for years for policy reasons it's been the
4 fact that we've had higher intrastate access charges in place.
5 If we get those at parity, why should there be any -- why
6 should a call from Miami to Jacksonville cost more than a call
7 from Miami to New York?

8 MR. HATCH: Almost no calls these days are distance
9 sensitive. They're all on a --

10 COMMISSIONER DEASON: I'm not talking about distance,
11 I'm talking about boundaries, intrastate/interstate.

12 MR. HATCH: And what I'm suggesting to you,
13 Commissioner Deason, is most people today pay the same rate
14 from a call to LA that they do a call to Miami from Tallahassee
15 because they're all on a per minute rate, most folks, not
16 everybody. Some are probably still distance sensitive but most
17 are not.

18 COMMISSIONER DEASON: Well, before I started taking
19 Mr. Twomey's advice and using a Sam's card --

20 MR. HATCH: I do the same thing myself,
21 Commissioner Deason.

22 COMMISSIONER DEASON: -- I noticed a difference when
23 it was an -- in fact, an AT&T calling card, it was right there,
24 if you called intrastate, it costs more than if the call was
25 interstate.

1 MR. HATCH: On some cards, but not on every card.

2 COMMISSIONER DEASON: There's just a lack of
3 information here, Mr. Hatch.

4 MR. HATCH: And I can't give you all the information
5 that you seek, Commissioner Deason. I wish that I could, but
6 the problem is that it can't be done.

7 CHAIRMAN JABER: It can't be done?

8 MR. HATCH: I don't believe -- well, all the
9 information that he seeks I don't think you could get it.

10 CHAIRMAN JABER: Mr. Twomey, hold on to that thought.
11 I want to continue on with the presentations.

12 Mr. Fons.

13 MR. FONTS: Good morning, Madam Chairman, members of
14 the Commission. John Fons representing Sprint. I was hopeful
15 of being able to say only that Sprint supports staff in the
16 recommendation, but I see that there have been some questions
17 raised that I feel compelled to address.

18 The first question is, is that we're now getting into
19 an area that ultimately is a decision of the Commission. There
20 are indications that somehow there's the level of the toll
21 rates is relevant beyond what the statute requires. And the
22 statute, as far as the Sprint's petition is concerned, is very
23 specific. The criteria that the Commission must address in
24 determining of whether or not to grant or deny Sprint's
25 petition is very clear on this issue of benefit to residential

1 customers.

2 As the staff has pointed out very clearly in staff's
3 recommendation, the language in the statute says that the
4 Commission shall consider whether the removal of current
5 support for basic local telecommunication services that
6 prevents the creation of a more attractive residential -- I'm
7 sorry, attractive local exchange market for the benefit of
8 residential consumers. The Commission staff correctly points
9 out that the statute does not say that the Commission shall
10 consider whether or not the ILECs' proposals will affect the
11 toll market for the benefit of residential consumers.

12 The relevant issue is whether or not the elimination
13 of the subsidy will create a more competitive market for the
14 benefit of residential consumers. That's the issue, and that's
15 the issue upon which this motion to dismiss must be balanced.
16 It's not on the issue of what is going to take place in the
17 toll market. We're here today only to address the singular
18 issue that's been raised by AARP as to whether or not the ILECs
19 are -- I'm sorry, the IXCs are indispensable parties and must
20 be joined in this proceeding.

21 The fact of the matter is I think that issue is moot
22 because the IXCs have joined or are attempting to join. I'm
23 perplexed by the fact that on one hand Mr. Twomey says they
24 have got to be joined, and then he tells the Commission that
25 they have filed their petitions to intervene and he's going to

1 oppose them. I don't think you can have it both ways. But
2 even if he is going to oppose them, whether or not they are
3 joined in this proceeding is really up to the IXCs.

4 There is no concept in administrative law other than
5 substantially interested parties. Even under the Rules of
6 Civil Procedure an indispensable party is some party that has a
7 substantial interest. And the rule that we've got to look at
8 is very clear. That's the administrative rules that were
9 adopted by the state of Florida. These are the administrative
10 rules that were adopted in 1997, the Uniform Rules of
11 Procedure, Florida Administrative Code.

12 And Rule 28-106.109 says very specifically, "If it
13 appears that the determination of the rights of parties in a
14 proceeding will necessarily involve a determination of the
15 substantial interests of persons who are not parties, the
16 presiding officer may enter an order requiring that the absent
17 person be notified of the proceeding and be given an
18 opportunity to be joined as a party of record." So a
19 substantially interested party is one whose interests will be
20 decided.

21 Mr. Twomey, in the first place, has not indicated
22 that the IXCs' substantial interest will be determined in this
23 proceeding. The IXCs' interests have already been determined
24 by the Legislature. The IXCs' interests are that if there are
25 access reductions, they must flow them through to the benefit

1 of their consumers, and they must reduce -- eliminate the
2 in-state connection fee. Those are the interests of the IXCs
3 in this proceeding. And even if they had a different interest
4 and it was a substantial interest to be decided, all the
5 Commission can do is notify them that their interests will be
6 determined and then --

7 COMMISSIONER DAVIDSON: Mr. Fons, if you would --
8 sorry to interrupt -- turn to Page 2 of some of the summaries
9 of testimony that Mr. Twomey handed out. The middle of the
10 Page 2, a summary of one of the responses of
11 Representative Mayfield to a question.

12 And I will assume, Mr. Twomey, that this is correct,
13 that there have been no edits.

14 MR. TWOMEY: It has been transcribed by a court
15 reporter.

16 COMMISSIONER DAVIDSON: Perfect.

17 Representative Mayfield states that the law sets
18 forth provisions which will require the Public Service
19 Commission to sit in judgment and to determine two factors.
20 One, will the petition to change rates create competition in
21 the local marketplace, and two, will it be beneficial to
22 residential customers before any changes can take place that
23 has to be determined by the PSC. Would you agree that the
24 information we're talking about today is relevant to those two
25 determinations that have to be determined by the PSC before any

1 changes can take place?

2 MR. FONTS: I would not agree to that.

3 COMMISSIONER DAVIDSON: Was Representative Mayfield
4 incorrect?

5 MR. FONTS: He was absolutely correct. You have to
6 read the two pieces together, and that's what the statute says.
7 The statute says it will create competition in the local
8 marketplace and that will benefit the benefit of residential
9 consumers. That's what you have to find. There's not some net
10 benefit analysis, and even if there were -- let's just dwell
11 upon what the legal requirements are here. The legal
12 requirements are that even if AT&T and MCI have substantial
13 interests -- and we don't agree to that. Just having knowledge
14 of information does not make them a substantially interested
15 party. But just assume that they were --

16 COMMISSIONER DAVIDSON: So should they not be
17 intervening?

18 MR. FONTS: They can if they wish. That's what the
19 rules says.

20 COMMISSIONER DAVIDSON: But you just said they don't
21 have substantial interest, so should they --

22 MR. FONTS: They can't.

23 COMMISSIONER DAVIDSON: -- not be here?

24 MR. FONTS: Well, I said even if they didn't have
25 substantial interest. I didn't say they don't have a

1 substantial interest. What I said was that just because they
2 have information --

3 COMMISSIONER DAVIDSON: I thought you said that you
4 didn't think they did have substantial interest.

5 MR. FONS: If you were equating it just because they
6 had information that might be of some useful nature, that does
7 not create a substantial interest. They may have a substantial
8 interest, and indeed, in their petitions, they point out what
9 their substantial interest is, but that's their decision to be
10 made, not the Commission's decision.

11 We take exception to what the staff says that they
12 have used indispensable party as requiring joinder. We don't
13 believe that they can. The cases cited by the staff, three of
14 them are before the Model Rules. The last one was after the
15 Model Rule, but the language says that the rule initially seems
16 to indicate that customers may be indispensable parties that
17 should be joined to this action. That's not -- that's staff's
18 interpretation; that's not what the rule says. The rule says
19 the Commission has only two obligations with regard to
20 substantially interested parties. The first one is to give
21 them notice, and then it's up to the substantially interested
22 party to join themselves.

23 CHAIRMAN JABER: Mr. Fons, in response to one of the
24 questions Mr. Hatch said, they can't give us some of the
25 information we've been talking about here because it all

1 depends on how the components related to the access charge
2 reductions will be put forward. And hypothetically speaking,
3 we may reject your allocation of those components, or we may
4 agree to them. Would you agree, based on what Mr. Hatch says,
5 that that is a decision that will affect the substantial
6 interests of the IXCs?

7 MR. FONS: It very well could. I would not disagree
8 with that at all. They certainly have that right to come in
9 and challenge whether or not the local exchange companies have
10 properly calculated how you get to parity. And if that's one
11 of their basis, that's fine.

12 But the issue here to be decided is whether or not we
13 should have our petitions dismissed because we have failed to
14 join an indispensable party. The first thing we have to look
15 at is, what does the statute require? And we indicate, as
16 staff has recognized, that the issue is whether or not
17 consumers will benefit from creation of a more competitive
18 market.

19 CHAIRMAN JABER: You make a good point. Does this
20 Commission have authority on its own motion to dismiss the
21 petitions because we believe all the information we need
22 related to the long distance flow-throughs is not before us?

23 MR. FONS: I don't believe at this stage of the
24 proceeding that you can do so. I think you have to accept all
25 of the facts as given. You cannot look at any facts outside of

1 the facts that are already in the record. That's the standard
2 for a motion to dismiss. And we believe that at the end of the
3 day you find that something is lacking, then of course you
4 have, as the Legislature has given you, the discretion to
5 either grant or deny the petitions. But we believe that there
6 are no holes in the petition. We have met the requirements of
7 the statute with regard to each one of the criteria that the
8 Legislature has enumerated.

9 CHAIRMAN JABER: You think the Varn Standard, the
10 motion to dismiss standard would apply to the Commission even
11 if on our own motion we discussed whether the petition should
12 be dismissed?

13 MR. FONS: I believe you cannot go outside the record
14 that's been presented by the petitioners in this proceeding,
15 yes.

16 COMMISSIONER DAVIDSON: Chairman, just an
17 observation. This Commission has noted and staff has often
18 noted the converging nature of the communications marketplace
19 and how there are all types of bundled offerings, including
20 local, long distance, wireless, all types of packages, and part
21 of this may relate also to Docket 5, but as I sit here, I
22 understand the legal arguments behind both side's positions on
23 the motion to dismiss aspect, but I just cannot get over the
24 hurdle, especially based on what I think we all understand to
25 be the legislative intent behind this, I can't get over the big

1 gap in information that we have right now in the record
2 relating to how this flow-through is going to work and the
3 overall impact of that flow-through on competitive markets
4 generally. And I think it's an artificial construct in this
5 day and age, and I think it's a construct that has been said
6 not to exist by the LECs by themselves, there's not just a
7 clear local exchange market and a clear long distance market.
8 There's a lot of convergence and overlap. And it may be at the
9 end of the game that any information given to us by the long
10 distance companies we as a body would say, that doesn't affect
11 the petitions because of X, Y, and Z, but I would like to get
12 that information and understand it.

13 As I sit here, not necessarily the view that not
14 having it means that the petitions get dismissed, but I want to
15 again send a signal that I think we've all sent repeatedly from
16 the bench from the hearings, that this information is
17 important, and hopefully, that signal will have been received
18 somewhere on earth.

19 CHAIRMAN JABER: Mr. Fons, we're going to let you
20 finish your presentation.

21 MR. FONS: I have finished, Madam Chairman.

22 CHAIRMAN JABER: Ms. White.

23 MS. WHITE: Mr. Fons has already stated what
24 BellSouth's position would be.

25 CHAIRMAN JABER: Okay. Verizon.

1 MR. CHAPKIS: Verizon would also echo the comments of
2 Mr. Fons.

3 CHAIRMAN JABER: Okay. Thank you. Mr. Twomey, it's
4 your motion. I know we have thrown out a lot of questions, so
5 I'm going to let you respond to all of those questions and
6 close it out. We'll be ready for a motion or further questions
7 from the Commissioners.

8 MR. TWOMEY: Yes, ma'am. Thank you. I'll be brief.
9 The statute, contrary to the assertions of the companies and
10 your staff, and AARP's belief is not abundantly clear, that one
11 section about the -- remove subsidies for benefit, whatever it
12 says, it's not clear, remotely clear. It's clear as mud. And
13 that leads you to the ability to try and ascertain and discern
14 what the intent of the Legislature was. And as pointed out by
15 Commissioner Davidson in my handout, Page 2, the response of
16 Representative Mayfield, who, by the way, as you all may recall
17 was the House sponsor of that bill and would be presumed
18 somewhat to know what it meant and was intended, he points out
19 that there has to be -- it will be beneficial to residential
20 customers before any changes can take place that has to be
21 determined by the PSC.

22 Commissioners, it was no accident that
23 Representative Mayfield said that. It was said in committee
24 repeatedly. I assert by Mr. Fons representing all three of the
25 LECs that there would be benefits for consumers. There was

1 discussion in committee and testimony before the committees
2 repeatedly about the benefits potentially of customers
3 benefiting on their total bill by the lower in-state toll
4 calls.

5 The comments of Mr. Hatch, as noted by
6 Commissioner Baez, this is an up or down deal per the statute.
7 They have asked for \$355.5 million a year in rate increases, if
8 you accept the BellSouth most expensive option, which I always
9 do. It's precisely known, Mr. Hatch should know or does know,
10 that it's up or down, and therefore, the IXCs can take that as
11 a given. They can take zero, which would be the AARP's option
12 for them, or they can take \$355.5 million per the very specific
13 testimony of these companies.

14 The reference to the in-state connection fee is
15 irrelevant to this discussion, I believe, except let me point
16 out to you that any suggestion, and it's been made repeatedly
17 throughout these hearings, that everybody benefits by the
18 elimination of the in-state connection fee is not remotely
19 true. The only people that pay those in-state fees are those
20 that are sufficiently uninformed to sign up for them in the
21 first place. The fees are remarkably misleading in their
22 label. Nobody should be taking service from a company that
23 charges one in the first place.

24 It's finally acknowledged by Mr. Hatch those in-state
25 connection charges don't have to be eliminated not just until

1 2006 but July of 2006. And as I think he started to concede,
2 they are eliminated, lest you not know this, they're eliminated
3 then, and only then, if the parity hasn't been reached.
4 Concededly or potentially if parity -- you approve the two-year
5 reductions and parity is reached, there won't be any money left
6 for AT&T to net against the loss of the \$50 million a year they
7 get from that fee. And there's a net. Even if they have to
8 reduce that fee, the statute, as drawn by them, allows them to
9 net against the reductions they have to give to their
10 customers. So that's not any big deal.

11 CHAIRMAN JABER: Mr. Twomey, walk me through that
12 slowly because I didn't understand your point.

13 MR. TWOMEY: Yes, ma'am. The language of the statute
14 says that if and when, and you can ask Mr. Hatch more
15 specifically if you want, if and when they take that fee out,
16 which they had variously testified over the last couple of
17 years they got \$50 million a year from, when they take that
18 out, they get to net that \$50 million against the moneys they
19 have to give back to their business and residential customers.
20 So, you know, it wasn't -- in AARP's view, it wasn't any big
21 deal for consumers. They make a big show of getting rid of it,
22 and then they wack you someplace else.

23 CHAIRMAN JABER: Mr. Hatch, the \$1.95 or \$1.88 in
24 some places is -- comes off the top of what you've agreed to
25 flow through?

1 MR. HATCH: It's my reading of that statute that we
2 have to eliminate that fee. Now, we can use some of our
3 flow-through to eliminate that fee, but it has to be eliminated
4 assuming the total amount of revenue available getting down to
5 parity equals the amount of revenue in terms of generated by
6 the fee.

7 But I think Mr. Twomey has mischaracterized what I
8 said, is that if we don't eliminate the fee up front, we take
9 all of our flow-through and dump it on other services, if that
10 revenue -- all the way down to parity, then we're still
11 obligated to remove the in-state connection fee. We would just
12 eat that. We would have no other choice. I mean, it's in our
13 interest, frankly, to eliminate that early enough in the
14 process to ensure that the flow-through covers that, and then
15 deal with the rest of the flow-through with other rates and
16 services.

17 CHAIRMAN JABER: Go ahead, Mr. Twomey.

18 MR. TWOMEY: I'll conclude there. I'll just begin by
19 saying that this is not merely a piece of a larger jigsaw
20 puzzle. The IXCs, their business of, you know, competition
21 doesn't let us do this, doesn't let us do that, we don't want
22 to show our hand, too bad. The AARP would say, let them eat
23 zero, you know. If they're confused about getting a part of
24 \$355 million of access fee reductions and that bothers them in
25 trying to cope with that versus getting zero, let them eat

1 zero. They need to be in -- that is to say, let's not have any
2 rate increases at all if they can't show their hand a couple of
3 months early.

4 They are an essential part of this case. Either they
5 have a substantial interest, which I haven't had time to even
6 read their petition yet following the service hearings we've
7 gone to, either they have a substantial interest or, as noted
8 by Commissioner Davidson, they don't get in. By voluntarily
9 petitioning, you have to have a substantial interest to get in
10 a case. So they need in. The AARP says that they are
11 essential to this, and it's not just them, it is the
12 information they bring with them in the form of their tariffs
13 that relate directly to the \$355 million in rate increases
14 being sought by the LECs. They should come in with their
15 tariffs, or they shouldn't be allowed in. And if they are not
16 allowed in or if they don't come in voluntarily with their
17 tariffs hand in hand with the LECs, then you should dismiss
18 their cases.

19 CHAIRMAN JABER: Mr. Twomey, has there -- at least
20 Ms. McNulty and Mr. Hatch have stated that they have petitioned
21 to intervene and testimony has been filed. Granted, we don't
22 know what's in that testimony except what was represented to us
23 today. Do those facts though -- how do those facts affect your
24 motion to dismiss?

25 MR. TWOMEY: I don't -- well, if I can qualify my

1 answer by saying that I haven't read either the -- I scanned
2 the petitions. I haven't even seen the testimony. Recognizing
3 I haven't studied either one, I would say it doesn't affect it
4 at all unless they bring in the particular tariffs they plan to
5 file so that we know, Commissioner Deason, how much they're
6 willing to give to the consumers that are taking the major --
7 the residential consumers that are taking the major hit on
8 these rate increases in terms of possible in-state savings
9 reductions, then it doesn't, in my opinion, Madam Chair, affect
10 it one bit.

11 CHAIRMAN JABER: Okay. Let me explore that a little
12 bit more because your motion to dismiss was based on the fact
13 that these were indispensable parties and they weren't part of
14 the case. Now, at least two of those companies have made
15 themselves part of the case. Recognize, the petitions to
16 intervene probably haven't been ruled on because we just got
17 them. Now, what I hear you say is the weight of the evidence
18 may be in question, but that's precisely what we take up at the
19 hearing.

20 MR. TWOMEY: In response to that, Madam Chair, I
21 think in fairness to my petition what I said was is that they
22 need to be -- that they were indispensable because we had to
23 know, we needed to know, it was only fair for us to know how
24 they wanted to propose to a portion the rate reductions on the
25 in-state tolls. So that's -- you know, I wasn't saying I just

1 needed -- the AARP just needed them. It was never that. We
2 need them and their tariffs so we can see what they propose to
3 do with this wealth of access fee reductions they will enjoy if
4 the ILECs' petitions are granted.

5 CHAIRMAN JABER: Okay. Commissioners, if I may, I've
6 got a series of questions for staff just to try to make sense
7 of all of this in my own mind. And forgive me, because some of
8 it gets into Item 5, and I'm not really trying to get into the
9 substance of Item 5. I'm more concerned with the logistics of
10 all of this. And as I understand reading the two items
11 together, you envisioned that if this Commission granted the
12 petitions in some form, that the flow-through reductions would
13 be made simultaneously, very close together. Item 5 is PAA.

14 MS. KEATING: That's correct.

15 CHAIRMAN JABER: It is possible Item 5 gets
16 protested. Assume with me -- I'm going to come back to 4A, but
17 if you assume with me that there is a protest in Item 5,
18 logistically how do you accomplish implementation of granting
19 the petition if that's what's done with flow-through
20 reductions?

21 And I ask that question, Beth, because I come full
22 circle wanting all of this information in one hearing, one
23 time, comprehensive review, and contrary to what was stated, I
24 think that's what the Legislature contemplated.

25 MS. KEATING: You hit on a point that staff has

1 talked about, Madam Chairman, and that is that if Item 5 does
2 get protested, then you're looking potentially at a hearing.
3 The hope is, is that if that occurs, that we could do something
4 on a fairly expedited basis.

5 CHAIRMAN JABER: I'm here to tell you we can't. If
6 Item 5 is protested, we cannot have a hearing before the end of
7 the year. We are currently scheduled to have a hearing in the
8 docket with 4A December 10th, 11th, 12th. So what does that
9 do? Again, if you assume this Commission at the end of the
10 hearing grants the petitions, does the statute give us the
11 flexibility to not allow implementation of any rate increases
12 until the flow-through reductions are made?

13 MS. KEATING: To be quite honest, Madam Chairman,
14 that's not something that I've really thought about directly.
15 I think that an argument could probably be made that you can,
16 but I would like a little more time to look at that because I,
17 quite frankly, haven't looked at it.

18 CHAIRMAN JABER: Mr. Twomey has taken --

19 COMMISSIONER DEASON: I'm sorry, I'm sorry. Could
20 she repeat that again?

21 CHAIRMAN JABER: Sure. Ms. Keating.

22 MS. KEATING: I'm sorry.

23 CHAIRMAN JABER: The question, Commissioner Deason --

24 COMMISSIONER DEASON: I just need -- could you just
25 repeat what you just said in answer to the Chair?

1 MS. KEATING: The question that the Chairman put
2 forth is not one that I personally have looked at directly.
3 Whether or not the Commission could defer implementation of the
4 ILECs' tariffs implementing increases until such time as the
5 IXCs' flow-throughs have been approved and considered and that
6 process is in place such that what staff had been recommending
7 that the increases and the concurrent flow-through actually
8 occur on a concurrent basis, it's not something I have looked
9 at directly. I think maybe an argument could be made that you
10 could do that, but again, I was just asking to have an
11 opportunity to look at that a little more.

12 CHAIRMAN JABER: Mr. Twomey, it comes out pretty
13 strongly, and, frankly I'm surprised, but he comes out strongly
14 and suggests that the PSC doesn't have any flexibility with
15 regard to the allocations of flow-throughs between residential
16 and business. I have to tell you, as we sit here today, I
17 disagree with you, but saying that, what is your legal opinion
18 about the statutory interpretation of that sentence? It says,
19 "By the amount necessary to return the benefits of such
20 reduction to both its residential and business customers."

21 MS. KEATING: I think it's pretty clear,
22 Madam Chairman, that you definitely have discretion to make
23 sure that some of the benefit is flowed through to both
24 residential and business. The argument does get a little more
25 tenuous to the extent that the statute says the IXC may

1 determine the specific rates to be decreased. That being said,
2 I think you've also raised another possible argument that the
3 Commission could perhaps make, in that if the Commission
4 doesn't believe what they filed accurately flows through the
5 benefit.

6 CHAIRMAN JABER: Well, it seems to me the general
7 discretion is how it gets allocated in terms of percentages
8 between residential and consumers, and perhaps the discretion
9 the IXCs have relates to where the specific rates in the
10 residential bill and in the consumer bill will be reduced.

11 COMMISSIONER DAVIDSON: And as we sit here, I have a
12 follow-up because --

13 CHAIRMAN JABER: Commissioner Davidson.

14 COMMISSIONER DAVIDSON: -- I mean, you're reading my
15 mind on this and this does get into 5 a bit, but a follow-up on
16 one of your answers to the Chairman's question. If we have the
17 discretion to make sure that the flow-through is in an amount
18 necessary to return the benefits of such reduction to both its
19 residential and business customers, and you say we have that
20 discretion, if we have that discretion, then don't we also have
21 a fiduciary obligation to, to the extent possible, reflect the
22 intent of the legislation in exercising that discretion?

23 MS. KEATING: Commissioner, again, I think that's an
24 argument that you can certainly make. I just feel obligated
25 though to point out that the language though as stated actually

1 says that the IXCs may determine the specific rate, but again,
2 that's not to say that the argument that you make isn't a
3 viable one.

4 COMMISSIONER DAVIDSON: No, I understand that. As I
5 sit here, I have to tell you I don't think there was one member
6 who voted for this bill who thought that 90 percent of the
7 benefit would go to large business customers and 90 percent of
8 the burden would go to individual customers. They just didn't
9 think that when they were talking about their parents not
10 having bill increases, and they were talking about the
11 customers. So I was comforted by your general statement that
12 we do have the discretion to address at some broad level that
13 allocation, and then what perhaps is the best way of doing that
14 we'll have to take up.

15 CHAIRMAN JABER: Yeah, and, Beth, I'm done with the
16 questions, but let me just say it is not my intent to put you
17 on the spot. The very fact though that those are arguments
18 that can be made brings me back to where I am, Commissioners,
19 at the end of this item. I want to preserve the opportunity to
20 address those arguments, which is why, frankly, Mr. Twomey, I
21 was so surprised at how adamant you were that the IXCs had the
22 discretion. I want to hear that argument, and I want to hear
23 it all together because I want to understand what discretion we
24 have or may not have. And I recognize that may be a legal
25 argument, but I think the opportunity to hear it is at this

1 hearing.

2 Commissioners, I don't know what your pleasure might
3 be, but just in an effort to disclose where I am, when we had
4 to appear -- when I appeared in front of the Legislature on
5 behalf of the Commission and talked about the comprehensive
6 review, not to put ourselves in the position of the Legislature
7 because we have what we have now and it's our job to implement
8 it, but the comprehensive review we discussed, I think, related
9 to rate structures across the board, and the Legislature time
10 and time again said, we want to give the PSC the tools and
11 discretion necessary to make this decision. I say that as a
12 foundation. But the second thing as a secondary point is that
13 it is how you view this. And we have yet to interpret some of
14 those provisions in this statute. And I want to preserve that
15 opportunity. I don't know what the right answer is today, but
16 the agenda conference isn't designed to address that.

17 I don't think it's been decided what discretion we
18 have in terms of allocating the flow-throughs between
19 residential and business. And for me, they're not separable.
20 If I could understand what the allocations to be proposed will
21 be, then I may understand where the tangible monetary benefits
22 may be to the residential consumer. And I say that carefully
23 because I have an appreciation, Mr. Hatch, for there are a
24 multitude of benefits that all of you collectively, I assume,
25 are going to address, whether they're the benefits associated

1 with technological advances, a competitive market in terms of
2 product offerings, but the reality is I want to see where the
3 monetary benefits are, and that would help me in terms of
4 understanding where the flow-throughs will be.

5 I think that the IXC's should come forward with a
6 commitment. I think there should be a comprehensive review.
7 Personally, I'm disappointed that we haven't had that thus far.

8 Commissioners, I also personally believe that the
9 opportunity to find that these were indispensable parties does
10 exist. We are obligated to follow the Uniform Rules of
11 Procedure now.

12 One of the things I circled, Beth, in your legal
13 analysis was the standard says, "Any person may at any time be
14 made a party if the person's presence is necessary or proper."
15 And maybe I'm reading it too broadly, but I think it was proper
16 for them to be here.

17 I recognize that a couple of them have intervened,
18 but I'm coming at this recommendation the way it was filed. I
19 don't know what's in the testimony that was filed by AT&T and
20 MCI. It may be just fine; I don't know.

21 But for all of those reasons I just stated,
22 Commissioners, I'm going to support AARP's motion to dismiss.
23 And recognize, that's not a motion. I just want you all to
24 know where I am.

25 COMMISSIONER DEASON: Well, let me say where I am

1 then. I agree with much of what you said, Madam Chair, but I
2 cannot reach the conclusion that we need to dismiss the
3 petitions that are in front of us. And the reason for that, to
4 me, is one of burden of proof. Now, we all know that there are
5 criteria set out in 364.164(1)(a) through (d).

6 In (a), there is language which refers to benefit of
7 residential consumers. I'm a little bit concerned with the
8 very narrow interpretation the incumbent LECs are taking of
9 that particular provision. I would point out to them that they
10 have a burden to meet, and it may behoove them to look at that
11 a little bit more broadly to make sure they meet their burden.
12 And they may have to get the information, provide it to this
13 Commission that we need from the IXC's, who also want to see
14 these petitions granted.

15 But, Madam Chair, while I share in your frustration
16 and share with you that the information is needed for us to
17 make -- to exercise whatever discretion we have, and we have
18 not determined how much discretion we have as of yet, but it
19 falls down to the burden. And I don't think that we can
20 dismiss the petitions at this point. We may very well deny
21 them after hearing because the burden's not been met, but
22 that's their burden.

23 CHAIRMAN JABER: Commissioner Baez.

24 COMMISSIONER BAEZ: Commissioner Deason, I guess I'm
25 hung up on the same thing you are in part. Something I said

1 earlier is that this motion to dismiss, at least in my mind,
2 has placed one of those ultimate questions squarely before us
3 as to what we consider to be benefits. And to decide one
4 way -- certainly to decide in favor of the motion to dismiss,
5 in my mind, would answer that question which I believe is
6 better left as part of the entire case.

7 I think that the definition of what a benefit is, is
8 wrapped up in exactly what the burden -- you know, whether the
9 petitioners are going to carry their burden or not. I would
10 agree with you that at the end of the day it's up to us to
11 decide, well, you know, were we persuaded or not. I will say
12 this. I think much has been made of the tariffs, the need for
13 tariffs to be presented. We did have a long conversation of
14 what the IXCs' ability or even willingness to provide even pro
15 forma estimates and something, but in truth, I see all of that
16 as helping the case along.

17 I cannot sit here and say that the existence or
18 absence of a tariff as part of the record or even any estimates
19 are, in fact, completely determinative of the case. I can't
20 say that. I agree with you that there is an incremental
21 effect, perhaps. It certainly has a persuasive effect. I
22 would join the rest of the Commissioners that have expressed
23 their sense of frustration over at least at this point a
24 feeling that not enough information will be put before us, and
25 I hope certainly that we're proven wrong at the end one way or

1 the other. But I don't think that approving or dismissing the
2 petitions at this point does anything more than to decide
3 ultimate questions, and I don't -- I guess I just don't feel
4 comfortable doing that.

5 CHAIRMAN JABER: Commissioner Davidson.

6 COMMISSIONER DAVIDSON: Thank you, Chairman. I agree
7 with everything that's been said with one caveat that I am
8 going to, with having given this a lot of thought, support
9 staff on AARP's motion. And I approach this from a purely
10 legal standpoint. If we set sort of as a tribunal of equity
11 purely, I would probably support AARP's motion here, but we
12 also have an obligation to apply the law. And I believe that
13 with regard to the standard for a motion to dismiss that the
14 key criteria is whether or not taken the petitions on their
15 face they state a cause of action for which relief can be
16 granted. I believe that under the statute they state a cause
17 of action. Ultimately, whether they prove the elements of
18 their claim, that's a completely different story, and that goes
19 to the issue of burden here. And I hope the parties have taken
20 all of the comments constructively and will really do their
21 best to meet their burden. So with that, I will support staff.

22 CHAIRMAN JABER: Okay. Commissioner Bradley, do you
23 have anything to add?

24 COMMISSIONER BRADLEY: No.

25 CHAIRMAN JABER: Okay. Motion.

1 COMMISSIONER DAVIDSON: Move staff.

2 CHAIRMAN JABER: There's a motion to approve staff.

3 COMMISSIONER DEASON: Well, I want to make one thing
4 clear, and I don't think this is contained in staff's
5 recommendation, but I want to make sure before I just support a
6 motion which approves staff.

7 CHAIRMAN JABER: That's a good point.

8 COMMISSIONER DEASON: Staff, you're not making any
9 interpretation as to the amount of discretion or the reading of
10 the terminology benefit of residential consumers as it relates
11 to whether this should or not be dismissed. That's a matter
12 which we are going to ultimately address, but you are not
13 making any recommendation on that at this point. So if I vote
14 to approve staff's recommendation, that issue is remaining
15 open.

16 MS. KEATING: That's correct, Commissioner. We have
17 tried very hard to make sure that we are not prejudging any
18 issue.

19 COMMISSIONER DEASON: I thought that was the case,
20 and I just wanted to confirm that.

21 COMMISSIONER BAEZ: I can second the motion now.

22 CHAIRMAN JABER: And a second. All those in favor
23 say "aye."

24 COMMISSIONER DEASON: Aye.

25 COMMISSIONER BAEZ: Aye.

1 COMMISSIONER DAVIDSON: Aye.

2 COMMISSIONER BRADLEY: Aye.

3 CHAIRMAN JABER: Oppose, "nay."

4 Nay.

5 So the motion carries 4:1.

6 That takes us to Item 5.

7 Staff, let me take an opportunity to compliment you
8 and the parties for their presentation. It didn't really
9 matter what the vote was going to be today. I really felt like
10 we had everything we needed to make a decision today, so I
11 appreciate that.

12 MS. KEATING: Thank you, Madam Chair.

13 CHAIRMAN JABER: Let's take a 15-minute break, and
14 we'll come back to Item 5.

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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I, TRICIA DeMARTE, RPR, Official Commission Reporter, 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' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 10th DAY OF NOVEMBER, 2003.

Tricia Demarte

TRICIA DeMARTE, RPR
FPSC Official Commission Reporter
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