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April 27, 2005

VIA FEDERAL EXPRESS

Florida Public Service Commission
ATTN: BLANCA BAYO, DIRECTOR
Division of Commission Clerk
and Administrative Services
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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Re: In re BellSouth Tariff
Docket No. 050194-TL

Dear Ms. Bayo:

Enclosed for filing, please find an original and eight copies of Response to BellSouth's Motion to Dismiss regarding the above-referenced case. Please file the original with the Court, and return one copy to me stamped "FILED." A self-addressed, stamped envelope has been provided for your convenience.

- CMP _____
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- MMS _____ /wsj
- RCA _____ Enclosures
- SCR _____ cc: BellSouth Telecommunications, Inc.
- SEC 1
- OTH kimp.

Thank you for your assistance.

Yours very truly,

Wanda S. Jenkins

Wanda S. Jenkins
Paralegal

DOCUMENT NUMBER-DATE
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BEFORE THE FLORIDA 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

Filed: April 27, 2005

RESPONSE TO BELLSOUTH’S MOTION TO DISMISS

Pursuant to Rule 28-106.204, Uniform Rules of Procedure, Petitioners file this Response to the Motion to Dismiss the above captioned complaint and request that the Public Service Commission (“PSC”) deny BellSouth’s Motion to Dismiss. In support thereof, Complainants state the following:

Background

Over twenty years ago, Bellsouth sought and obtained permission from this PSC to charge its customers residing in Miami-Dade County a fee for expenses it allegedly incurred in connection with Miami-Dade County’s Manhole Ordinance (“Manhole Ordinance”). That authority, however, contained a very important limitation: the amount Bellsouth charged its customers could not be more than the actual expenses it incurred as a result of complying with the Manhole Ordinance. To insure compliance with this limitation, Bellsouth was required to perform an audit of its Manhole Ordinance related

costs every six months and to refund its customers for any charges billed which exceeded those actual costs.¹

In the twenty years since Bellsouth got permission to charge its customers the Manhole Ordinance fees, it has not once performed an audit to reconcile the charges imposed upon its customers to the actual costs it incurred as a result of the Manhole Ordinance. Then, on May 6, 2004, Petitioners in this action – Miami-Dade County Bellsouth Customers -- filed a consolidated lawsuit against Bellsouth demanding that they do what they had failed to do for all those years and reconcile the actual Manhole Ordinance Costs to the charges it had imposed upon its Miami-Dade County customers. Not surprisingly, Bellsouth made its first adjustment in more than twenty years to the Manhole Ordinance fee shortly after Petitioners' lawsuit was filed. Throughout the history of this dispute, BellSouth has never denied that it failed to conduct an audit and to reconcile customers' bills.

Bellsouth's response to Petitioners' lawsuit was to move to dismiss it, arguing that Petitioners' claims were not properly before the court and instead should be decided by the PSC. Indeed, Bellsouth's lawyers repeatedly pressed this argument both in their papers and hearings on the matter. "This Court should say to [Petitioners], take your claim to the right forum, that is the Public Service Commission, that can give you all the

¹ Bellsouth General Subscriber Service Tariffs, Section A.2.4.6 provides:

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.

relief you seek in this court.” Hightshoe, et. al v. Bellsouth Telecommunications, Inc., Case No. 03-26623-CA11, Tr. Dated November 3, 2004 at 19 (attached as Ex. A). And, in their Reply in Support of their Motion to Dismiss, Bellsouth wrote an entire section entitled “The PSC is Authorized to Award the Relief Sought by Plaintiffs.” Bellsouth Reply in Support of Defendants’ Motion to Dismiss (“Reply”) at 6 (attached as Ex. B). Ultimately, the circuit court agreed with Bellsouth and abated the complaint so that Plaintiffs could bring this matter to the PSC as Bellsouth had suggested.

Having gotten their cake, Bellsouth now seeks to eat it too. It has moved the PSC to dismiss Petitioners’ Complaint contending that they lack standing to bring their claims and that the PSC lacks the authority to grant the relief Petitioners seek. Like a dog chasing its tail, BellSouth would have its Miami-Dade County customers stuck in a revolving loop, shuffling endlessly between circuit court and the PSC, unable to have its claims against BellSouth addressed in either forum on the merits. In addition to the fact that, in light of their prior arguments, this position is extremely disingenuous, Bellsouth’s arguments are both legally and factually flawed. For the reasons set forth below, Bellsouth’s motion should be denied.²

Named Party Standing

The Petitioners in this matter are three individuals and one business who were Bellsouth customers and who were charged and paid the “Cost of Dade County Manhole Ordinance #83-3” fees. Compl. ¶¶ 2, 3, 5. The Petitioners have alleged that Bellsouth has failed to comply with its Tariff, Part A2.4.6, in that it has failed to conduct semi-annual audits to reconcile the Manhole Ordinance charges levied upon them with the

² In the alternative, Petitioners would suggest that the PSC enter an Order which acknowledges the fact that the matters in the complaint are and were properly before the Circuit Court.

actual Manhole Ordinance charges it has incurred. Compl. ¶¶ 21, 22, 24. Consequently, Petitioners allege, they have been overcharged by Bellsouth for the Manhole Ordinance fees. Compl. ¶ 25.

A complaint is appropriate before the PSC when a person complains of an act or omission by an entity subject to Commission jurisdiction that affects the complainant's substantial interests. *See 25-22.036(2); Agrico Chem. Co. v. Dep't of Environ. Reg.*, 406 So.2d 478 (Fla. 2d DCA 1981). Substantial interests are affected when the party will suffer an injury in fact and the injury suffered is of a type that the proceeding is designed to protect. *Id.* at 482.

Petitioners clearly satisfy these requirements. They have alleged that they are Bellsouth customers, that they have been charged the Manhole Ordinance fee, that they have paid the Manhole Ordinance fee, that Bellsouth has failed to conduct a semi-annual audit, as required by their Tariff, to determine the correct Manhole Ordinance fee, and that, as a result the Petitioner's have been overcharged for the Manhole Ordinance fee. Petitioners have specifically and precisely alleged an injury in fact – an injury which has incurred and is continuing.

Bellsouth's arguments that the Petitioners have not adequately alleged "injury in fact" simply ignore the allegations of the Complaint. Bellsouth asserts: "Because the Complaint does not allege that the Complainants paid more than they should have in fees – or even that they paid the fees at all – the Complaint does not satisfy the first prong of the *Agrico* standing test, which requires a demonstration of 'injury in fact which is of sufficient immediacy' to entitle a person to a hearing." *Reply* at 4. In fact, Petitioners allege both of those things: "This is a complaint brought on behalf of the petitioners

identified below and all other Bellsouth customers who paid the “Cost of Dade County Manhole Ordinance #83-3” fee.” Compl. ¶ 3. “As a result of BellSouth’s non-compliance with the Tariff, it has overcharged, and currently overcharges, customers for the Manhole Fee in violation of the Tariff.” Compl. ¶ 25. A cursory review of the Complaint should have revealed to Bellsouth that the premises of its argument are simply false. Consequently, its argument is completely without merit.

Bellsouth next tries to argue that the Petitioners lack standing because the relief that they seek “is speculative in that it is not contemplated by the Bellsouth Tariff.” *Reply* at 5. While confusing and poorly asserted, the gist of this argument appears to be one of semantics.³ Bellsouth argues that because the Bellsouth Tariff requires Bellsouth to “reconcile” the charges imposed upon its customers for the Manhole Ordinance with the actual costs it incurs for compliance with the Manhole Ordinance, the Petitioners request that any Manhole Ordinance overcharges be “returned” or “refunded” is speculative. Bellsouth’s argument is ridiculous. If Bellsouth has overcharged its customers for the Manhole Ordinance fee for two decades and the Tariff mandates that it “reconcile” its estimated charges with its actual costs, how is it going to accomplish that reconciliation? Obviously, it will be required to return or refund the overcharge to its customers including the Petitioners. Instead of playing word games, Bellsouth should be taking steps to comply with its Tariff and refund the overcharges it has levied on its Miami-Dade County customers for the last twenty years.

³This argument also flies in the face of Bellsouth’s previous averment to the circuit court that the PSC is authorized to award the relief sought by the Petitioners,

The Putative Class

Petitioners have alleged that the Manhole Ordinance fee was applied uniformly and in the exact same way to all Miami-Dade County customers. Compl. ¶ 26.

Similarly, the wrongful conduct Bellsouth has engaged in – failing to perform audits to determine its actual costs associated with the Manhole Ordinance and failing to reconcile those costs to the amounts that it actually charged its customers – has affected all its Miami-Dade County customers uniformly and in the exact same way. Until Petitioners filed their lawsuit, Bellsouth charged each Miami-Dade County customer \$0.11/per line per month in Manhole Ordinance fees for more than twenty years. Until Petitioners filed their lawsuit, Bellsouth did not once “reconcile” those charges with the charges it actually incurred. To this day, Bellsouth has not gone back to reconcile those charges. As a result, each Miami-Dade County Bellsouth customer who paid Manhole Ordinance fees on every one of the customer’s lines has suffered the exact same injury and has the exact same complaint.

Because all Miami-Dade County Bellsouth customers who paid the Manhole Ordinance fees have suffered the same injuries and have the same complaints, the PSC’s resolution of the Petitioners’ Complaint will necessarily affect the members of the putative class. It would be the height of inefficiency to require each Bellsouth customer in Miami-Dade County who has paid the Manhole Ordinance fee to file a complaint and proceed through the administrative process to receive the benefit that flows from the resolution of Petitioners’ claims. Not only would it be inefficient, but proceeding on behalf of less than all of those Bellsouth customers situated similarly to the Petitioners

would run afoul of the prohibitions set forth in Florida Statutes §§ 364.08 – 364.10 (all similarly situated telecommunications customers must be treated equally).

When a publicly regulated utility company acts in a manner that uniformly affects a class of its customers, the expected and ordinary method of addressing the conduct of the public utility is through the class-action vehicle. When a court determines that the matter is one over which the PSC exercises primary jurisdiction, the ordinary course is to send the matter as a whole – both the Petitioners and the putative class – to the PSC for disposition. *See Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 2005 WL 475441 (Fla. 3d DCA March 2, 2005) (“The essence of the purported class-action claim against FP & L is a refund of money customers paid FP & L for electricity they did not actually use. *Jurisdiction for actions such as this properly resides in the Commission.*”) (emphasis added); *Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. 2d DCA 1979). In urging that this matter be dismissed, Bellsouth represented that Petitioners **and the putative class** would be better served by allowing the matter to proceed before the PSC. Reply at 10 (“Assuming Bellsouth erroneously calculated the Charge (which Bellsouth denies), the affected group of subscribers that is the ‘class’ in this proceeding would obtain a larger benefit in a shorter time frame from the application of the PSC’s expertise.”) Relying on those representations, Judge Harnage specifically contemplated that this matter would proceed as a putative class before the PSC: “It also appears to the Court that pursuant to Fla. Stat. § 364.285, the Florida Public Service Commission has the authority to provide the relief to the Plaintiffs and class sought in [the] lawsuit.” *See* Order of Abatement at 2.

The PSC has never ruled that it lacks the authority to deal with a class of customers wronged by a public utility. On the contrary, as noted above, the PSC is regularly referred cases brought on behalf of classes of utility consumers. To deal with these issues on an individual basis when they are matters which clearly affect classes of consumers as a whole, would thwart the intention of the legislature in charging the PSC with the task of protecting **all** public utility customers. *See* Fla. Stat. §§ 364.01, 364.03—.035, 364.04—.051, 364.055, 364.057, 364.06—.063, 364.08, 364.105, 361.14; *see also* Florida Administrative Code Rule 28-5.207 (allowing the consolidation of proceedings which involve similar issues of law or fact).

Petitioners' Requested Relief

After repeatedly representing to the circuit court that the PSC had the authority to grant the relief requested by the Petitioners in their complaint, Bellsouth now asks the PSC to dismiss Petitioners' requests for the same relief they sought before the circuit court. *Reply* at 8 ("Thus, the relief sought by Plaintiffs is precisely the type of remedy the PSC awards in proper circumstances.). The essence of the relief requested by Petitioners is that Bellsouth's Tariff, specifically section A2.4.6, be enforced. As applied to the facts of this case, enforcement of Bellsouth's Tariff requires that Bellsouth establish the actual charges it incurred for compliance with the Manhole Ordinance and that they then "reconcile" that amount with the amount that they have charged Petitioners and the class of similarly situated consumers. Petitioners have requested that any overcharges revealed in that process be returned with interest. Petitioners have further requested that the Tariff be enforced on an on-going basis and that Bellsouth be prevented from charging the Manhole Ordinance fee to its customers unless and until

Bellsouth complies with its own tariff. Ironically, it is Bellsouth that has made the argument that the requested relief is within the clear authority of the PSC. *Reply* at 7 - 8 (“[T]he PSC is authorized to issue refunds to customers and former customers of Bellsouth. *See Richter v. Florida Power Corp.*, 366 So. 2d 798, 801 (Fla 2d DCA 1979); Fla. Admin Code, Rule 25-4114 . . . the PSC is authorized to award interest related to any refund. *See Fla. Admin Code, Rule 24-4114(4)* . . . An injunctive order from this Court to set the Charge is not appropriate because this Court not only lacks the authority to regulate or adjust the rate, but should not place itself in the role of a surrogate PSC perpetually overseeing BellSouth’s rates and compliance with its tariffs. . . . The PSC is the state agency authorized by statute to regulate telecommunications companies and oversee the telecommunications companies’ compliance with their tariffs. *See, e.g.*, Fla. Stat. §§ 364.01(1), 364.01(2), 364.04, 364.051, 364.08.) (some internal citation omitted).

Unless BellSouth intended to mislead the circuit court, BellSouth must stand by its own argument and citations of authority that establish that the PSC has the authority to issue the relief requested by the Petitioners. Petitioner would further point out, however, that no statute prohibits the PSC from ordering or enjoining the type of relief sought here. While Florida Statute § 364.015 allows the PSC to seek an injunctive order from the circuit court, it does not limit the PSC’s authority regarding injunctions. On the contrary, the enforcement of the provisions cited above necessarily contemplates a mandatory order or “injunction.” Had the legislature intended to make such orders an ultra vires act of the PSC, it would not have provided mandatory procedures for carrying out such orders. *See, e.g.*, § 364.03 Fla. Stat. To conclude that the PSC lacks the authority necessary to effect the requested relief would eviscerate the legislature’s charge to the

PSC to regulate telecommunications companies and to “protect the public health, safety, and welfare.” Fla. Stat. § 364.01(2), (4)(a).

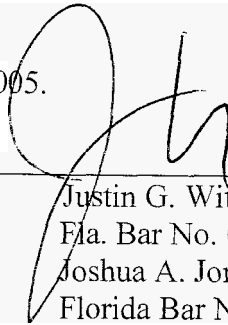
In the alternative, if the PSC concludes that it lacks the authority to grant the requested relief, including the Petitioners request for attorney fees⁴, Petitioners respectfully suggest that the proper course of action for the PSC is to determine the matters properly within its jurisdiction and then allow the Petitioners to return to the circuit court to seek any relief that lies outside the jurisdiction of the PSC. Bellsouth’s argument that the PSC has primary jurisdiction over this matter was premised on the assertion that “rather than the parties bringing expensive accounting experts to testify before the trier of the fact in this Court, the PSC’s experts can efficiently consider the innumerable issues that go into calculating the [actual cost of compliance with the Manhole Ordinance] at no cost to the class.” *Reply* at 9. Once the PSC has performed that function, the rationale for abating this matter in the first instance will have been rendered moot. Once the actual cost of compliance has been determined, the expertise of the PSC will no longer be needed and this matter can be returned to circuit court where the appropriate orders can be entered without any doubt about the jurisdiction of the tribunal.

⁴ Contrary to Bellsouth’s assertion that the PSC has no jurisdiction to award attorney fees, the PSC has, in the past, reserved jurisdiction to do precisely that. *See e.g., City of Homestead v. Johnson*, 760 So. 2d 80, 84 n.7 (Fla. 2000) (“The PSC’s Order reserved jurisdiction to consider awarding attorney fees.”). The cases relied upon by Bellsouth for the proposition that attorney fees cannot be awarded by the PSC deal with the interpretation and application of specific statutes not at issue here, and deal with agencies other than the PSC. Moreover, the cases relied upon by Bellsouth deal with disputes between individual complainants and certain public utilities. Here, Petitioners seek to right a wrong that has been inflicted not only on themselves, but on all other similarly situated Miami-Dade County residents. As a matter of public policy, it would be unjust to require the Petitioners to bear the burden of enforcing Bellsouth’s Tariff and, in the process, obtaining relief for thousands of other Bellsouth customers. The simple reality is that individuals such as the Petitioner typically cannot afford to hire attorneys to fight against large public utilities who violate their own tariffs. Unless the cost of hiring attorneys can be defrayed through the award of attorney fees, wrongs such as that alleged in the instant matter will be left to stand and justice will not be served.

Conclusion

For the reasons expressed above, Petitioners respectfully request that BellSouth's Motion to Dismiss be denied. Petitioners also request that this case be maintained on its hearing docket as a formal proceeding because informal means of resolution have been attempted without success.

Respectfully submitted this 27th day of April, 2005.



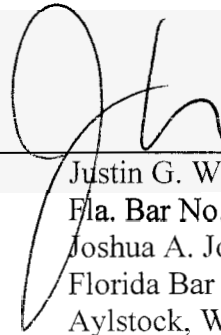
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to BellSouth's Motion to Dismiss has been furnished by United States mail, return receipt requested and postage prepaid to BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee FL 32301-1556, on this 27th day of April, 2005.



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EXHIBIT A

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY,
FLORIDA
Case No. 03-26623-CA11

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

vs.

COPY

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia
Corporation.

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

vs.

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia
Corporation.

----- X

The above-entitled cause came on for hearing
before the HONORABLE HENRY H. HARNAGE, judge of the
above-styled court, at the Miami-Dade County
Courthouse, on Wednesday, November 3, 2004, commencing
at 4:00 p.m.

APPEARANCES:

BARBARA PEREZ, ESQ., and LANCE A. HARKE, ESQ., on
behalf of the Plaintiffs.

WILLIAM F. HAMILTON, ESQ., and JENNIFER KAY, ESQ.,
on behalf of the Defendants.

Job No. 668331

1 THE COURT: Make your appearances for the
2 record.

3 MR. HAMILTON: Bill Hamilton for the
4 defendant BellSouth of Holland & Knight and with
5 me is Jennifer Kay from BellSouth legal
6 department.

7 MR. HARKE: Good afternoon, Your Honor,
8 Lance Harke on behalf of the plaintiffs. My
9 co-counsel in this case, Barbara Perez from
10 Aronovitz Trial Lawyers, is not yet here.

11 I believe Ms. Perez is scheduled to argue
12 this motion. I spoke with her earlier this
13 morning. I can only assume she is running a few
14 minutes late.

15 THE COURT: I will wait a short while.

16 MR. HAMILTON: Here she is.

17 THE COURT: I just had appearances
18 announced.

19 MS. PEREZ: Barbara Perez on behalf of the
20 plaintiffs.

21 THE COURT: I have a motion to dismiss.
22 There is a fair amount of material here.
23 Plaintiffs' response to that. I have gone
24 through most of it. There was also a reply to
25 that by the defendant.

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Then also I had, was it this morning or yesterday, a notice of supplemental filing. I think that has to do with something that is out of the Third District that Judge Baggily entered; is that right?

MR. HAMILTON: You got it.

MR. HARKE: That's correct.

THE COURT: In other words, you're letting me know that the issue or something very comparable is already out in the Third?

MR. HAMILTON: Not exactly. I hope I am able to explain that to you. It was cited by the plaintiffs.

I intend to distinguish it, some interesting language in the briefs. I just found out about it last night. We managed to get it to the Court this morning.

THE COURT: Thank you. So you're ready to argue this?

MR. HAMILTON: I intend to, with Your Honor's pleasure.

THE COURT: Come forward to the podium and use this microphone.

MR. HAMILTON: May it please the Court, Your Honor. Telephone rate overcharge claims

1 are heard exclusively by the Florida Public
2 Service Commission. It's Horn Book law in the
3 State of Florida.

4 This is an overcharge case brought by two
5 BellSouth subscribers, Hightshoe and McCall.
6 Because it's an overcharge case, it must be
7 dismissed by this Court with direction to the
8 plaintiffs to go take their claim and bring it
9 before the right body, the right forum, that is,
10 the Florida Public Service Commission, that can
11 provide all the appropriate relief that this
12 Court could provide.

13 What I would like to do, in the short time
14 I have before the Court, is briefly go through
15 the Florida statutory outline.

16 THE COURT: Yes, I definitely want to be
17 starting with the statute.

18 MR. HAMILTON: What I will do is talk about
19 the pertinent case law.

20 After I have explained the case law that
21 supports our position, I will turn to the
22 arguments of the plaintiffs and address those,
23 and there are four principal arguments.

24 And conclude my presentation with, I hope
25 having convinced the Court that this case should

1 be dismissed.

2 The statutory analysis begins with section
3 364.01. What I would like to do is, as I'm
4 going through my documents, if the Court would
5 permit me, I would like to hand them up to the
6 Court for you to follow.

7 THE COURT: Surely.

8 MR. HAMILTON: I have marked the portions
9 I'm talking about in yellow, so it will be able
10 to direct your attention. I have a similarly
11 marked copy in yellow for opposing counsel.

12 Under 364.01, which is a chapter that
13 specifically is devoted to the regulation of
14 telecommunication carriers, subsection 2
15 provides, it is the legislative intent to give
16 exclusive jurisdiction to all matters set forth
17 in this chapter to the Florida Public Service
18 Commission in regulating telecommunication
19 companies.

20 That provision literally means what it
21 says.

22 What we have then is an entire chapter
23 devoted to the regulation of telecommunication
24 companies that the Public Service Commission has
25 exclusive jurisdiction over.

1 This is a list of the subsections within
2 the chapter. I will be citing some of them in
3 particular. I wanted to give the Court the
4 sense of the scope of the exclusive jurisdiction
5 of all matters within the chapter that is
6 granted by the Florida legislature to the Public
7 Service Commission.

8 Of particular interest in the nitty-gritty
9 of it, we turn to subsection 364.03, which is
10 the requirement under subsection 1 that the
11 Public Service Commission regulate all rates,
12 tolls, contracts and charges. In this case that
13 pertains to a charge, the Florida manhole
14 charge, the County manhole charge, and all rules
15 and regulations of telecommunications companies
16 and goes on and on.

17 Further down, four lines down, it says that
18 these rates, tolls, contracts and charges shall
19 be fair, just and reasonable. So it's the duty
20 of the Florida Public Service Commission to
21 determine the rates and charges are fair and
22 reasonable.

23 Additionally, as part of the statutory
24 scheme, Your Honor, every telecommunications
25 company has to file its rates and charges with

1 the Public Service Commission. This is called a
2 tariff in various parlance. That requirement is
3 under 364.04.

4 364.04 says upon order of the commission,
5 which is simply the granting of a license, every
6 telecommunications company shall file with the
7 commission and shall keep in print open to
8 inspections, schedules showing the rates, tolls,
9 rental contracts and charges of that company.

10 What this means is that the company cannot
11 charge any tariffs, any rates, any commissions
12 different from what is filed with the Public
13 Service Commission.

14 If there is going to be a change, the law
15 requires that a petition be filed with the
16 commission by the particular telecommunications
17 carrier.

18 That's in section 364.05, which says unless
19 the commission orders, otherwise a change may
20 not be made in any rate, toll, rental contract
21 or charge which has been filed and published by
22 any telecommunications company without notice to
23 the Public Service Commission and other
24 provisions.

25 Subsection 2 says the commission may allow

1 changes in toll rental contract charges without
2 the 60 days, upon a showing of good cause.

3 In short, Your Honor, what we have is a
4 statutory scheme that requires the Public
5 Service Commission to determine that all rates,
6 charges, are fair and just. That these be filed
7 with the Public Service Commission.

8 If there is any change, they have to be
9 petitioned to the Public Service Commission to
10 make the change. It's within the exclusive
11 jurisdiction of the Public Service Commission to
12 regulate these charges.

13 The Public Service Commission has
14 significant enforcement authority within the
15 same chapter. I would cite to the Court
16 364.285, which are penalties.

17 It says the commission has the power, in
18 section 1, to impose upon any entity subject to
19 its jurisdiction, if you're found not to have
20 complied with rules and requirements, that is if
21 you deviate from your filed rates, various kind
22 of penalties in section number 2.

23 It's especially pertinent for our discourse
24 this afternoon, Your Honor. It provides that
25 the commission may, at its discretion, institute

1 injunctive relief to compel compliance with this
2 chapter or any commission rule or to compel an
3 accounting and refund and refund of any moneys
4 collected in violation of this chapter.

5 What this means is that if there is any
6 violation of the rates that are filed and the
7 charges, then it's the commission that has the
8 exclusive jurisdiction to seek an action to
9 determine there has been a violation and to seek
10 and bring an action that requires injunction to
11 stop it or refunds to compensate the aggrieved
12 parties.

13 This case -- And also just to be clear,
14 there is a special provision governing
15 injunctions that is 364.015. So what this
16 statute creates is a disciplinary picture of
17 power of the Public Service Commission to demand
18 the telecommunications carriers file their rates
19 and charges, that they adhere to the rates and
20 charges.

21 If they don't adhere to the rates and
22 charges, then sanctions can be brought against
23 them, including an injunction and a refund to
24 affected customers.

25 The case law is very clear on that. I will

1 turn to the case law. We have articulated the
2 statutory framework. I would ask the Court to
3 look at Rictor versus Florida Power Corporation
4 366 So.2d 798.

5 I have highlighted the appropriate sections
6 in yellow for the Court. This was a case in
7 which similarly situated, in fact, it's unusual
8 that we have a case so directly on point that is
9 such wonderful guidance for the Court, this is a
10 case in which we had an individual claiming an
11 overcharge which is exactly what we have here.

12 The plaintiffs in this case claim that
13 BellSouth's manhole charge was too great -- it's
14 a tariff charged by the Public Service
15 Commission -- that the claim was too great.

16 On the third page, which is page 2 of 4 of
17 the case I have handed the Court, it says, we
18 think the trial court correctly found that under
19 the statutory and additional law of this State,
20 the Public Service Commission has exclusive
21 jurisdiction to determine the matters alleged in
22 the consumer's complaint.

23 If we turn to the next page, we find out
24 what the complaint is. The complaint alleges
25 that the consumers were forced to pay

1 unreasonably high fuel adjustment charges for
2 various reasons.

3 That's exactly what the plaintiffs are
4 alleging in this case. That the plaintiffs were
5 forced to pay an unreasonably high manhole
6 charge. In this case it was 21 cents per gallon
7 extra for a surcharge. Here they are claiming
8 11 cents per line was too great, being charged
9 by BellSouth.

10 For the purposes of the motion, I'm taking
11 the allegations of the complaint as true.

12 Interestingly, if we look down on page 3 of
13 4, again this structure of this charge is
14 exactly the same as the structure of the manhole
15 charge. BellSouth is authorized to determine
16 the costs, and then pass the cost onto the
17 consumers, which is exactly what the electrical
18 company was permitted to do in this particular
19 case.

20 So what we have in Rictor is a clear and
21 recent specific affirmation by the appellate
22 court of the State of Florida that overcharge
23 cases are within the exclusive jurisdiction of
24 the Public Service Commission.

25 As if there were any doubt about the

1 matter, there is a second case that backs it up,
2 which is Florida Power Company versus Zenith.

3 If I may approach the Bench, in Zenith, if
4 we turn to page 3 of 4, what we have here in the
5 middle of the page is the language in the
6 summary judgment.

7 However, this court recently held in a case
8 presented on the same overcharges, exactly the
9 issue in this case, an overcharge under a filed
10 tariff, that jurisdiction to determine and award
11 the refund of the alleged overcharges does not
12 align the court but with the Florida Public
13 Service Commission.

14 Thus we submit to the Court that the
15 statutory framework is absolutely clear, and we
16 submit that the decisional case law is
17 absolutely clear. What does the plaintiff have
18 to say what is their response to all of this?

19 Their first response is to say, well, the
20 Florida Public Service Commission claims that it
21 doesn't have jurisdiction. Well, that derives
22 from a letter that was written two years ago by
23 a junior staff member.

24 What we have more recently is a letter from
25 the Florida Public Service Commission general

1 counsel which frankly trumps any earlier letter
2 that was written under different circumstances
3 in which the general counsel repudiates the
4 letter of the junior staff member.

5 I have highlighted pertinent language in
6 the third paragraph which says the commission
7 does regulate charges of this type, the Dade
8 County manhole charge, second, although the
9 BellSouth tariff does not contain specific
10 reference to a charge of 11 cents per month, the
11 tariff contemplates and authorizes BellSouth to
12 collect the cost of compliance with ordinance
13 83.3 on a prorated basis per access exchange
14 line from customers residing within the area
15 subject to the ordinance.

16 If a charge is levied to customers in any
17 municipality not in compliance with the approved
18 tariff, the commission has the statutory
19 authority to require refunds of any overcharges.

20 That eliminates their argument, number one,
21 that clearly the Public Service Commission
22 believes it has the jurisdiction to act in this
23 case.

24 What is their next argument? They cite a
25 series of cases that purport to say the Court

1 has jurisdiction when you're suing a utility.
2 However, we need to read those cases, Your
3 Honor. I'm going to go through the cases with
4 you very briefly right now.

5 The cases the plaintiffs cite are, for
6 example, Florida Power and Light versus Glasser,
7 for the proposition that an action can be
8 brought in this court against BellSouth or any
9 utility for damages. I hand the Court that
10 case.

11 Interestingly, if you turn to page 2, what
12 this case stands for is that you can sue a
13 utility for personal injury. Here we have a
14 case where Glasser contends that his exposure to
15 magnetic fields caused him to contract a rare
16 fatal -- contract a chronic myelogenous
17 leukemia. What we have here is personal injury.

18 In this case, our case involves an
19 overcharge. Therefore, this case doesn't
20 control overcharges or does not in any way
21 controvert the holdings in Rictor and Zenith.

22 Let's take another look at their next case.
23 It's a case by the name, we're all familiar with
24 Henry Trawick as a plaintiff, Mr. Trawick was
25 upset because Florida Power and Light came out

1 and cut down some trees in front of his house.

2 He said they ruined the beauty of the
3 trees, destroyed personal property and wanted to
4 bring an action against the electrical contract.
5 Why? Because he has damaged their personal
6 property just as if you had an accident with a
7 BellSouth truck or Florida Power and Light truck
8 on a highway.

9 The Public Service Commission doesn't have
10 exclusive jurisdiction over that. What the
11 Public Service Commission does have jurisdiction
12 over is overcharges, that is, something right
13 out of a filed rate. That's what Rictor stands
14 for. That's what Zenith stands for. That's
15 what the statute stands for.

16 Finally, the plaintiffs cite to Southern
17 Bell versus Mobile America. That's 291 So.2d
18 199. It's another case they are going to rely
19 upon or have relied upon.

20 This case is just the same as the others,
21 Your Honor. This is a case not challenging a
22 rate overcharge but challenging business losses.

23 These are genuine cases, both Mobile
24 America, both Trawick and Glasser are all cases
25 involving legitimate claims of damages, personal

injury, business loss in the sense of lost
2 profits or lost business opportunity or property
3 damage.

4 The Public Service Commission does not have
5 exclusive jurisdiction over that. What the
6 Public Service Commission has is exclusive
7 jurisdiction over overcharges.

8 This case merely alleges that an overcharge
9 of a filed rate, that a rate -- an authorized
10 tariff was not properly implemented.

11 That's clearly within the jurisdiction of
12 the Public Service Commission to say you charged
13 those customers in a way that is not authorized
14 by the tariff. You come to us, consumer, if you
15 have a problem with that.

16 THE COURT: Where is the language on that?

17 MR. HAMILTON: In Rictor. These cases are
18 different on principles.

19 THE COURT: The Southern Bell -- Mobile
20 America?

21 MR. HAMILTON: They all discuss cases of
22 damage as opposed to an overcharge. The
23 overcharge is Rictor and Zenith.

24 Now, as the Court mentioned, earlier I
25 delivered to the Court a large, unfortunately a

1 large package this morning of a petitioner for
2 prohibition.

3 The reason I did that, Your Honor, is
4 because they have made an issue of Judge
5 Baggily's ruling as somehow controlling in this
6 particular case. I wanted to discuss that case
7 for a few minutes.

8 THE COURT: By the way, you only have 30
9 minutes. You're closing to 15 or 20.

10 MR. HAMILTON: I will come to a real quick
11 conclusion here, Your Honor. **Finally the reason**
12 I'm citing that case -- I wanted to bring this
13 to your attention was because that case involved
14 defective meters.

15 Judge Baggily specifically said there is a
16 tort here. Because they had alleged there was
17 negligence, they had alleged there was fraud in
18 the case that was before Judge Baggily relating
19 to the defective Florida Power and Light meters,
20 they claim there was damage caused by tortious
21 behavior, Judge Baggily said I'm going to let
22 that part stand. We don't have any of those.
23 This case has just a claim for breach of
24 contract, breach of the tariff.

25 You charged us too much, just an overcharge

1 claim plus a claim for accounting that flows
2 from it. All the so-called damages, which
3 really aren't damages, is the difference between
4 what was charged and the so-called overcharge.

5 The plaintiffs essentially admitted in the
6 petitioner for prohibition that those charges
7 are in the exclusive jurisdiction of the Public
8 Service Commission. I'm handing you pages
9 excerpted from their response petition in front
10 of the Third D.C.A.

11 I ask you to look at the highlighted
12 provisions. It's within the package I presented
13 earlier. There is no dispute that the Florida
14 legislature, through chapter 366, has given the
15 PSC regulatory authority to approve rates and
16 charges that a public utility imposes upon its
17 customers and exclusive jurisdiction to
18 adjudicate disputes and challenges to those
19 rates and charges.

20 THE COURT: What is this from?

21 MR. HAMILTON: It's from their brief they
22 filed in the Third D.C.A. in the petition for
23 prohibition that Florida Power and Light took
24 from Judge Baggily's decision. They are
25 claiming that Baggily was right because that

1 case involved a tort with some kind of
2 consequential damage.

3 They are saying here -- if the case doesn't
4 involve consequential damages or a tort, then
5 the Public Service Commission has exclusive
6 jurisdiction to handle and adjudicate disputes
7 and challenges to rates and charges.

8 That's exactly what we have here, a dispute
9 and challenge to the Miami-Dade manhole charge
10 that was authorized by the Public Service
11 Commission and has appeared on the bills within
12 Dade County for the past 20 years.

13 In short, Your Honor, we believe this
14 matter is within exclusive jurisdiction of the
15 Public Service Commission.

16 I have more to talk about in terms of the
17 complicated nature of administering this
18 ordinance, this tariff which shows why the
19 Public Service Commission has expertise, but I
20 will let that go because the real issue before
21 the Court is the exclusive jurisdiction of the
22 Public Service Commission to hear this dispute.

23 This Court should say to McCall and
24 Hightshoe, take your claim to the right forum,
25 that is the Public Service Commission, that can

1 give you all the relief that you seek in this
2 court. They have got exclusive jurisdiction.
3 Thank you very much, Your Honor.

4 MS. PEREZ: Good afternoon, Judge. Your
5 Honor, I will speak briefly with regard to the
6 issues involved in this case.

7 With regard to addressing the Judge
8 Baggily's decision in the FPL case, I will, with
9 the Court's indulgence, allow Mr. Harke to
10 address that, since he is counsel in that case
11 for the plaintiffs also.

12 One thing briefly that is distinguishable
13 from that case and our case is that one of the
14 chief arguments of FP&L in their writ of
15 prohibition is that that case or those claims
16 are already before the Public Service
17 Commission.

18 This case and the claims involved in it are
19 not before the commission. There is no argument
20 with regard to duplicative efforts or
21 inefficiencies of time or money because there is
22 nothing before the Public Service Commission
23 with regard to the claims in this case against
24 BellSouth.

25 So that is one distinguishing feature which

1 again is one of the primary arguments in FPL
2 writ of prohibition. With regard to the other
3 distinguishing features, I will allow Mr. Harke
4 to address that.

5 With regard to the claims that are before
6 this Court, Mr. Hamilton has spent the majority
7 of his time discussing the statutory framework
8 and the tariffs and whether the tariff is
9 reasonable and whether all of that is within the
10 exclusive authority or the primary authority of
11 the Public Service Commission.

12 We are not here -- the plaintiffs complaint
13 does not challenge the tariff. There is no
14 necessary experience or technical expertise that
15 this Court needs because the question before the
16 Court is actually a very simple question.

17 THE COURT: In the Albert matter?

18 MS. PEREZ: In this case before the Court.
19 That is whether BellSouth -- the tariff in this
20 case that is applicable in this case is the
21 contract between BellSouth and its customers,
22 the tariff that discusses the manhole fee.

23 Our claim is that BellSouth breached that
24 contract, not because of the amount of money,
25 because there is no amount of money that is set

1 forth in that tariff. What is set forth in that
2 tariff is that BellSouth every six months from
3 the time that this tariff went into place, which
4 was back in February of 1983, so for the past 21
5 years BellSouth was supposed to conduct an audit
6 every six months in order to determine what was
7 the actual cost for complying with the Dade
8 County manhole ordinance.

9 In other words, what did they actually pay
10 out for that manhole fee to comply with Dade
11 County's ordinance? They were required to
12 perform that audit every six months for the past
13 21 years, and once that audit established what
14 they actually paid out, then if it was less than
15 what they charged their customers, then they
16 were to reimburse their customers for any
17 overcharges.

18 We are claiming at this point which
19 obviously we haven't been permitted to do any
20 discovery, is there anything in the record to
21 dispute the plaintiffs' claim and their
22 complaint that BellSouth has failed to perform
23 those audits every six months for the past 21
24 years.

25 There has never been an audit performed by

1 BellSouth with regard to the costs of complying
2 with the Dade County manhole ordinance, and
3 there is nothing in the record to show they
4 performed those audits, and there is nothing to
5 show that they ever reimbursed any of the
6 customers for anything that they -- once
7 determining what that actual cost was,
8 reimbursing any of its customers anything that
9 they charged in excess of that amount.

10 That requirement is in the tariff. We're
11 not challenging the language in the tariff.
12 We're not challenging anything with regard to
13 the tariff.

14 The question before the Court is, did
15 BellSouth perform the audit that is required for
16 them to do in the tariff. That's it. This
17 Court doesn't have to interpret anything
18 technical, any of the language of the tariff.
19 That is the very simple question before the
20 Court.

21 One of the cases that Mr. Hamilton did not
22 discuss, which is discussed in the papers before
23 the Court is BellSouth versus Caragon. At page
24 10 of BellSouth's reply in support of their
25 motion to dismiss, at footnote 4, they discuss

1 that case.

2 Right towards the bottom of their
3 discussion of that case it says, "The key point
4 is that the claim before the court in Caragon,"
5 in this other BellSouth case, BellSouth versus
6 Caragon 55F Sup.2d 1314, Northern District of
7 Florida 1999, and BellSouth states in its reply,
8 "The key point is that the claim before the
9 Court in Caragon was not to set a tariffed rate,
10 but to enforce a separate written contract
11 between the parties."

12 That's exactly the same claim in this case.
13 We're not asking this Court to set the rate for
14 the tariff. What we are here before the Court
15 is on a breach of contract claim claiming that
16 BellSouth failed to comply with the tariff which
17 is its contract between BellSouth and its
18 customers.

19 And it's precisely the same issue that was
20 before the Court in Caragon in BellSouth versus
21 Caragon, that the tariff is the contract between
22 the parties, and we're asking the Court to
23 enforce that contract as written.

24 We're not asking the Court to look at the
25 tariff. We're not challenging the tariff, which

1 the cases cited by BellSouth all have to do with
2 plaintiffs who came before the Court asking the
3 Courts to alter or modify the tariffs in some
4 way, shape or form.

5 Specifically, the Rictor case, which was
6 just discussed by Mr. Hamilton, also talks about
7 a daisy chain scheme which the PSC will have to
8 go back and reopen its file in order to do a
9 rate adjustment.

10 We're not asking the Court to go back and
11 look at this tariff and determine whether its
12 reasonable or not. We're just asking the Court
13 to enforce the tariff, which is the contract as
14 it is written.

15 Like I said, the tariff requires BellSouth
16 to perform an audit every six months and
17 reimburse its customers, and it is our
18 allegation in the complaint that that has not
19 been done for the past 21 years.

20 With regard to the filed rate doctrine,
21 which is one of the arguments in BellSouth's
22 papers, the filed rate doctrine bars our case
23 against BellSouth. The filed rate doctrine does
24 not bar every case, and every case against
25 BellSouth is not governed by the PSC, by the

1 Public Service Commission.

2 The purpose of the filed rate doctrine is
3 only to bar lawsuits that try to alter the
4 tariffs that have the effective law once they
5 are ordered by the PSC.

6 Again, we're not asking the Court to alter
7 the tariff as written that was filed with the
8 PSC by BellSouth with regard to the manhole
9 charge. We're asking the Court to specifically
10 enforce the language of the tariff.

11 I don't know if the court has the BellSouth
12 versus Caragon case. That's the case I was just
13 discussing with regard to the fact that in that
14 case, the case was before the Court, the Court
15 did, in fact, rule that it had authority, that
16 the PSC did not have primary or exclusive
17 jurisdiction over the matters in that case
18 because similar to this case all the -- it was
19 the defendants in that case because the
20 plaintiff in that case was actually BellSouth.
21 It was the customers, to make it more clear.

22 They were pursuing a claim for breach of
23 contract, and the contract was the tariff
24 because they had failed -- they were alleging
25 that BellSouth had failed to give them the

1 notice that was required by the tariff.

2 That case, the Court specifically found
3 that it was within the Court's jurisdiction to
4 be able to interpret whether, based on the
5 record evidence, BellSouth had, in fact, given
6 the five days notice required in the tariff.

7 The Court in that case was not being asked
8 to interpret the tariff. It needed no technical
9 experience or expertise exclusive to the PSC in
10 order to make that determination, obviously that
11 was just from the record evidence.

12 Similarly, in this case, this Court is
13 competent to determine whether BellSouth has
14 performed audits every six months for the past
15 21 years in compliance with the tariff.

16 There is no technical experience necessary
17 in order to make that determination, and
18 obviously that determination can easily be made
19 based on record evidence that would be disclosed
20 during the discovery process.

21 With regard to exclusive jurisdiction, Mr.
22 Hamilton talked to the Court and presented the
23 statutes and what the statutes state.

24 Again, the complaint in this case does not
25 implicate the statutory provisions because all

1 we're claiming is that BellSouth has breached
2 its contract by failing to comply with the
3 manhole fee by performing the required audits
4 and return any excess money once -- if those
5 audits even reveal that they have to return any
6 money

7 So it's a matter of them complying with
8 their own tariff. There is nothing that makes
9 this case within the exclusive jurisdiction of
10 the PSC.

11 The PSC's powers are only prescribed by the
12 statutes and constitutional provisions, and
13 nothing in our complaint impedes those statutes
14 or implicates anything in the statutory
15 language.

16 There is very, very specifically, as
17 Mr. Hamilton provided to the Court, statute
18 364.01 has 8 subdivisions that discuss what the
19 PSC must do.

20 Again, this class action is properly before
21 the Court because we're simply -- Like I said,
22 there is nothing complicated about it. It's not
23 a big complicated regulatory scheme that this
24 Court is being asked to review

25 We're not asking you to look at the tariff

1 and determine whether it's reasonable or
2 unreasonable. It's just based on the very plain
3 and simple language of the tariff, there was a
4 requirement by BellSouth to perform audits every
5 six months, and it is our allegations in the
6 complaint that they have failed to do so.

7 They have failed to comply with the
8 statute. And, therefore, they have breached the
9 contract with their customers in Dade County.

10 With regard to primary jurisdiction, again
11 that has to do with the requirement or the
12 necessity of this Court to have specific
13 knowledge in the telecommunications field or
14 some kind of technical experience or expertise
15 in order to make the determinations in this
16 case.

17 Again, there is nothing that is raised by
18 the plaintiffs' complaint that requires this
19 Court to have any specific knowledge of the
20 telecommunications field in order to adjudicate
21 this case.

22 Again, with regard to the cases that were
23 cited by the defendant with regard to the Rictor
24 versus FPL and the other case that also had to
25 do with a daisy chaining scheme, both of those

1 are required to go back and review the PSC's
2 action which they sanctioned originally and
3 that, again, is not something that we're asking
4 this Court to do.

5 THE COURT: So you are asking to make sure
6 that regulatory and statutory schemes are
7 enforced.

8 MS. PEREZ: The tariff that is with this
9 case that deals with the Dade County manhole
10 ordinance, it's exclusive with Dade County, it
11 doesn't have to do with any other County in
12 Florida. It's a specific Dade County ordinance.

13 Back in 1983 BellSouth filed with the PSC a
14 tariff in order for them to be able to recoup
15 from their customers the additional costs of
16 having to comply with the tariff, which
17 basically what it is, is that it requires for a
18 person to be above the manhole, in other words
19 on the street, while there is a worker in the
20 manhole working, to be able to make sure that
21 that person's life is basically not in danger.

22 And there are other requirements with
23 regard to the person that is above ground, that
24 they have to have a radio, be able to get in
25 touch with emergency personnel and provide first

aid and those things. Basically that's what it
2 requires.

3 It requires a second person to be above
4 ground while there is a worker in the manhole.

5 When that tariff was filed back in 1983,
6 and it's very simple, you can read it very
7 easily, it's not in any technical language, it's
8 in English, it says that because they couldn't
9 fix a determined amount at that time as to how
10 much it was going to cost, that BellSouth could
11 estimate it. They came up with 11 cents amount
12 per line per month.

13 I'm not sure if you have BellSouth. If you
14 have BellSouth, look at your bill. There is a
15 charge and it's referenced in different ways.
16 Either a manhole fee or 83-3 ordinance and 11
17 cents per line per month is charged to
18 customers.

19 It's not just to residential customers.
20 It's to residential and business customers, both
21 of which are plaintiffs in this case.

22 BellSouth, according to the tariff, is
23 allowed to do that to estimate, to come up with
24 some estimated charge.

25 And then the tariff specifically states

1 that BellSouth is required to perform an audit
2 every six months.

3 And based on that audit, determine how much
4 it actually cost them to comply with the manhole
5 fee or the manhole ordinance.

6 And then reimburse its customers for
7 anything above that they collected above the
8 actual amount that they paid out because it's
9 just supposed to be a pass through charge.

10 Our complaint specifically alleges that
11 BellSouth has failed to do that for the past 21
12 years, since the implementation of this manhole
13 ordinance fee has been being passed on to
14 customers and since this filed rate -- this
15 tariff was filed and approved by the PSC in
16 February of 1983.

17 It is our allegation that BellSouth has
18 failed to perform those audits and failed to
19 return to customers any overages on those
20 amounts.

21 Again, it doesn't require a -- We're not
22 challenging the tariff itself. We're not saying
23 it's unreasonable for BellSouth to have filed
24 this tariff and for the PSC to have approved the
25 tariff.

1 In order for them to recoup the money, they
2 have to comply with the ordinance.

3 We're simply saying that they have failed
4 to comply with the tariff and, therefore, they
5 have failed to comply with their contract with
6 their customers, and that equals a breach of
7 contract.

8 That is the essence of our claim. With
9 that, unless the Court has any other questions,
10 I would like to allow Mr. Harke to speak to the
11 FPL case.

12 THE COURT: Sure.

13 MR. HARKE: Good afternoon, Your Honor. I
14 don't want to belabor what you have already
15 heard.

16 I wanted to make just a few clarifications
17 to what I heard BellSouth's attorney argue with
18 regard to the other case, in which I'm also
19 co-counsel, a case against FPL before the Third
20 D.C.A.

21 With regard to the filing that you received
22 this morning from BellSouth's counsel, it is
23 instructive Your Honor, if you look about midway
24 in there, you will see that there is in fact a
25 Public Service Commission and amicus curae

1 memorandum that was filed by the Public Service
2 Commission.

3 There is a Public Service Commission
4 memorandum of law as amicus curae. This is in
5 the Albert Little matter that is against FPL
6 that BellSouth talked about.

7 THE COURT: Yes, I see it.

8 MR. HARKE: I had the pleasure of appearing
9 before the PSC before they issued this amicus
10 curae to argue against the position that FPL had
11 sought the PSC to take in the case involving
12 these FPL commercial meters, thermal demand
13 meters.

14 THE COURT: Commercial --

15 MR. HARKE: Thermal demand meters that the
16 plaintiffs allege are negligent and grossly and
17 improperly assess the electrical service of
18 commercial customers in the State of Florida per
19 month.

20 But in any event, the PSC in this
21 particular case filed an amicus curae brief.

22 I wanted to draw Your Honor's attention to
23 page 2 footnote 2 of that brief. That I think
24 is the heart of what Your Honor needs to
25 consider in this case.

1 You will see at footnote 2 this is the
2 PSC's position, the commission has jurisdiction
3 to order refunds for utility overcharges.

4 It does not have jurisdiction to issue
5 injunctions or award damages for tort or
6 contract claims.

7 Now, what Your Honor needs to consider in
8 this case is what the plaintiffs are alleging
9 here, an overcharge or is it instead a tort or
10 contract claim?

11 I would argue that when you look at it in
12 the abstract, any case against any public
13 utility in this state implicates the Public
14 Service Commission to some degree.

15 For example, even in a, for example,
16 Glasser case where you have an electrical
17 electrocution at a bus station or something like
18 that, there is a standard of care that is set by
19 the PSC in terms of how the electric utility or
20 the public utility is supposed to operate.

21 The question is, is this something that is
22 before the exclusive jurisdiction of the PSC or
23 is there a tort or contract claim that is
24 independent of the PSC's jurisdiction.

25 In this case I would argue, Your Honor, in

1 this case involving BellSouth, that there is no
2 overcharge issue involved at all because we're
3 not challenging the rate.

4 What is being discussed here is whether or
5 not BellSouth performed a service that it was
6 contractually obligated to render to the
7 plaintiffs.

8 In other words, the tariff is more or less
9 the contract. In other words, it provides the
10 framework for which BellSouth delivers services
11 to its customers.

12 So if the defendant was correct, BellSouth
13 would never be sued in any courtroom for any
14 breach of contract ever.

15 You really have to think, what is a breach
16 of contract and why is the Public Service
17 Commission, in footnote 2, saying that breach of
18 contract claims against any of these that are
19 regulated by the Public Service Commission can
20 proceed?

21 I would suggest to you, well, what would a
22 breach of contract claim be other than a failure
23 to perform a contracted service.

24 Now, the contract, for want of a better
25 term, is the tariff. I will stipulate and

1 Ms. Perez has talked about that in her brief
2 that the tariff is what sets the framework for
3 the provision of the service by the regulated
4 entity.

5 But the failure to provide a service is a
6 contract claim. What we're asserting in this
7 case is that the failure to provide the twice a
8 year audits was a breach of contract.

9 There is no question, and we're not
10 challenging whether or not the rate is right or
11 whether or not there is an overcharge in that
12 BellSouth charge, 21 cents as opposed to the PSC
13 established rate of 11 cents. That is not the
14 issue here.

15 What is at issue is whether or not there
16 was a breach of a contractual obligation to
17 service which should have been performed by
18 BellSouth, which was not.

19 I wanted to bring the Public Service
20 Commission's own statement to the Court's
21 attention because the PSC is well aware, and I
22 can assure you having been up there, they take
23 their jurisdiction in a much more limited sort
24 of sense than both FPL and BellSouth here
25 assert.

1 Their jurisdiction is limited to the
2 establishments of rates and regulating issues
3 related thereto. But breach of contract claims
4 in which BellSouth agrees to perform a service
5 or provide a service, let's say, for example,
6 BellSouth agrees with a customer to deliver 30
7 days of telephone service and fails to do so,
8 that would be a breach of contract.

9 That would be a contractual claim that a
10 party could bring in a court because although
11 there is jurisdiction at the PSC over matters
12 involving how the rate is going to be set,
13 whether the rate is proper, whether the rate
14 should be adjusted, things of that sort, breach
15 of contract claims are within the jurisdiction
16 of this Court.

17 I would refer Your Honor to several of the
18 cases that Ms. Perez talked about.

19 THE COURT: This includes as to the
20 manholes?

21 MR. HARKE: Part of what the manhole fee
22 provides, the manhole regulation says there is
23 supposed to be the assessment of a fee, which is
24 not set forth in the manhole provision.

25 If Your Honor takes a minute to look at it,

1 you will see the 11 cents that BellSouth
2 selected here is not set forth expressly in that
3 manhole provision but the audit is.

4 The audit is something that BellSouth is
5 contractually obligated to provide to customers.

6 THE COURT: The audit is set forth
7 within -- where did you say the audit is set
8 forth?

9 MR. HARKE: It's set forth --

10 THE COURT: In the statute?

11 MR. HARKE: It is.

12 MS. PEREZ: In the tariff.

13 MR. HARKE: It's in 8246.

14 The only thing I wanted to point out is --
15 the reason why we refer to Judge Baggily's
16 opinion is that, if you look at the oral
17 argument, which was attached to the materials
18 that BellSouth submitted this morning, at the
19 very end there is the oral argument that was
20 before Judge Baggily in the FPL matter.

21 I would respectfully request that you read
22 that. You will see, I think, Judge Baggily
23 carefully considered exclusive jurisdiction
24 versus primary jurisdiction versus jurisdiction
25 that is in both locations, and determined that

1 the Court has independent jurisdiction over
2 contract and tort claims.

3 Contrary to what I heard by Mr. Hamilton in
4 his oral argument, the very first count in the
5 complaint against FPL is a count for breach of
6 an implied contract.

7 Although in a case pending against FPL,
8 there are also tort claims. They are all common
9 law claims. There are tort claims for
10 negligence. There is a fraud claim.

11 There is also count 1 which is a breach of
12 an implied contract which Mr. Hamilton didn't
13 reference in his arguments before Your Honor.

14 Similarly here, we have a breach of
15 contract claim. This is not -- we're not making
16 new ground here. It's against a public utility
17 in Florida that has been ongoing for many, many,
18 many years.

19 There is always a determination that the
20 Court needs to make as to whether or not this is
21 something that purely relates to a challenge to
22 the rate and whether the rate is proper or
23 should be higher or lower or something along
24 those lines.

25 But Courts, over the years, have made it

1 very clear that contract claims and tort claims
2 for money damages are claims that Courts have a
3 special obligation to the citizens of this state
4 to administer. That's precisely what is at
5 issue here.

6 THE COURT: When was the last statutory
7 change that has something to do with the subject
8 matter considerations? Statutory or
9 administrative PC change, have they discussed --

10 MR. HARKE: Involving the manhole ordinance
11 or their own jurisdiction? The PSC is a
12 creature of statute. It operates at the
13 limited --

14 THE COURT: Is it by the Constitution or
15 only statute?

16 MR. HARKE: I believe it's a creation of
17 the statutory scheme which may be pursuant to a
18 Constitutional provision, Your Honor. I don't
19 have that in front of me.

20 When I was up before the PSC arguing the
21 FPL matter, the PSC was very careful -- they
22 understand they have a unique role. What they
23 do is their thing.

24 THE COURT: They have an expertise.

25 MR. HARKE: They have an expertise on

1 certain matters and feel very confident they are
2 best able to administer that expertise in
3 certain areas.

4 The question of whether or not a service
5 was provided or should have been provided,
6 that's the bread and butter of Courts in the
7 state of Florida, whether or not there has been
8 a breach of a contract, I mean a contractual
9 obligation.

10 What the defendants argument would mean is
11 that there could never be a breach of argument
12 against BellSouth by a customer ever in any
13 situation, and the courts don't provide that.

14 As you see, when you look through the
15 cases, that it's not just tort actions that are
16 exempted from exclusive jurisdiction by the PSC,
17 but also contract action.

18 THE COURT: You have a case that you can
19 provide to me?

20 MR. HARKE: Florida Public Service
21 Commission versus Bryson, which is 569 So.2d
22 1253. That's Supreme Court 1990, Supreme Court
23 of Florida. There is another one, Utilities of
24 Florida versus Coros. That's 846 So.2d 1159.
25 That's a 5th D.C.A. case from 2003.

1 THE COURT: I'm sorry, utility --

2 MR. HARKE: Utilities of Florida. Of
3 course, the cases cited by Ms. Perez in her
4 brief, including the BellSouth versus Caragon
5 case, which we think is perhaps most on point
6 here.

7 Thank you, Your Honor.

8 MR. HAMILTON: The issue before the Court
9 is not what BellSouth did or didn't do with
10 respect to implementing the manhole charge. The
11 question before the Court is who is going to
12 decide where it should be decided, whether
13 BellSouth did right or wrong.

14 We, of course, will contend if we get to
15 the merits, we did right. The point here in
16 this motion before the Court is who has
17 jurisdiction to resolve this particular claim.

18 What this is, if you listen to the
19 plaintiffs, they have to admit as by Mr. Harke
20 the tariff is the contract. They keep throwing
21 this word contract without any substance
22 associated with it.

23 Contract is the tariff. The way to get to
24 the nitty-gritty of this, Your Honor, is to ask
25 what are the damages that are being sought in

1 the complaint.

2 The so-called damages in the complaint are
3 merely the difference between what BellSouth
4 charged and what they claim should have been
5 charged. It's a refund of an overcharge. It's
6 not a contract claim.

7 It's basically them saying that BellSouth
8 didn't implement the tariff properly. The
9 implementation and compliance with the tariff,
10 there is no separate contract out there about
11 this. It's just the tariff.

12 BellSouth's compliance with the tariff is
13 clearly within the jurisdiction and exclusive
14 jurisdiction of the Public Service Commission.

15 We said that before. It was present when
16 we cited 36.401, which said the Public Service
17 Commission has exclusive jurisdiction over all
18 matters.

19 Then we cited the fact that what they are
20 going to do is all rates and charges must be
21 filed. This is a manhole charge. The tariff
22 says figure it out this way and bill it and make
23 adjustments along the way.

24 What they are saying is, BellSouth, you
25 don't do that. That's what the tariff says

1 you're supposed to do. We have to comply with
2 that because we filed with the Public Service
3 Commission.

4 If we don't file it, we're in violation of
5 the Public Service Commission rules. They have
6 exclusive jurisdiction to enforce it. We would
7 be in violation of it because pursuant to the
8 other statute I showed you, 364.05, we hadn't
9 petitioned for a change.

10 Therefore, if we don't follow the statute,
11 we don't petition for a change, we violated the
12 ordinance, the tariff. Therefore, they have got
13 jurisdiction to enforce it. They would bring an
14 enforcement proceeding and decide whether we
15 have adhered to the tariff they have approved
16 that we filed with them. It's as simple as
17 that.

18 THE COURT: You want to comment on this
19 amicus?

20 MR. HAMILTON: First of all, I would cite
21 to the Court we have a letter from general
22 counsel of the Public Service Commission.

23 I'm not going to concede that Mr. Harke is
24 an expert on how they approach jurisdiction. I
25 would suggest the Court look at the letter which

1 says we regulate this and we'll provide refunds
2 if there is a problem.

3 THE COURT: That letter again is --

4 MR. HAMILTON: I had previously given that
5 to you. If you look at the third paragraph, we
6 regulate this and if there is a violation we're
7 going to enforce and issue a refund.

8 Let's took a look at the amicus brief.
9 What they are saying in footnote 2, if there is
10 a claim in tort or contract that has damages
11 different than a refund, we're not going to deal
12 with that.

13 But if it's a refund case, that belongs
14 within our exclusive jurisdiction. If you look
15 at the pleadings in this case, Your Honor, it's
16 purely a refund case.

17 They say damages. What they mean by
18 damages when you read the complaint is a refund
19 to the difference. That's all it is.

20 So when the PSC says we're not going to
21 handle the tort or contract claims, that would
22 be some tort or contract claim that has
23 consequential damages beyond a refund.

24 THE COURT: Actually only a refund of the
25 differences between --

1 MR. HAMILTON: Between what we charged the
2 customer and what the Public Service Commission
3 would later determine what should have been
4 charged.

5 In other words, we charged 11 cents per
6 line. Suppose the Public Service Commission
7 said you did this improperly, it has to be 10
8 cents. We would have to refund each customer 1
9 cent we're month.

10 That is what they call damages under the
11 tariff. Essentially it's a refund tariff that
12 the Public Service Commission would grant.

13 There is no separate contract that says
14 we're going to do this and then you breached it
15 and the business suffered consequential damages
16 in the sense it couldn't meet its production.

17 Let's take a hypothetical example. Suppose
18 I have a contract with your business, Judge, and
19 you're making widgets.

20 I said I'm going to provide telephone
21 service to you in a wamma jamma Centrex system
22 and that system fails. You can't get calls
23 coming in.

24 I have a contract with you, BellSouth does
25 to provide that Centrex. It fails. You lose

1 business.

2 THE COURT: That's in the Circuit Court.

3 MR. HAMILTON: That's in the Circuit Court.

4 That's different, when BellSouth charges you for
5 the Centrex your business, at a charge that is
6 not authorized by the tariff.

7 That's what this case is about. It's a
8 charge they claim isn't authorized by the
9 tariff, not a business claim for breach of
10 contract with consequential damages.

11 Let's take another example. Suppose you
12 had a contract with BellSouth for telephone
13 service. As a result of BellSouth negligently
14 providing you with telephone service, you
15 couldn't make a call to get hospital help.
16 Somebody passed away or got hurt. You might
17 have a claim against the company for negligence,
18 maybe a breach of contract if it was a contract
19 associated with it. That would be in the
20 Circuit Court.

21 You wouldn't be asking in those
22 circumstances for a refund of the differential
23 of a mischarged tariff. This is a differential
24 of a mischarged tariff case. There is no
25 separate contract.

1 The tariff is the contract. They are
2 claiming we didn't follow it. The Public
3 Service Commission has the jurisdiction to
4 determine refund claims just like Rictor said.

5 THE COURT: Anything else?

6 MR. HAMILTON: I'll be happy to answer any
7 questions the Court has or clarify anything or
8 provide some more examples.

9 THE COURT: I want to get through some of
10 this material obviously in greater detail. I
11 might ask for some supplemental arguments. I
12 will ask for it sooner than later. **Thank** you
13 all.

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15 (Hearing concluded at 5:00 p.m.)
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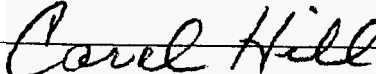
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2 CERTIFICATE OF REPORTER

3 STATE OF FLORIDA)

4 COUNTY OF MIAMI-DADE)
5

6 I, CAROL HILL, Registered Merit Reporter and
7 Certified Realtime Reporter, certify that I was
8 authorized to and did stenographically report the
9 foregoing proceedings and that the transcript is a true
10 and complete record of my stenographic notes.

11 Dated this November 16, 2004.
12
13

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15 CAROL HILL, RMR, CRR
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<p style="text-align: center;">A</p> <p>able 3:12 5:9 27:4 30:14,20,24 42:2</p> <p>about 3:16 4:18 5:9 11:25 19:16 25:6 28:22 33:23 34:6 37:1 38:18 44:10 48:7</p> <p>above 30:18,23 31:3 32:7,7</p> <p>above-entitled 1:15</p> <p>above-styled 1:17</p> <p>absolutely 12:15,17</p> <p>abstract 35:12</p> <p>access 13:13</p> <p>accident 15:6</p> <p>according 31:22</p> <p>accounting 9:3 18:1</p> <p>act 13:22</p> <p>action 9:8,10 14:7 15:4 28:20 30:2 42:17</p> <p>actions 42:15</p> <p>actual 22:7 23:7 32:8</p> <p>actually 21:16 22:9,14 26:20 32:4 46:24</p> <p>additional 10:19 30:15</p> <p>Additionally 6:23</p> <p>address 4:22 20:10 21:4</p> <p>addressing 20:7</p> <p>adhere 9:19,21</p> <p>adhered 45:15</p> <p>adjudicate 18:18 19:6 29:20</p> <p>adjusted 38:14</p> <p>adjustment 11:1 25:9</p> <p>adjustments 44:23</p> <p>administer 41:4 42:2</p> <p>administering 19:17</p> <p>administrative 41:9</p> <p>admit 43:19</p> <p>admitted 18:5</p> <p>affected 9:24</p> <p>affirmation 11:21</p> <p>After 4:20</p> <p>afternoon 2:7 8:24 20:4 33:13</p> <p>again 11:13 21:1 26:6 27:24 28:20 29:10,17 29:22 30:3 32:21 46:3</p> <p>against 9:22 14:8 15:4 20:23 25:23,24 33:19 34:5,10 35:12 36:18 40:5,7,16 42:12 48:17</p> <p>aggrieved 9:11</p> <p>ago 12:22</p> <p>agrees 38:4,6</p> <p>aid 31:1</p>	<p>Albert 21:17 34:5</p> <p>align 12:12</p> <p>allegation 25:18 32:17</p> <p>allegations 11:11 29:5</p> <p>allege 34:16</p> <p>alleged 10:21 12:11 17:16,17</p> <p>alleges 10:24 16:8 32:10</p> <p>alleging 11:4 26:24 35:8</p> <p>allow 7:25 20:9 21:3 33:10</p> <p>allowed 31:23</p> <p>along 40:23 44:23</p> <p>already 3:10 20:16 33:14</p> <p>alter 25:3 26:3,6</p> <p>although 13:8 38:10 40:7</p> <p>always 40:19</p> <p>America 15:17,24 16:20</p> <p>amicus 33:25 34:4,9,21 45:19 46:8</p> <p>amount 2:22 21:24,25 23:9 31:9,11 32:8</p> <p>amounts 32:20</p> <p>analysis 5:2</p> <p>announced 2:18</p> <p>another 14:22 15:18 42:23 48:11</p> <p>answer 49:6</p> <p>anything 22:20 23:6,8 23:12,17 28:14 32:7 49:5,7</p> <p>appearances 1:20 2:1 2:17</p> <p>appeared 19:11</p> <p>appearing 34:8</p> <p>appellate 11:21</p> <p>applicable 21:20</p> <p>approach 12:3 45:24</p> <p>appropriate 4:11 10:5</p> <p>approve 18:15</p> <p>approved 13:17 32:15 32:24 45:15</p> <p>area 13:14</p> <p>areas 42:3</p> <p>argue 2:11 3:19 33:17 34:10 35:11,25</p> <p>arguing 41:20</p> <p>argument 13:20,24 20:19 39:17,19 40:4 42:10,11</p> <p>arguments 4:22,23 20:14 21:1 25:21 40:13 49:11</p> <p>Aronovitz 2:10</p> <p>articulated 10:1</p>	<p>asked 27:7 28:24</p> <p>asking 24:13,22,24 25:2,10,12 26:6,9 28:25 30:3,5 48:21</p> <p>assert 37:25</p> <p>asserting 37:6</p> <p>assess 34:17</p> <p>assessment 38:23</p> <p>associated 43:22 48:19</p> <p>assume 2:13</p> <p>assure 37:22</p> <p>attached 39:17</p> <p>attention 5:10 17:13 34:22 37:21</p> <p>attorney 33:17</p> <p>audit 22:5,12,13,25 23:15 25:16 32:1,3 39:3,4,6,7</p> <p>audits 22:23 23:4 27:14 28:3,5 29:4 32:18 37:8</p> <p>authority 8:14 13:19 18:15 21:10,10 26:15</p> <p>authorized 11:15 16:9 16:13 19:10 48:6,8 50:8</p> <p>authorizes 13:11</p> <p>award 12:10 35:5</p> <p>aware 37:21</p> <p>away 48:16</p> <p style="text-align: center;">B</p> <p>back 22:4 25:8,10 30:1 30:13 31:5</p> <p>backs 12:1</p> <p>Baggily 3:4 17:15,18 17:21 18:25 39:20,22</p> <p>Baggily's 17:5 18:24 20:8 39:15</p> <p>bar 25:24 26:3</p> <p>Barbara 1:21 2:9,19</p> <p>bars 25:22</p> <p>based 27:4,19 29:2 32:3</p> <p>basically 30:17,21 31:1 44:7</p> <p>basis 13:13</p> <p>beauty 15:2</p> <p>before 1:16 4:9,14 17:18 19:20 20:16,19 20:22 21:5,15,18 23:14,19,22 24:4,8 24:14,20 25:2 26:14 28:20 33:19 34:9,9 35:22 39:20 40:13 41:20 43:8,11,16 44:15</p> <p>begins 5:2</p> <p>behalf 1:4,9,22,24 2:8 2:19</p>	<p>behavior 17:21</p> <p>being 11:8 27:7 28:24 32:13 36:4 43:25</p> <p>belabor 33:14</p> <p>believe 2:11 19:13 41:16</p> <p>believes 13:22</p> <p>Bell 15:17 16:19</p> <p>BellSouth 1:6,12 2:4,5 4:5 11:9,15 13:9,11 14:8 15:7 20:24 21:19,21,23 22:2,5 22:22 23:1,15,23 24:5,5,7,16,17,20 25:1,15,23,25 26:8 26:11,20,25 27:5,13 28:1 29:4 30:13 31:10,13,14,22 32:1 32:11,17,23 34:6 36:1,5,10,12 37:12 37:18,24 38:4,6 39:1 39:4,18 42:12 43:4,9 43:13 44:3,7,24 47:24 48:4,12,13</p> <p>BellSouth's 10:13 23:24 25:21 33:17,22 44:12</p> <p>belongs 46:13</p> <p>Bench 12:3</p> <p>best 1:9 42:2</p> <p>better 36:24</p> <p>between 18:3 21:21 24:11,17,21 44:3 46:25 47:1</p> <p>beyond 46:23</p> <p>big 28:23</p> <p>bill 2:3 31:14 44:22</p> <p>bills 19:11</p> <p>body 4:9</p> <p>Book 4:2</p> <p>both 15:23,24 29:25 31:20 37:24 39:25</p> <p>bottom 24:2</p> <p>breach 17:23,24 24:15 26:22 33:6 36:14,15 36:17,22 37:8,16 38:3,8,14 40:5,11,14 42:8,11 48:9,18</p> <p>breached 21:23 28:1 29:8 47:14</p> <p>bread 42:6</p> <p>brief 18:21 34:21,23 37:1 43:4 46:8</p> <p>briefly 4:14 14:4 20:5 20:12</p> <p>briefs 3:15</p> <p>bring 4:8 9:10 15:4 17:12 37:19 38:10 45:13</p> <p>brought 4:4 9:22 14:8</p>	<p>Bryson 42:21</p> <p>ous 35:17</p> <p>business 15:22 16:1,2 31:20 47:15,18 48:1 48:5,9</p> <p>butter 42:6</p> <hr/> <p>call 47:10 48:15</p> <p>called 7:1</p> <p>calls 47:22</p> <p>came 1:15 14:25 25:2 31:11</p> <p>Caragon 23:23 24:4,6 24:9,20,21 26:12 43:4</p> <p>care 35:18</p> <p>careful 41:21</p> <p>carefully 39:23</p> <p>CAROL 50:6,15</p> <p>carrier 7:17</p> <p>carriers 5:14 9:18</p> <p>case 1:3 2:9 4:4,6,19,20 4:25 6:12 9:13,25 10:1,6,8,10,12,17 11:4,6,19 12:1,7,9,16 13:23 14:10,12,14,18 14:18,19,22,23 15:18 15:20,21 16:8 17:6,6 17:12,13,18,23 19:1 19:3 20:6,8,10,13,13 20:15,18,23 21:18,20 21:20 24:1,3,5,12 25:5,22,24,24 26:12 26:12,14,14,17,18,19 26:20 27:2,7,12,24 28:9 29:16,21,24 30:9 31:21 33:11,18 33:19 34:11,21,25 35:8,12,16,25 36:1 37:7 40:7 42:18,25 43:5 46:13,15,16 48:7,24</p> <p>cases 11:23 13:25 14:2 14:3,5 15:23,24 16:17,21 23:21 25:1 29:22 38:18 42:15 43:3</p> <p>cause 1:15 8:2</p> <p>caused 14:15 17:20</p> <p>cent 47:9</p> <p>Centrex 47:21,25 48:5</p> <p>cents 11:6,8 13:10 31:11,17 37:12,13 39:1 47:5,8</p> <p>certain 42:1,3</p> <p>CERTIFICATE 50:2</p> <p>CERTIFIED 50:7</p> <p>certify 50:7</p> <p>chain 25:7</p>
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<p>chaining 29:25 challenge 19:9 21:13 40:21 challenges 18:18 19:7 challenging 15:21,22 23:11,12 24:25 32:22 36:3 37:10 change 7:14,19 8:8,10 41:7,9 45:9,11 changes 8:1 chapter 5:12,17,22 6:2 6:5 8:15 9:2,4 18:14 charge 6:13,14,14 7:11 7:21 10:13 11:6,13 11:15 13:8,10,16 19:9 26:9 31:15,24 32:9 37:12 43:10 44:21 48:5,8 charged 10:14 11:8 16:12 17:25 18:4 22:15 23:9 31:17 44:4,5 47:1,4,5 charges 6:12,18,21,25 7:9 8:1,6,12 9:7,19 9:20,22 11:1 13:7 18:6,16,19 19:7 44:20 48:4 chief 20:14 chronic 14:16 Circuit 1:1,1 48:2,3,20 circumstances 13:2 48:22 cite 8:15 13:24 14:5 15:16 45:20 cited 3:12 25:1 29:23 43:3 44:16,19 citing 6:2 17:12 citizens 41:3 claim 4:8 10:12,15 17:20,23 18:1,1 19:24 21:23 22:21 24:4,8,12,15 26:22 33:8 35:10,23 36:22 37:6 38:9 40:10,15 43:17 44:4,6 46:10 46:22 48:8,9,17 claiming 10:10 11:7 18:25 22:18 24:15 28:1 49:2 claims 3:25 12:20 15:25 20:15,18,23 21:5 35:6 36:18 38:3 38:15 40:2,8,9,9 41:1 41:1,2 46:21 49:4 clarifications 33:16 clarify 49:7 class 1:10 28:20 clear 9:13,25 11:20 12:15,17 26:21 41:1 clearly 13:21 16:11</p>	<p>44:13 closing 17:9 collect 13:12 collected 9:4 32:7 come 3:22 16:14 17:10 31:23 coming 47:23 commencing 1:18 comment 45:18 commercial 34:12,14 34:18 commission 4:2,10 5:18,24 6:7,11,20 7:1 7:4,7,13,16,19,23,25 8:5,7,9,11,13,17,25 9:2,7,17 10:15,20 11:24 12:13,20,25 13:6,18,21 15:9,11 16:4,6,12 18:8 19:5 19:11,15,19,22,25 20:17,19,22 21:11 26:1 33:25 34:2,3 35:2,14 36:17,19 42:21 44:14,17 45:3 45:5,22 47:2,6,12 49:3 commissions 7:11 Commission's 37:20 common 40:8 companies 5:19,24 6:15 company 6:25 7:6,9,10 7:22 11:18 12:2 48:17 comparable 3:10 compel 9:1,2 compensate 9:11 competent 27:13 complaint 10:22,24,24 11:11 21:12 22:22 25:18 27:24 28:13 29:6,18 32:10 40:5 44:1,2 46:18 complete 50:10 compliance 9:1 13:12 13:17 27:15 44:9,12 complicated 19:17 28:22,23 complied 8:20 comply 22:10 24:16 28:2 29:7 30:16 32:4 33:2,4,5 45:1 complying 22:7 23:1 28:7 concede 45:23 conclude 4:24 concluded 49:15 conclusion 17:11 conduct 22:5 confident 42:1</p>	<p>consequential 19:2,4 46:23 47:15 48:10 consider 34:25 35:7 considerations 41:8 considered 39:23 Constitution 41:14 constitutional 28:12 41:18 consumer 16:14 consumers 10:25 11:17 consumer's 10:22 contain 13:9 contemplates 13:11 contend 43:14 contends 14:14 contract 7:20 8:1 14:15 14:16 15:4 17:24 21:21,24 24:10,15,17 24:21,23 25:13 26:23 26:23 28:2 29:9 33:5 33:7 35:6,10,23 36:9 36:14,16,18,22,24 37:6,8 38:3,8,15 40:2 40:6,12,15 41:1 42:8 42:17 43:20,21,23 44:6,10 46:10,21,22 47:13,18,24 48:10,12 48:18,18,25 49:1 contracted 36:23 contracts 6:12,18 7:9 contractual 37:16 38:9 42:8 contractually 36:6 39:5 Contrary 40:3 control 14:20 controlling 17:5 controvert 14:21 convinced 4:25 copy 5:11 Coros 42:24 corporation 1:7,9,13 10:3 correct 3:7 36:12 correctly 10:18 cost 11:16 13:12 22:7 23:7 31:10 32:4 costs 11:16 23:1 30:15 counsel 5:11 13:1,3 20:10 33:22 45:22 count 40:4,5,11 County 1:2,17 6:14 13:8 19:12 22:8 23:2 29:9 30:9,10,11,12 50:4 County's 22:11 course 43:3,14 court 1:1,17 2:1,15,17 2:21 3:8,17,18,22,24 4:7,12,14,16,25 5:4,6 5:7 6:3 8:15 10:2,6,9</p>	<p>10:17,18 11:22 12:7 12:12,14 13:25 14:8 14:9 16:16,19,24,25 17:8 18:20 19:21,23 20:2 21:6,15,16,17 21:18 23:14,17,20,23 24:4,9,13,14,20,22 24:24 25:2,10,12 26:6,9,11,14,14 27:2 27:7,12,22 28:17,21 28:24 29:12,19 30:4 30:5 33:9,12 34:7,14 38:10,16,19 39:6,10 40:1,20 41:6,14,24 42:18,22,22 43:1,8 43:11,16 45:18,21,25 46:3,24 48:2,2,3,20 49:5,7,9 Courthouse 1:18 courtroom 36:13 courts 25:3 40:25 41:2 42:6,13 Court's 20:9 27:3 37:20 co-counsel 2:9 33:19 creates 9:16 creation 41:16 creature 41:12 CRR 50:15 curae 33:25 34:4,10,21 customer 38:6 42:12 47:2,8 customers 9:24 13:14 13:16 16:13 18:17 21:21 22:15,16 23:6 23:8 24:18 25:17 26:21 29:9 30:15 31:18,19,20 32:6,14 32:19 33:6 34:18 36:11 39:5 cut 15:1</p>	<p>decide 43:12 45:14 decided 43:12 decision 18:24 20:8 decisional 12:16 defective 17:14,19 defendant 2:4,25 29:23 36:12 defendants 1:24 26:19 42:10 definitely 4:16 degree 35:14 deliver 38:6 delivered 16:25 delivers 36:10 demand 9:17 34:12,15 department 2:6 derives 12:21 destroyed 15:3 detail 49:10 determination 27:10 27:17,18 40:19 determinations 29:15 determine 6:21 8:5 9:9 10:21 11:15 12:10 22:6 25:11 27:13 29:1 32:3 47:3 49:4 determined 31:9 39:25 determining 23:7 deviate 8:21 devoted 5:13,23 difference 18:3 44:3 46:19 differences 46:25 different 7:12 13:2 16:18 31:15 46:11 48:4 differential 48:22,23 direct 5:10 direction 4:7 directly 10:8 disciplinary 9:16 disclosed 27:19 discourse 8:23 discovery 22:20 27:20 discretion 8:25 discuss 16:21 17:6 23:22,25 28:18 discussed 23:22 25:6 36:4 41:9 discusses 21:22 discussing 21:7 26:13 discussion 24:3 dismiss 2:21 23:25 dismissed 4:7 5:1 dispute 18:13 19:8,22 22:21 disputes 18:18 19:6 distinguish 3:14 distinguishable 20:12 distinguishing 20:25</p>
--	--	---	---	---

<p>21:3 District 3:4 24:6 doctrine 25:20,22,23 26:2 documents 5:4 done 25:19 doubt 11:25 down 6:17,17 11:12 15:1 draw 24:22 duplicative 20:20 during 27:20 duty 6:19 D.C.A 18:10,22 33:20 42:25</p> <hr/> <p style="text-align: center;">E</p> <p>each 47:8 earlier 2:12 13:1 16:24 18:13 easily 27:18 31:7 effective 26:4 efforts 20:20 Either 31:16 electric 35:19 electrical 11:17 15:4 34:17 35:16 electrocution 35:17 ELEVENTH 1:1 eliminates 13:20 emergency 30:25 end 39:19 enforce 24:10,23 25:13 26:10 45:6,13 46:7 enforced 30:7 enforcement 8:14 45:14 English 31:8 entered 3:5 entire 5:22 entity 8:18 37:4 equals 33:6 especially 8:23 ESQ 1:21,21,23,23 essence 33:8 essentially 18:5 47:11 established 22:13 37:13 establishments 38:2 estimate 31:11,23 estimated 31:24 even 28:5 35:15 event 34:20 ever 23:5 36:14 42:12 every 6:24 7:5 22:2,6 22:12,23 25:16,24,24 27:14 29:4 32:2 evidence 27:5,11,19 exactly 3:11 10:11 11:3 11:14,17 12:8 19:8</p>	<p>24:12 example 14:6 35:15,15 38:5 47:17 48:11 examples 49:8 excerpted 18:9 excess 23:9 28:4 exchange 13:13 exclusive 5:16,25 6:4 8:10 9:8 10:20 11:23 15:10 16:5,6 18:7,17 19:5,14,21 20:2 21:10 26:16 27:9,21 28:9 30:10 35:22 39:23 42:16 44:13,17 45:6 46:14 exclusively 4:1 exempted 42:16 experience 21:14 27:9 27:16 29:14 expert 45:24 expertise 19:19 21:14 27:9 29:14 41:24,25 42:2 explain 3:12 explained 4:20 exposure 14:14 expressly 39:2 extra 11:7</p> <hr/> <p style="text-align: center;">F</p> <p>F 1:23 fact 10:7 26:13,15 27:5 33:24 44:19 failed 22:22 24:16 26:24,25 29:6,7 32:11,18,18 33:3,5 failing 28:2 fails 38:7 47:22,25 failure 36:22 37:5,7 fair 2:22 6:19,21 8:6 familiar 14:23 fatal 14:16 feature 20:25 features 21:3 February 22:4 32:16 fee 21:22 22:10 28:3 31:16 32:5,13 38:21 38:23 feel 42:1 few 2:13 17:7 33:16 field 29:13,20 fields 14:15 figure 44:22 file 6:25 7:6 9:18 25:8 45:4 filed 7:12,15,21 8:6,21 9:6 12:9 15:13 16:9 18:22 25:20,22,23 26:2,7 30:13 31:5 32:14,15,23 34:1,21</p>	<p>44:21 45:2,16 filing 3:2 33:21 Finally 15:16 17:11 find 10:23 first 12:19 30:25 40:4 45:20 five 27:6 fix 31:9 Florida 1:2,9 4:1,3,10 4:15 5:17 6:6,13,20 10:3 11:22 12:2,12 12:20,25 14:6,25 15:7 17:19 18:13,23 24:7 30:12 34:18 40:17 42:7,20,23,24 43:2 50:3 flows 18:1 follow 5:6 45:10 49:2 footnote 23:25 34:23 35:1 36:17 46:9 forced 10:25 11:5 foregoing 50:9 form 25:4 forth 5:16 22:1,1 38:24 39:2,6,8,9 forum 4:9 19:24 forward 3:22 found 3:16 8:19 10:18 27:2 four 4:23 6:17 FPL 20:8 21:1 29:24 33:11,19 34:5,10,12 37:24 39:20 40:5,7 41:21 FP&L 20:14 framework 10:2 12:15 21:7 36:10 37:2 frankly 13:1 fraud 17:17 40:10 from 2:5,9 7:12 8:21 12:22,24 13:14 18:2 18:9,20,21,24 20:13 22:2 27:11 30:15 33:22 42:16,25 45:21 front 15:1 18:9 41:19 fuel 11:1 Further 6:17</p> <hr/> <p style="text-align: center;">G</p> <p>gallon 11:6 GARCIA 1:8 general 12:25 13:3 45:21 genuine 15:23 Georgia 1:6,12 give 5:15 6:3 20:1 26:25 given 18:14 27:5 46:4 Glasser 14:6,14 15:24 35:16</p>	<p>to 4:8,14 14:3 19:20 25:8,10 30:1 goes 6:16 going 5:4 7:14 14:3 15:18 17:21 31:10 38:12 43:11 44:20 45:23 46:7,11,20 47:14,20 gone 2:23 good 2:7 8:2 20:4 33:13 governed 25:25 governing 9:14 grant 47:12 granted 6:6 granting 7:5 great 10:13,15 11:8 greater 49:10 grossly 34:16 ground 30:23 31:4 40:16 guidance 10:9</p> <hr/> <p style="text-align: center;">H</p> <p>H 1:16 Hamilton 1:23 2:3,3,16 3:6,11,20,24 4:18 5:8 16:17,21 17:10 18:21 21:6 23:21 25:6 27:22 28:17 40:3,12 43:8 45:20 46:4 47:1 48:3 49:6 hand 5:5 14:9 handed 10:17 handing 18:8 handle 19:6 46:21 happy 49:6 Harke 1:21 2:7,8 3:7 20:9 21:3 33:10,13 34:8,15 38:21 39:9 39:11,13 41:10,16,25 42:20 43:2,19 45:23 HARNAGE 1:16 having 4:25 30:16 37:22 hear 19:22 heard 4:1 33:15,17 40:3 hearing 1:15 49:15 heart 34:24 held 12:7 help 48:15 Henry 1:16 14:24 her 2:12 37:1 43:3 herself 1:4 high 11:1,5 higher 40:23 highlighted 10:5 13:5 18:11 Hightshoe 1:4 4:5 19:24</p>	<p>highway 15:8 HILL 50:6,15 him 14:15 holdings 14:21 Holland 2:4</p> <hr/> <p style="text-align: center;">I</p> <p>impedes 28:13 implement 44:8 implementation 32:12 44:9 implemented 16:10 implementing 43:10 implicate 27:25 implicates 28:14 35:13 implied 40:6,12 impose 8:18 imposes 18:16 improperly 34:17 47:7 INC 1:6,9,12 includes 38:19 including 9:23 43:4 independent 35:24 40:1 individual 1:4 10:10 individually 1:8 indulgence 20:9 inefficiencies 20:21 injunction 9:10,23 injunctions 9:15 35:5 injunctive 9:1 injury 14:13,17 16:1 inspections 7:8 instead 35:9 institute 8:25 instructive 33:23 intend 3:14,20 intent 5:15 interest 6:8 interesting 3:15 Interestingly 11:12 14:11 interpret 23:17 27:4,8 INVESTMENT 1:9 involve 19:4 involved 17:13 19:1</p>
--	---	---	---	---

20:6,18 36:2 involves 14:18 involving 15:25 34:11 36:1 38:12 41:10 issue 3:9 12:9 17:4 19:20 24:19 35:4 36:2 37:14,15 41:5 43:8 46:7 issued 34:9 issues 20:6 38:2	late 2:14 later 47:3 49:12 law 4:2,19,20 7:14 9:25 10:1,19 12:16 26:4 34:4 40:9 lawsuits 26:3 Lawyers 2:10 legal 2:5 legislative 5:15 legislature 6:6 18:14 legitimate 15:25 less 22:14 36:8 let 17:21 19:20 letter 12:22,24 13:1,4 45:21,25 46:3 letting 3:8 let's 14:22 38:5 46:8 47:17 48:11 leukemia 14:17 levied 13:16 license 7:5 life 30:21 Light 14:6,25 15:7 17:19 18:23 like 4:13 5:3,5 25:15 28:21 33:10 35:17 49:4 limited 37:23 38:1 41:13 line 11:8 13:14 31:12 31:17 47:6 lines 6:17 40:24 list 6:1 listen 43:18 literally 5:20 Little 34:5 locations 39:25 look 10:3 11:12 14:22 18:11 24:24 25:11 28:25 31:14 33:23 35:11 38:25 39:16 42:14 45:25 46:5,8 46:14	managed 3:16 manhole 6:13,14 10:13 11:5,14 13:8 19:9 21:22 22:8,10 23:2 26:8 28:3 30:9,18,20 31:4,16 32:4,5,12 38:21,22,24 39:3 41:10 43:10 44:21 manholes 38:20 MANUEL 1:8 many 40:17,17,18 marked 5:8,11 material 2:22 49:10 materials 39:17 matter 12:1 19:14 21:17 28:7 34:5 39:20 41:8,21 matters 5:16 6:5 10:21 26:17 38:11 42:1 44:18 may 3:24 7:19,25 8:25 12:3 41:17 maybe 48:18 McCall 1:8 4:5 19:23 mean 42:8,10 46:17 means 5:20 7:10 9:5 meet 47:16 member 12:23 13:4 memorandum 34:1,4 mentioned 16:24 merely 16:8 44:3 Merit 50:6 merits 43:15 meters 17:14,19 34:12 34:13,15 Miami-Dade 1:2,17 19:9 50:4 microphone 3:23 middle 12:5 midway 33:23 might 48:16 49:11 minute 38:25 minutes 2:14 17:7,9 mischarged 48:23,24 Mobile 15:17,23 16:19 modify 25:3 money 20:21 21:24,25 28:4,6 33:1 41:2 moneys 9:3 month 13:10 31:12,17 34:19 47:9 months 22:2,6,12,23 25:16 27:14 29:5 32:2 more 12:24 19:16 26:21 36:8 37:23 49:8 morning 2:13 3:1,17 17:1 33:22 39:18 most 2:24 43:5	motion 2:12,21 11:10 23:25 43:16 much 17:25 20:3 31:10 32:3 37:23 municipality 13:17 must 4:6 28:19 44:20 myelogenous 14:16	27:10,17 29:15,20 30:14 33:1 35:3 ordered 26:5 orders 7:19 ordinance 13:12,15 19:18 22:8,11 23:2 30:10,12 31:16 32:5 32:13 33:2 41:10 45:12 originally 30:2 other 1:10 3:8 7:23 21:2 22:9 24:5 29:24 30:11,18,22 33:9,18 36:8,9,22 45:8 47:5 others 1:4 15:20 otherwise 7:19 out 3:3,10,16 10:23 14:25 15:13 22:10,14 32:8 39:14 44:10,22 outline 4:15 over 5:25 15:10,12 16:5,7 26:17 38:11 40:1,25 44:17 overages 32:19 overcharge 3:25 4:4,6 10:11 11:22 12:9 14:19 15:22 16:8,22 16:23 17:25 18:4 35:9 36:2 37:11 44:5 overcharges 12:8,11 13:19 14:20 15:12 16:7 22:17 35:3 own 28:8 37:20 41:11		
J jamma 47:21 Jennifer 1:23 2:5 Job 1:25 judge 1:16 3:4 17:4,15 17:18,21 18:24 20:4 20:7 39:15,20,22 47:18 judgment 12:6 JUDICIAL 1:1 junior 12:23 13:4 jurisdiction 5:16,25 6:4 8:11,19 9:8 10:21 11:23 12:10,21 13:22 14:1 15:10,11 16:5,7 16:11 18:7,17 19:6 19:14,21 20:2 26:17 27:3,21 28:9 29:10 35:2,4,22,24 37:23 38:1,11,15 39:23,24 39:24 40:1 41:11 42:16 43:17 44:13,14 44:17 45:6,13,24 46:14 49:3 just 2:17 3:15 6:19 8:6 9:13 15:6,20 17:23 17:25 25:6,12 26:12 27:11 29:2 31:19 32:9 33:16 42:15 44:11 49:4	K KARLA 1:4 Kay 1:4,23 2:5 keep 7:7 43:20 key 24:3,8 kind 8:21 19:1 29:14 Knight 2:4 know 3:9 26:11 knowledge 29:13,19	L Lance 1:21 2:8 language 3:15 12:5 13:5 16:16 23:11,18 26:10 28:15 29:3 31:7 large 16:25 17:1 last 3:16 41:6	M made 7:20 17:4 27:18 40:25 magnetic 14:15 majority 21:6 make 2:1 8:10 26:21 27:10,17 29:15 30:5 30:20 33:16 40:20 44:22 48:15 makes 28:8 making 40:15 47:19	N name 14:23 nature 19:17 necessary 21:14 27:16 necessity 29:12 need 14:2 needed 27:8 needs 21:15 34:24 35:7 40:20 negligence 17:17 40:10 48:17 negligent 34:16 negligently 48:13 never 22:25 36:13 42:11 new 40:16 next 10:23 13:24 14:22 night 3:16 nitty-gritty 6:8 43:24 Northern 24:6 notes 50:10 nothing 20:22 23:3,4 28:8,13,22 29:17 notice 3:2 7:22 27:1,6 November 1:18 50:11 number 8:22 13:20	O obligated 36:6 39:5 obligation 37:16 41:3 42:9 obviously 22:19 27:10 27:18 49:10 once 22:13 23:6 26:4 28:4 one 13:20 20:12,13,25 21:1 23:21 25:21 42:23 ongoing 40:17 only 2:13 17:8 26:3 28:11 39:14 41:15 46:24 onto 11:16 open 7:7 operate 35:20 operates 41:12 opinion 39:16 opportunity 16:2 opposed 16:22 37:12 opposing 5:11 oral 39:16,19 40:4 order 7:4 22:6 25:8	P package 17:1 18:12 page 10:16,16,23 11:12 12:4,5 14:11 23:23 34:23 pages 18:8 paid 22:14 32:8 papers 23:22 25:22 paragraph 13:6 46:5 parlance 7:2 part 6:23 17:22 38:21 particular 6:3,8 7:16 11:18 17:6 34:21 43:17 parties 9:12 24:11,22 party 38:10 pass 11:16 32:9 passed 32:13 48:16 past 19:12 22:4,12,23 25:19 27:14 32:11 pay 10:25 11:5 22:9 PC 41:9 penalties 8:16,22 pending 40:7 per 11:6,8 13:10,13 31:12,12,17,17 34:18

47:5 Perez 1:21 2:9,11,19,19 20:4 21:18 30:8 37:1 38:18 39:12 43:3 perform 22:12,22 23:15 25:16 29:4 32:1,18 36:23 38:4 performed 22:25 23:4 27:14 36:5 37:17 performing 28:3 perhaps 43:5 permit 5:5 permitted 11:18 22:19 person 30:18,23 31:3 personal 14:13,17 15:3 15:5,25 personnel 30:25 person's 30:21 pertains 6:13 pertinent 4:19 8:23 13:5 petition 7:15 18:9,22 45:11 petitioned 8:9 45:9 petitioner 17:1 18:6 picture 9:16 place 22:3 plain 29:2 plaintiff 12:17 14:24 26:20 plaintiffs 1:22 2:8,20 2:23 3:13 4:8,22 10:12 11:3,4 14:5 15:16 18:5 20:11 21:12 22:21 25:2 29:18 31:21 34:16 35:8 36:7 43:19 pleadings 46:15 please 3:24 pleasure 3:21 34:8 pius 18:1 podium 3:22 point 10:8 22:18 24:3,8 39:14 43:5,15 portions 5:8 position 4:21 34:10 35:2 power 8:17 9:17 10:3 12:2 14:6,25 15:7 17:19 18:23 powers 28:11 precisely 24:19 41:4 prescribed 28:11 present 44:15 presentation 4:24 presented 12:8 18:12 27:22 previously 46:4 primary 21:1,10 26:16 29:10 39:24	principal 4:23 principles 16:18 print 7:7 problem 16:15 46:2 proceed 36:20 proceeding 45:14 proceedings 50:9 process 27:20 production 47:16 profits 16:2 prohibition 17:2 18:6 18:23 20:15 21:2 proper 38:13 40:22 properly 16:10 28:20 44:8 property 15:3,6 16:2 proposition 14:7 prorated 13:13 provide 4:11,12 30:25 37:5,7 38:5 39:5 42:13,19 46:1 47:20 47:25 49:8 provided 28:17 42:5,5 provides 5:15 8:24 36:9 38:22 providing 48:14 provision 5:20 9:14 37:3 38:24 39:3 41:18 provisions 7:24 18:12 27:25 28:12 PSC 18:15 25:7,25 26:5 26:8,16 27:9 28:10 28:19 30:13 32:15,24 34:9,11,20 35:19,22 37:12,21 38:11 41:11 41:20,21 42:16 46:20 PSC's 28:11 30:1 35:2 35:24 public 4:1,10 5:17,24 6:6,11,20 7:1,12,23 8:4,7,9,11,13 9:17 10:14,20 11:24 12:12 12:20,25 13:21 15:9 15:11 16:4,6,12 18:7 18:16 19:5,10,15,19 19:22,25 20:16,22 21:11 26:1 33:25 34:1,3 35:12,13,20 36:16,19 37:19 40:16 42:20 44:14,16 45:2 45:5,22 47:2,6,12 49:2 published 7:21 purely 40:21 46:16 purport 13:25 purpose 26:2 purposes 11:10 pursuant 41:17 45:7 pursuing 26:22	p.m 1:19 49:15 <hr/> Q <hr/> question 21:15,16 23:14,19 35:21 37:9 42:4 43:11 questions 33:9 49:7 quick 17:10 <hr/> R <hr/> radio 30:24 raised 29:17 rare 14:15 rate 3:25 7:20 15:13,22 16:9,9 24:9,13 25:9 25:20,22,23 26:2 32:14 36:3 37:10,13 38:12,13,13 40:22,22 rates 6:11,18,21,25 7:8 7:11 8:5,21 9:6,18,19 9:21 18:15,19 19:7 38:2 44:20 read 14:2 31:6 39:21 46:18 ready 3:18 real 17:10 19:20 really 18:3 36:15 Realtime 50:7 REALTY 1:9 reason 17:3,11 39:15 reasonable 6:19,22 21:9 25:12 29:1 reasons 11:2 received 33:21 recent 11:21 recently 12:7,24 record 2:2 22:20 23:3 27:5,11,19 50:10 recoup 30:14 33:1 refer 38:17 39:15 reference 13:10 40:13 referenced 31:15 refund 9:3,3,23 12:11 44:5 46:7,11,13,16 46:18,23,24 47:8,11 48:22 49:4 refunds 9:11 13:19 35:3 46:1 regard 20:5,7,20,23 21:2,5 23:1,12 25:20 26:8,13 27:21 29:10 29:22,23 30:23 33:18 33:21 Registered 50:6 regulate 6:11 8:12 13:7 46:1,6 regulated 36:19 37:3 regulating 5:18 38:2 regulation 5:13,23 38:22	regulations 6:15 regulatory 18:15 28:23 30:6 reimburse 22:16 25:17 32:6 reimbursed 23:5 reimbursing 23:8 related 38:3 relates 40:21 relating 17:18 relied 15:19 relief 4:11 9:1 20:1 rely 15:18 render 36:6 rental 7:9,20 8:1 reopen 25:8 reply 2:24 23:24 24:7 report 50:8 Reporter 50:2,6,7 Representatives 1:10 repudiates 13:3 request 39:21 require 13:19 32:21 required 22:11 23:15 27:1,6 28:3 30:1 32:1 requirement 6:10 7:2 23:10 29:4,11 requirements 8:20 30:22 requires 7:15 8:4 9:10 25:15 29:18 30:17 31:2,3 residential 31:19,20 residing 13:14 resolve 43:17 respect 43:10 respectfully 39:21 response 2:23 12:18,19 18:9 result 48:13 return 28:4,5 32:19 reveal 28:5 review 28:24 30:1 Rictor 10:3 11:20 14:21 15:13 16:17,23 25:5 29:23 49:4 right 3:5 4:9,9 14:4 15:12 18:25 19:24 24:2 37:10 43:13,15 RMR 50:15 role 41:22 ruined 15:2 rule 9:2 26:15 rules 6:14 8:20 45:5 ruling 17:5 running 2:13 <hr/> S <hr/> same 8:15 11:14 12:8 15:20 24:12,19	anctioned 30:2 anctions 9:22 saying 19:3 32:22 33:3 36:17 44:7,24 46:9 says 5:21 6:17 7:4,18 7:25 8:17 10:17 13:6 24:3 31:8 38:22 44:22,25 46:1,20 47:13 scheduled 2:11 schedules 7:8 scheme 6:24 8:4 25:7 28:23 29:25 41:17 schemes 30:6 scope 6:4 second 12:1 13:8 31:3 section 5:2 7:18 8:18 8:22 sections 10:5 see 33:24 34:7 35:1 39:1,22 42:14 seek 9:8,9 20:1 selected 39:2 sense 6:4 16:1 37:24 47:16 separate 24:10 44:10 47:13 48:25 series 13:25 service 4:2,10 5:17,24 6:7,11,20 7:1,13,23 8:5,7,9,11,13 9:17 10:14,20 11:24 12:13 12:20,25 13:21 15:9 15:11 16:4,6,12 18:8 19:5,10,15,19,22,25 20:16,22 21:11 26:1 33:25 34:1,3,17 35:14 36:5,16,19,23 37:3,5,17,19 38:4,5,7 42:4,20 44:14,16 45:2,5,22 47:2,6,12 47:21 48:13,14 49:3 services 36:10 set 5:16 21:25 22:1 24:9,13 35:18 38:12 38:24 39:2,6,7,9 sets 37:2 several 38:17 shape 25:4 short 2:15 4:13 8:3 19:13 show 23:3,5 showed 45:8 showing 7:8 8:2 shows 19:18 significant 8:14 similar 26:18 similarly 1:4,10 5:10 10:7 27:12 40:14 simple 21:16 23:19
--	---	---	---	--

29:3 31:6 45:16
simply 7:5 28:21 33:3
since 20:10 32:12,14
situated 1:4,10 10:7
situation 42:13
six 22:2,6,12,23 25:16
 27:14 29:5 32:2
some 3:14 6:2 15:1
 19:1 25:3 29:14
 31:24 35:14 46:22
 49:8,9,11
Somebody 48:16
somehow 17:5
something 3:3,9 15:12
 30:3 35:17,21 39:4
 40:21,23 41:7
sooner 49:12
sorry 43:1
sort 37:23 38:14
sought 34:11 43:25
Southern 15:16 16:19
so-called 18:2,4 44:2
So.2d 10:4 15:17 42:21
 42:24
speak 20:5 33:10
special 9:14 41:3
specific 11:21 13:9
 29:12,19 30:12
specifically 5:13 17:15
 25:5 26:9 27:2 28:16
 31:25 32:10
spent 21:6
spoke 2:12
staff 12:23 13:4
stand 17:22
standard 35:18
stands 14:12 15:13,14
 15:15
starting 4:17
state 4:3 10:19 11:22
 27:23 34:18 35:13
 41:3 42:7 50:3
statement 37:20
states 24:7 31:25
station 35:17
statute 4:17 9:16 15:15
 28:17 29:8 39:10
 41:12,15 45:8,10
statutes 27:23,23 28:12
 28:13
statutory 4:15 5:2 6:23
 8:4 10:2,19 12:15
 13:18 21:7 27:25
 28:14 30:6 41:6,8,17
stenographic 50:10
stenographically 50:8
stipulate 36:25
stop 9:11
street 30:19
structure 11:13,14

subdivisions 28:18
subject 8:18 13:15 41:7
submit 12:14,16
submitted 39:18
subscribers 4:5
subsection 5:14 6:9,10
 7:25
subsections 6:1
substance 43:21
sub 14:12
sued 36:13
suffered 47:15
suggest 36:21 45:25
suing 14:1
summary 12:6
supplemental 3:2
 49:11
support 23:24
supports 4:21
Suppose 47:6,17 48:11
supposed 22:5 32:9
 35:20 38:23 45:1
Supreme 42:22,22
Sup.2d 24:6
surcharge 11:7
sure 30:5,20 31:13
 33:12
Surely 5:7
system 47:21,22

T

take 4:8 14:22 19:24
 34:11 37:22 47:17
 48:11
takes 38:25
taking 11:10
talk 4:18 19:16
talked 27:22 34:6 37:1
 38:18
talking 5:9
talks 25:6
tariff 7:2 10:14 12:10
 13:9,11,18 16:10,14
 17:24 19:18 21:8,13
 21:19,22 22:1,2,3
 23:10,11,13,16,18
 24:14,16,21,25,25
 25:11,13,15 26:7,10
 26:23 27:1,6,8,15
 28:8,25 29:3 30:8,14
 30:16 31:5,22,25
 32:15,22,24,25 33:4
 36:8,25 37:2 39:12
 43:20,23 44:8,9,11
 44:12,21,25 45:12,15
 47:11,11 48:6,9,23
 48:24 49:1
tariffed 24:9
tariffs 7:11 21:8 25:3
 26:4

technical 21:14 23:18
 27:8,16 29:14 31:7
telecommunication
 5:14,18,23
telecommunications
 1:6,12 6:15,24 7:6,16
 7:22 9:18 29:13,20
telephone 3:25 38:7
 47:20 48:12,14
term 36:25
terms 19:16 35:19
Thank 3:18 20:3 43:7
 49:12
their 4:8 9:18 12:18,19
 13:20,24 14:22 15:5
 18:9,21 20:14 22:15
 22:16,21 23:24 24:2
 28:8 29:9 30:15 33:5
 33:6 37:23 38:1
 41:11,23
themselves 1:9
thereto 38:3
thermal 34:12,15
thing 20:12 39:14
 41:23
things 31:1 38:14
think 3:3 10:18 34:23
 36:15 39:22 43:5
third 3:4,10 10:16 13:6
 18:10,22 33:19 46:5
through 2:24 4:14 5:4
 14:3 18:14 32:9
 42:14 49:9
throwing 43:20
time 4:13 20:21 21:7
 22:3 31:9
TIMOTHY 1:8
toll 7:20 8:1
tolls 6:12,18 7:8
tort 17:16 19:1,4 35:5,5
 35:23 40:2,8,9 41:1
 42:15 46:10,21,22
tortious 17:20
touch 30:25
towards 24:2
transcript 50:9
Trawick 14:24,24
 15:24
trees 15:1,3
trial 2:10 10:18
truck 15:7,7
true 11:11 50:9
trumps 13:1
try 26:3
turn 4:21 6:9 10:1,23
 12:4 14:11
twice 37:7
two 4:4 12:22
type 13:7

U

under 5:12 6:10 7:3
 10:18 12:9 13:2
 47:10
understand 41:22
unfortunately 16:25
unique 41:22
unless 7:18 33:9
unreasonable 29:2
 32:23
unreasonably 11:1,5
unusual 10:7
upset 14:25
use 3:23
Utilities 42:23 43:2
utility 14:1,9,13 18:16
 35:3,13,19,20 40:16
 43:1

V

various 7:2 8:21 11:2
versus 10:3 12:2 14:6
 15:17 23:23 24:5,20
 26:12 29:24 39:24,24
 42:21,24 43:4
very 3:9 9:25 14:4 20:3
 21:16 23:19 28:16,16
 29:2 31:6,6 39:19
 40:4 41:1,21 42:1
violated 45:11
violation 9:4,6,9 45:4,7
 46:6
vs 1:5,11

W

wait 2:15
wamma 47:21
want 4:16 33:14 36:24
 45:18 49:9
wanted 6:3 15:3 17:6
 17:12 33:16 34:22
 37:19 39:14
way 14:20 16:13 17:8
 25:4 43:23 44:22,23
ways 31:15
Wednesday 1:18
well 12:19,21 36:21
 37:21
went 22:3
were 10:25 11:4,25
 22:11,16 26:22,24
 29:22
we'll 46:1
we're 14:23 23:10,12
 24:13,22,24,25 25:10
 25:12 26:6,9 28:1,21
 28:25 30:3 32:21,22
 33:3 36:2 37:6,9
 40:15 45:4 46:6,11
 46:20 47:9,14

while 2:15 30:19 31:4
widgets 47:19
VILLIAM 1:23
wonderful 10:9
word 43:21
words 3:8 22:9 30:18
 36:8,9 47:5
worker 30:19 31:4
working 30:20
wouldn't 48:21
writ 20:14 21:2
written 12:22 13:2
 24:10,23 25:14 26:7
wrong 43:13

X

X 1:14

Y

year 37:8
years 12:22 19:12 22:5
 22:13,24 25:19 27:15
 32:12 40:18,25
yellow 5:9,11 10:6
yesterday 3:2

Z

Zenith 12:2,3 14:21
 15:14 16:23

0

03-26623-CA11 1:3

1

1 6:10 8:18 40:11 47:8
10 23:24 47:7
11 11:8 13:10 31:11,16
 37:13 39:1 47:5
1159 42:24
1253 42:22
1314 24:6
15 17:9
16 50:11
1983 22:4 30:13 31:5
 32:16
199 15:18
1990 42:22
1999 24:7

2

2 5:14 7:25 8:22 10:16
 14:11 34:23,23 35:1
 36:17 46:9
20 17:9 19:12
2003 42:25
2004 1:18 50:11
21 11:6 22:4,13,23
 25:19 27:15 32:11
 37:12
291 15:17

3

3 1:18 11:12 12:4
30 17:8 38:6
36.401 44:16
364.01 5:3,12 28:18
364.015 9:15
364.03 6:9
364.04 7:3,4
364.05 7:18 45:8
364.285 8:16
366 10:4 18:14

4 10:16 11:13 12:4
23:25
4:00 1:19

5

5th 42:25
5:00 49:15
55F 24:6
569 42:21

6

60 8:2
668331 1:25

798 10:4

8

8 28:18
8246 39:13
83-3 31:16
83.3 13:13
846 42:24

EXHIBIT B

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

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

Plaintiffs,

Case No.: 03-26623-CA11

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
a Georgia Corporation,

Defendant.

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

Plaintiffs,

Case No.: 03-16239-CA11

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.,
a Georgia Corporation,

Defendant.

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiffs' Response in Opposition to BellSouth's Motion to Dismiss the
Consolidated Amended Complaint and Demand for Jury Trial ("Plaintiffs'
Response") fails in each of its arguments.

A. Plaintiffs Cannot Circumvent the PSC's Exclusive Jurisdiction.

1. The PSC Explicitly Asserts Regulatory Jurisdiction Over the Charge.

Plaintiffs' Response asserts that "[t]his class action was brought in the correct judicial forum because the PSC does not, nor does it claim to, regulate the Manhole Fee." Plaintiffs' Response, at 12. As authority for this remarkable (and erroneous) claim, Plaintiffs cite to a 2002 *letter* written by Jessica Elliott, a former Staff Counsel for the Public Service Commission ("PSC"), to a consumer. Ms. Elliott was mistaken then, and the Plaintiffs are mistaken today. The current General Counsel for the PSC, Richard D. Melson, has now corrected Ms. Elliott's mistake:

You [BellSouth] have also asked the basis for the statement in a letter dated May 3, 2002 from Jessica Elliott, PSC Staff Counsel, to Mr. David G. Kennedy to the effect that the \$0.11 monthly charge by BellSouth for the cost for complying with Miami-Dade County Ordinance 83-3 "is not a tariffed charge regulated by the Commission." This statement is misleading. ***First, the Commission does regulate charges of this type.*** Second, although BellSouth's tariff does not contain specific reference to a charge of \$0.11 per month, the approved tariff language contemplates and authorizes BellSouth to collect the cost of compliance with Ordinance 83-3 on a pro rata basis per exchange access line from customers residing within the area subject to the ordinance. ***If the charge levied to customers in any municipality is not in compliance with the approved tariff provision, the Commission has statutory authority to require refunds of any overcharges.*** Ms. Elliott is no longer employed by the Commission and we have been unable to determine the reason that the earlier letter was not entirely accurate on this point.

Letter from Richard D. Melson, PSC General Counsel, dated Aug. 30, 2004, attached hereto as Exhibit A (emphasis added).

Mr. Melson's statement confirms what is hornbook law. Chapter 364 of the Florida Statutes specifically addresses "Telecommunications Companies," and

grants the PSC “exclusive jurisdiction in all matters set forth in [Chapter 364].” Fla. Stat. § 364.01(2). This reach is broad and expansive. There are 62 subsections in Chapter 364 regarding the PSC’s regulation of telecommunications companies. Attached hereto as Exhibit B is the index of those subsections in Chapter 364. Even a cursory review of the subsection headings in Chapter 364 demonstrates the charge associated with the Miami-Dade County Manhole Ordinance (the “Charge”) falls squarely within the exclusive jurisdiction of the PSC. For example, Section 364.04 requires the filing of “Schedules of rates, tolls, rentals, contracts and **charges.**” Fla. Stat. § 364.04 (emphasis added). These filings are commonly known as “tariffs.” The costs associated with complying with the Miami-Dade County Manhole Ordinance are passed on to customers via a tariff filed with the PSC pursuant to Section 364.04.

Mr. Melson’s statement confirms that the Charge is authorized in the tariff:

Attached is a certified copy of currently effective Section A.2.4.6 which appears on Original Page 20.1 of BellSouth’s General Subscriber Service Tariff on file with the Commission. The language in the first two paragraphs of Section A.2.4.6 [pertaining to the Charge] was approved effective February 15, 1983 (the date of the Commission’s vote) by Commission Order No. 11679, issued March 7, 1983. ***This tariff language was approved in response to an ordinance adopted by Dade County which took effect on February 11, 1983.***

Exhibit A, Letter from Richard D. Melson, PSC General Counsel, dated Aug. 30, 2004.

The subsections of Chapter 364 and the related Rules of the Florida Administrative Code set forth this State’s entire regulatory scheme related to telecommunications companies, including provisions and rules regarding

investigations, enforcement, refunds, and sanctions. *See Fla. Stat. §364.01, et seq.;* Fla. Admin. Code, Ch. 25. Plaintiffs' claim that the PSC does not regulate the Charge ignores the Tariff, the PSC proceedings, Chapter 364 of the Florida Statutes, and Chapter 25 of the Florida Administrative Code, and rests upon an inaccurate letter to a consumer by a PSC staff attorney that has now been corrected by the PSC's General Counsel.¹

The PSC has explicitly stated that it regulates the Charge and has the statutory authority to require refunds of any overcharges not in compliance with the approved tariff provision regarding the Charge. *See Exhibit A, Letter from Richard D. Melson, PSC General Counsel, dated Aug. 30, 2004.*² As set forth below and in Defendant's Motion to Dismiss, the Complaint should be dismissed. The PSC is exclusively empowered to regulate the Charge and has the authority to grant the relief requested by the Plaintiffs.

2. Plaintiffs' Claims Are Not Tort Claims, But Rather Squarely Seek a Determination of the Correct Charge.

The Plaintiffs' Response purports to circumvent the PSC's exclusive jurisdiction by citing to cases where circuit courts deny dismissal because they have jurisdiction over tortious acts causing harm to persons, property and businesses.

¹ Plaintiffs' reliance on *State ex rel. Burr v. Jacksonville Terminal Co.*, 71 Fla. 295 (1916) and *Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493 (Fla 1973) is misplaced because those cases involved different industries (railroads and sewer and water services) regulated by different statutes, and further, as shown above, there is no doubt that the PSC's regulatory authority over tariffed consumer charges by telecommunications companies is specifically provided in Chapter 364.

² When the PSC approved the tariff revisions permitting BellSouth to pass on the costs of compliance with the Miami Manhole Ordinance to subscribers in Miami-Dade County, the PSC conducted a detailed analysis of the cost of compliance and the cost per line per month and per year. Ex. 3 to Defendant's Motion to Dismiss, Memorandum to Commission Clerk from the Communications Department, Feb. 11, 1983, at 9-10.

See *Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So.2d 199, 201-202 (Fla. 1974) (*affirming as modified* 282 So.2d 181 (Fla. 1st DCA 1973)) (PSC does not have authority to enter an award of money damages to a mobile home business in a ***negligence action with allegations that the public utility's "facilities and equipment were not in good condition and repair and its appliances, instrumentalities and service were antiquated, inadequate, insufficient or inefficient,"*** thereby causing the business to lose customers) (emphasis added); *Florida Power & Light Co. v. Glazer*, 671 So.2d 211, 213-14 (Fla. 3d DCA 1996) (***plaintiff's claim that exposure to a public utility's power line and transformer caused him to develop cancer was a tort action*** within the trial court's jurisdiction) (emphasis added). Plaintiffs' Complaint, however, does not contain tort claims, and the cases cited by Plaintiffs are inapposite. BellSouth's motion is based upon Plaintiffs' attack on BellSouth's authorized Charge.

Plaintiffs rely heavily on *Albert Litter Studios, Inc. v. Florida Power & Light Co.*, Case No. 04-03155 CA 13, claiming it is "similar litigation," but that case involved tort claims as well. See Plaintiff's Response, at 14. In the *Albert Litter* case, the plaintiff alleged that Florida Power & Light Company intentionally used defective thermal demand meters knowing that customers would be charged more for electricity. Ex. C, Amended Complaint and Demand for Jury Trial in *Albert Litter Studios, Inc. v. Florida Power & Light Co.* The complaint in the *Albert Litter* case contained causes of action for fraudulent inducement, negligent

misrepresentation, and negligence, *see id.*, and Judge Bagley's decision not to dismiss the complaint is specifically hinged on the existence of a tort claim, *see Ex. D, Order on Defendant's Motion to Dismiss Amended Complaint in Albert Litter Studios, Inc. v. Florida Power & Light Co.* Moreover, Florida Power & Light Company, the public utility involved in the *Albert Litter* case, is regulated by different statutory provisions than those defining the PSC's jurisdiction to regulate telecommunications companies, such as BellSouth. *Compare* Fla. Stat. §§ 366.04-366.05 *with* Fla. Stat. § 364.01 *et seq.*

Here, there is no tort claim in the Complaint. The Complaint contains four purported causes of action (breach of contract, unjust enrichment, injunctive relief, and accounting) about the Charge. Plaintiffs' appeal to tort cases is unavailing as Plaintiffs' challenge is to the rates charged by BellSouth, a matter within the PSC's exclusive jurisdiction. The Plaintiffs claim that BellSouth's Charge is incorrect, and the Plaintiffs' causes of action implicitly require this Court to set the correct past rates and the correct current rate, and presumably to supervise BellSouth to bill the correct rate in the future. The Plaintiffs, in short, ask this Court to do what the PSC is exclusively empowered by statute to do.

3. The PSC Is Authorized to Award the Relief Sought by Plaintiffs.

The Plaintiffs' argument that the PSC cannot award damages or injunctive relief is misleading and misses the point. Plaintiffs' damages are not "tort damages" of personal injury or lost business profits, but a refund of purported

overcharges for the Charge and to lower the rate imposed for the Charge. This relief is only properly granted by the PSC.

First, the PSC is authorized to issue refunds to customers and former customers of BellSouth. *See Richter v. Florida Power Corp.*, 366 So.2d 798, 801 (Fla. 2d DCA 1979); Fla. Admin. Code, Rule 25-4114; Ex. A, Letter from Richard D. Melson, PSC General Counsel, dated Aug. 30, 2004. Second, the PSC is authorized to award interest related to any refund. *See Fla. Admin. Code, Rule 25-4114(4)*. Third, the PSC is authorized to regulate the Charge and determine whether the charge complies with the approved tariff provision. *See Ex. A, Letter from Richard D. Melson, PSC General Counsel, dated Aug. 30, 2004; Ex. 2 to Defendant's Motion to Dismiss, In re: Southern Bell Telephone and Telegraph Company's filing to pass the cost of a local ordinance on to the local subscribers, 83 F.P.S.C. 63, Florida Public Service Commission Docket No. 830065-TP, Order Approving Tariff, Order No. 11679 (March 7, 1983); Ex. 3 to Defendant's Motion to Dismiss, Memorandum to Commission Clerk from the Communications Department, Feb. 11, 1983; Ex. A to Complaint, Excerpts from General Subscriber Service Tariffs, Section A.2.4.6*. Fourth, the PSC is authorized to sanction BellSouth for any failure to comply with its filed tariffs. *See Fla. Stat. § 364.08; Fla. Stat. § 364.285* ("The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty

for each offense. . . or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it. . . .”).

Thus, the relief sought by Plaintiffs is precisely the type of remedy the PSC awards in proper circumstances. An injunctive order from this Court to set the Charge is not appropriate³ because this Court not only lacks the authority to regulate or adjust the rate, but should not place itself in the role of a surrogate PSC perpetually overseeing BellSouth’s rates and compliance with its tariffs. *See, e.g., Florida Jai Alai, Inc. v. Southern Catering Services, Inc.*, 388 So.2d 1076, 1078 (Fla. 5th DCA 1980) (reversing trial court’s decision permanently enjoining defendant from terminating its agreement with plaintiff and recognizing “the impropriety of projecting the judiciary into overseeing the specific performance of the subject agreement ad infinitum”). The PSC is the state agency authorized by statute to regulate telecommunications companies and oversee the telecommunications companies’ compliance with their tariffs. *See, e.g., Fla. Stat. §§ 364.01(1), 364.01(2), 364.04, 364.051, 364.08.*

³ Plaintiffs cite *Trawick v. Florida Power & Light Co.*, 700 So.2d 770 (Fla. 2d DCA 1997), for the proposition that the PSC cannot award injunctive relief. That case involved claims for injunctive and declaratory relief to prevent the electric company from unnecessarily and severely trimming live oaks in the homeowners’ yard in the future. *See Trawick v. Florida Power & Light Co.*, 700 So.2d 770, 771 (Fla. 2d DCA 1997). In *Trawick*, the Second DCA explicitly noted that the subject matter of the action was not within the jurisdiction of the PSC and the action did “*not implicate rates or service.*” *Id.*, at 771 (emphasis added). The Second DCA determined that “courts are not precluded from determining whether a utility company, in serving a customer, has acted arbitrarily to the detriment of that customer or in a manner that results in unnecessary damage to the customer’s property.” *Id.*, at 772. Here, however, the Plaintiffs are seeking injunctive relief to adjust the rate of the Charge. *See Complaint*, ¶¶ 63-67. Plaintiffs’ claim for injunctive relief does not empower this Court to usurp the regulatory powers of the PSC. Plaintiff’s Complaint directly implicates the rate of the Charge, and the PSC alone is responsible for the review and adjustment of the rate of the Charge.

B. The PSC Has Primary Jurisdiction to Decide the Matters in the Complaint.

Even if the PSC lacked exclusive jurisdiction, the Court should defer to the PSC's regulatory expertise. The PSC has staff, experts, and a history of regulating these kinds of charges. *See Florida Public Service Commission: Statement of Agency Organization & Operations*, attached hereto as Exhibit E. The PSC already completed a complex examination of the basis of the Charge and the amount of the Charge. *See Excerpt from Memorandum to Commission Clerk from the Communications Department, Feb. 11, 1983*, attached hereto as Exhibit F. The determination of which costs go into such a calculation requires a thorough understanding of the business operations of a telecommunications provider and the nature of the billing and general administrative costs related to such a charge. The calculation includes an examination of the direct cost and the many different sources of indirect costs, including the cost of calculating, implementing, and administering the Charge. The PSC is intimately familiar with the process of analyzing and quantifying costs incurred by regulated companies, such as BellSouth, and determining how those costs should be allocated. *See, e.g., In re: Cost Recovery and Allocation Issues for Number Pooling in Florida*, Docket No, 001503-TP.

In short, rather than the parties bringing expensive accounting experts to testify before the trier of the fact in this Court, the PSC's experts can efficiently consider the innumerable issues that go into calculating the Charge at no cost to the class. The PSC can award exactly the same refund (were such to be required) as

this Court, but without requiring the payment of attorney's fees and expert expenses that would be deducted from any common fund. Assuming BellSouth erroneously calculated the Charge (which BellSouth denies), the affected group of subscribers that is the "class" in this proceeding would obtain a larger benefit in a shorter time frame from the application of the PSC's expertise.

Plaintiffs' insistence that this Court can interpret BellSouth's tariff misses the point. This matter is not about interpreting a single term in a tariff.⁴ This matter concerns the implementation and administration of a complex cost recovery through a pass-on charge for compliance with a county ordinance. The PSC is in the best position to review the Charge and order refunds, if appropriate, because the PSC has experience, knowledge, and expertise concerning the implementation and administration of pass-on charges by regulated companies. See Exhibit 3 to Defendant's Motion to Dismiss, Memorandum to Commission Clerk from the Communications Department, Feb. 11, 1983, at 2 ("This ordinance is similar to

⁴ Indeed, the Plaintiffs' reliance on the case of *BellSouth Telecommunication, Inc. v. Kerrigan*, 55 F. Supp. 2d 1314 (N.D. Fla. 1999) is misplaced. The parties in *Kerrigan* were before the Court on cross-motions for summary judgment and were not seeking to have claims dismissed based on the PSC's primary jurisdiction. See *BellSouth Telecommunication, Inc. v. Kerrigan*, 55 F. Supp. 2d 1314, 1317, 1321-22 (N.D. Fla. 1999). In *Kerrigan*, BellSouth had filed suit against two defendants who were service subscribers to recover unpaid charges. See *BellSouth Telecommunication, Inc. v. Kerrigan*, 55 F. Supp. 2d 1314, 1316 (N.D. Fla. 1999). The defendants had signed letters of agreement with BellSouth for certain lines, and BellSouth's General Service Subscriber Tariff was incorporated into the letters of agreement *by reference* to define the services. *Id.*, at 1316. BellSouth sued the defendants for non-payment under the contracts, and the defendants counterclaimed that BellSouth breached the contracts by cutting off the defendants' services without prior notice. *Id.*, at 1317. The Court determined that it was able to interpret the term "non-recurring charge" from the tariff incorporated into the parties' contracts, and that the interpretation of the term was not overly technical or complex. *Id.* at 1322-23. The key point is that the claim before the Court was not to set a tariffed rate, but to enforce a separate written contract between the parties. In no way does *Kerrigan* stand for the proposition that the PSC cannot award the relief requested by Plaintiffs in this case.

Commission requirements for direct pass-on of local taxes and franchise fees to the customer in the assessing municipality.”).

CONCLUSION

The Plaintiffs’ Consolidated Amended Complaint should be dismissed with prejudice.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via facsimile and Federal Express on September 1st, 2004 to:

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STATE OF FLORIDA

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Public Service Commission

August 30, 2004

Nancy H. Sims
Director - Regulatory Relations
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301

Dear Ms. Sims:

You have asked the Florida Public Service Commission to confirm that BellSouth has a tariff on file authorizing it to bill to residents of a municipality or county the costs incurred in complying with a municipal or county ordinance that imposes significant costs on BellSouth.

You are correct. Attached is a certified copy of currently effective Section A.2.4.6 which appears on Original Page 20.1 of BellSouth's General Subscriber Service Tariff on file with the Commission. The language in the first two paragraphs of Section A.2.4.6 was approved effective February 15, 1983 (the date of the Commission's vote) by Commission Order No. 11679, issued March 7, 1983. This tariff language was approved in response to an ordinance adopted by Dade County which took effect on February 11, 1983.

You have also asked the basis for the statement in a letter dated May 3, 2002 from Jessica Elliott, PSC Staff Counsel, to Mr. David G. Kennedy to the effect that the \$0.11 monthly charge by BellSouth for the cost of complying with Miami-Dade County Ordinance 83-3 "is not a tariffed charge regulated by the Commission." This statement is misleading. First, the Commission does regulate charges of this type. Second, although BellSouth's tariff does not contain specific reference to a charge of \$0.11 per month, the approved tariff language contemplates and authorizes BellSouth to collect the cost of compliance with Ordinance 83-3 on a pro rata basis per exchange access line from customers residing within the area subject to the ordinance. If the charge levied to customers in any municipality is not in compliance with this approved tariff provision, the Commission has statutory authority to require refunds of any overcharges. Ms. Elliott is no longer employed by the Commission and we have been unable to determine the reason that the earlier letter was not entirely accurate on this point.

If you have any additional questions, please let me know.

Yours truly,

A handwritten signature in black ink, appearing to read "Richard D. Melson".

Richard D. Melson
General Counsel

RDM:mee

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD • TALLAHASSEE, FL 32399-0850

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Internet E-mail: contact@psc.state.fl.us

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

EFFECTIVE: August 15, 2003

A2. GENERAL REGULATIONS

A2.4 Payment Arrangements and Credit Allowances (Cont'd)

A2.4.5 Provision for Certain Local Taxes and Fees

(M)

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

(M)

A2.4.6 Provision for Certain Local Ordinance Costs

(M)

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

(M)

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

(M)

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

(M)

A2.4.7 Reserved for Future Use

(M)

A TRUE COPY
ATTEST Kay Dyer
Chief Bureau of Records

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CHAPTER 364

TELECOMMUNICATIONS COMPANIES

PART I GENERAL PROVISIONS (ss. 364.01-364.503)

PART II EDUCATION FACILITIES INFRASTRUCTURE IMPROVEMENT
(ss. 364.506-364.516)

PART III TELECOMMUNICATIONS CONSUMER PROTECTION (ss. 364.601-364.604)

PART I		364.15	
GENERAL PROVISIONS		364.16	
364.01	Powers of commission, legislative intent.		Compelling repairs, improvements, changes, additions, or extensions.
364.015	Injunctive relief.		Connection of lines and transfers; local interconnection; telephone number portability.
364.016	Travel costs.	364.161	Unbundling and resale.
364.02	Definitions.	364.162	Negotiated prices for interconnection and for the resale of services and facilities; commission rate setting.
364.025	Universal service.		Network access services.
364.0251	Competitive providers of local service; implementation of consumer information program required.	364.163	Competitive market enhancement.
		364.164	Forms of reports, accounts, records, and memoranda.
364.0252	Expansion of consumer information programs; customer assistance; rulemaking authority.	364.17	Inspection of accounts and records of companies.
364.03	Rates to be reasonable; performance of service; maintenance of telecommunications facilities.	364.18	Access to company records.
		364.183	Investigations and inspections; power of commission.
364.035	Rate fixing; criteria service complaints.	364.185	Telecommunications service contracts; regulation by commission.
364.0361	Local government authority; nondiscriminatory exercise.	364.19	Termination of telecommunications service contract by a servicemember.
364.037	Telephone directory advertising revenues.	364.195	Penalty for making telephone message or customer account information known.
364.04	Schedules of rates, tolls, rentals, contracts, and charges; filing; public inspection.	364.24	Discontinuation of telecommunications service used for unlawful purpose.
364.05	Changing rates, tolls, rentals, contracts, or charges.	364.245	Powers and duties as to interstate rates, fares, charges, classifications, or rules of practice.
364.051	Price regulation.	364.27	Penalties.
364.052	Regulatory methods for small local exchange telecommunications companies.	364.285	Telecommunications companies; points of connection.
364.055	Interim rates; procedure.	364.30	Definitions applicable to ss. 364.33, 364.337, 364.345 and 364.37.
364.057	Experimental and transitional rates and services.	364.32	Certificate of necessity prerequisite to construction, operation, or control of telecommunications facilities.
364.058	Limited proceedings.	364.33	Application for certificate.
364.059	Procedures for seeking stay; benchmark; criteria.	364.335	Regulatory assessment fees.
364.06	Joint rates, tolls, contracts, or charges.	364.336	Competitive local exchange telecommunications companies; intrastate interexchange telecommunications services; certification.
364.063	Rate adjustment orders.	364.337	Pay telephone service providers.
364.07	Joint contracts; intrastate interexchange service contracts.	364.3375	Operator services.
364.08	Unlawful to charge other than schedule rates or charges; free service and reduced rates prohibited.	364.3376	Cross-subsidization.
		364.3381	Disclosure.
364.09	Giving rebate or special rate prohibited.	364.3382	Shared tenant service; regulation by commission; certification; limitation as to designated carriers.
364.10	Undue advantage to person or locality prohibited; Lifeline service.	364.339	
364.105	Discounted rate for basic service for former Lifeline subscribers.		
364.14	Readjustment of rates, charges, tolls, or rentals; order or rule compelling facilities to be installed, etc.		

- 364.345 Certificates; territory served; transfer.
- 364.37 Controversy concerning territory to be served; powers of commission.
- 364.381 Judicial review.
- 364.385 Saving clauses.
- 364.386 Reports to the Legislature.
- 364.501 Telecommunications company underground excavation damage prevention.
- 364.502 Video programming; capacity for public use.
- 364.503 Merger or acquisition.

364.01 Powers of commission, legislative intent.

(1) The Florida Public Service Commission shall exercise over and in relation to telecommunications companies the powers conferred by this chapter.

(2) It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies, and such preemption shall supersede any local or special act or municipal charter where any conflict of authority may exist. However, the provisions of this chapter shall not affect the authority and powers granted in s. 166.231(9) or s. 337.401.

(3) The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure. The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition, but nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws. The Legislature further finds that changes in regulations allowing increased competition in telecommunications services could provide the occasion for increases in the telecommunications workforce; therefore, it is in the public interest that competition in telecommunications services lead to a situation that enhances the high-technological skills and the economic status of the telecommunications workforce. The Legislature further finds that the provision of voice-over-Internet protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest.

(4) The commission shall exercise its exclusive jurisdiction in order to:

(a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.

(c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecom-

munications companies continue to be subject to effective price, rate, and service regulation.

(d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies.

(e) Encourage all providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints.

(f) Eliminate any rules and/or regulations which will delay or impair the transition to competition.

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

(h) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis.

(i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

History.—ss. 1-4, ch. 6186, 1911; ss. 1-6, ch. 6187, 1911; s. 1, ch. 6525, 1913; RGS 4393; CGL 6357; s. 1, ch. 63-279; s. 1, ch. 65-52; s. 1, ch. 67-541; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 1, 32, ch. 80-36; s. 2, ch. 81-318; s. 25, ch. 83-218; ss. 6, 7, ch. 89-163; ss. 1, 48, 49, ch. 90-244; s. 4, ch. 91-429; s. 5, ch. 95-403; s. 2, ch. 2003-32.

Note.—Repealed by s. 38, ch. 2000-260.

364.015 Injunctive relief.—The Legislature finds that violations of commission orders or rules, in connection with the impairment of a telecommunications company's operations or service, constitute irreparable harm for which there is no adequate remedy at law. The commission is authorized to seek relief in circuit court including temporary and permanent injunctions, restraining orders, or any other appropriate order. Such remedies shall be in addition to and supplementary to any other remedies available for enforcement of agency action under s. 120.69 or the provisions of this chapter. The commission shall establish procedures implementing this section by rule.

History.—s. 1, ch. 93-35.

364.016 Travel costs.—The commission has the authority to assess a telecommunications company for reasonable travel costs associated with reviewing the records of the telecommunications company and its affiliates when such records are kept out of state. The telecommunications company may bring the records back into the state for review.

History.—s. 2, ch. 93-35.

364.02 Definitions.—As used in this chapter:

(1) "Basic local telecommunications service" means voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which

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

GENERAL JURISDICTION DIVISION

CASE NO.: 04-03155 CA 13

CLASS ACTION

ALBERT LITTER STUDIOS, INC., a Florida
corporation on behalf of itself and all others
similarly situated,

Plaintiffs,

v.

FLORIDA POWER & LIGHT COMPANY,
a Florida Corporation,

Defendant.

FILED FOR RECORD
2004 MAY 13 PM 12:46
CLERK, CIRCUIT COURT COUNTY OF MIAMI-DADE
CLERK, MIAMI-DADE COUNTY, FLA.
CIVIL #488

IRIS PALMER

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Albert Litter Studios, Inc., on behalf of itself and on behalf of a class of
similarly situated commercial entities throughout the State of Florida, sue Florida Power & Light
Company, and allege¹ as follows:

NATURE OF THE ACTION

1. This is an action for breach of contract, negligence, fraudulent inducement and
negligent misrepresentation in connection with Florida Power & Light Company's ("FPL")
deceptive, unfair, and misleading practice of charging its commercial consumers for more
electricity than is actually used by knowingly providing them with faulty thermal demand meters.

2. Plaintiff and class members are commercial customers of FPL who are charged
for electric services provided by FPL. For certain commercial consumers, FPL relies on a

¹ Plaintiff, on behalf of itself and a class of similarly situated commercial entities, makes the following allegations on
information and belief based on an investigation reasonable under the circumstances, except as to those allegations
pertaining to the named Plaintiff, which are alleged on personal knowledge.

reading of a consumer's thermal demand meter in order to determine the proper amount to bill a consumer for each month. Thermal demand meters register two components for billing consumers: electric energy, or kilowatt-hours, and maximum rate of power consumption each month. FPL used and continues to use these thermal demand meters even though it is aware that the meters are inaccurate and fail to register an accurate accounting of a consumer's electric usage, and in fact, charges its consumers for more electricity than is actually used.

3. This action is brought on behalf of Florida commercial consumers who were charged for more electricity than they actually used.

JURISDICTION

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

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

PARTIES

6. Plaintiff Albert Litter Studios, Inc. is a Florida corporation doing business in Miami-Dade County, Florida and is otherwise *sui juris*. Defendant FPL is organized under the laws of the State of Florida, and conducts substantial business throughout this state and within this County.

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

FACTUAL ALLEGATIONS

8. FPL is one of the major electric utilities in Florida. It services millions of customers, both residential and commercial, within Florida and in Miami-Dade County.

9. FPL has a duty to bill its commercial consumers for electricity in a manner that is consistent with the consumers' actual usage.

10. Consumers receive their electric bills and reasonably assume that the amount FPL charges is charged in good faith, is legitimate, and is based on the consumer's actual electric usage.

11. As part of its billing process, FPL installed thermal demand meters for certain commercial consumers to gauge the amount of electric power used by each commercial consumer, and uses the readings from those meters to determine the amount to bill each consumer.

12. Thermal demand meters register two components for billing consumers: electric energy, or kilowatt-hours, and maximum rate of power consumption each month.

13. FPL continues to use these thermal demand meters even though it is aware that the meters do not register an accurate reading of the consumer's energy usage. In fact, the consumers are charged for more electricity than is actually used.

14. Upon information and belief, FPL has been aware of these problems for some time, but purposefully decided not to repair or replace their thermal demand meters.

15. As a result of FPL's conduct, hundreds of thousands of commercial consumers have unknowingly been charged millions of dollars for electricity they did not use.

16. Further, FPL has never and presently does not disclose to its consumers that their thermal demand meters are faulty and prone to charging consumers for more electricity than is actually used. Instead, FPL simply charges consumers for more electricity than is actually used.

17. FPL's scheme deceives or misleads the consumer about how much electricity they are using and about what the consumer is actually paying for.

CLASS ACTION ALLEGATIONS

18. This action is brought on behalf of Plaintiff individually and as a class action on behalf of all commercial consumers who after January 1, 1999 (the "Class Period"), were charged for more electric power than was actually used as a result of the defective thermal demand meters (the "Class").

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

20. Plaintiff Albert Litter Studios, Inc. is a member of the Class, as it was charged for more electric power than it actually used as a result of a defective thermal demand meter. As with all of the class members, FPL intentionally and deceptively charged Plaintiff for more

electricity that it actually used and retained the ill-gotten profits; all unbeknownst to the Plaintiff and class members.

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

22. Plaintiff's claims are typical of the claims of the class members in that the putative class members likewise paid for more electricity than was actually used as a result of defective thermal demand meters.

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

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

- Whether FPL charges its commercial consumers for more electricity than is actually consumed by the use of a defective thermal demand meter;
- Whether FPL knows that the thermal demand meters are faulty, but continues to use them;
- Whether FPL failed in its duty to repair the defective thermal demand meters;
- Whether FPL discloses or effectively discloses to consumers that its thermal demand meters are faulty and it charges consumers for more electricity than they actually used;
- Whether FPL discloses or effectively discloses to consumers that it retains for its own benefit and profit the amount it charges for electricity that is not used;

- Whether FPL's conduct breaches their implied agreement to provide an accurate accounting of a consumer's electric power, and subsequently, bill an accurate amount to the consumer;
- Whether FPL knew or should have known it was charging consumers for electricity that was not used; and
- Whether FPL had a duty to accurately charge its consumers for the amount of electricity consumed.

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

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

COUNT I- BREACH OF IMPLIED CONTRACT

27. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

28. FPL has an implied contract with each class member to provide electric service for a reasonable fee. One of the essential terms of these contracts is that FPL will provide electric power to the consumer, and the consumer will make timely payment based on the

consumer's usage. Implied in each and every contract is that FPL's charges to the consumer are an accurate gauge of the consumer's electric power consumption.

29. FPL breached its implied contract with each class member by charging consumers for electric power that was not used as a result of defective thermal demand meters. FPL's breach was purposeful as it knowingly failed to repair or replace the defective thermal demand meters.

30. As a result, Plaintiff and the Class have been damaged by FPL's breach.

WHEREFORE, Plaintiff and class members demand an award against FPL for damages incurred as a result of defective thermal demand meters, plus interest, and such other relief as this Court deems just and proper.

COUNT II- BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

31. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

32. FPL owes a duty to act in good faith and to deal fairly with each of its consumers regarding its billing practices.

33. FPL breached its duty to act in good faith with each class member by charging consumers for electric power that was not used as a result of defective thermal demand meters. FPL's breach was purposeful as they knowingly failed to repair or replace the defective thermal demand meters.

34. As a result, Plaintiff and the Class have been damaged by FPL's breach.

WHEREFORE, Plaintiff and class members demand an award against FPL for damages as a result of defective thermal demand meters, plus interest, and such other relief as this Court deems just and proper.

COUNT III-NEGLIGENCE

35. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

36. FPL had a duty to select and maintain meters that would accurately measure the electricity used by its customers, including plaintiff and the class.

37. FPL has breached this duty with its use of the defective thermal demand meters that charge consumers for more electricity than is actually used.

38. Plaintiff and the class have been damaged as a direct and proximate result of FPL's breach of its duty to select and maintain meters that accurately measure their use of electricity.

WHEREFORE, Plaintiff and class members demand an award against FPL for damages, plus interest, and such other relief as this Court deems just and proper.

COUNT IV-FRAUDULENT INDUCEMENT

39. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

40. Each billing cycle, FPL made a representation on its invoices to Plaintiff and the class regarding the amount of electricity used.

41. Due to the use of the thermal demand meters that FPL knew or should have known were defective, FPL knew or should have known that the representations on the invoices as to how much electricity was consumed were false.

42. FPL intended that Plaintiff and the Class rely upon its representations as to the amount of electricity consumed.

43. Plaintiff and the Class reasonably relied upon FPL's representations as to the amount of electricity consumed and as a result were charged for electricity that was not used.

WHEREFORE, Plaintiff and class members demand an award against FPL for damages, plus interest, and such other relief as this Court deems just and proper. Plaintiff also reserves the right to seek punitive damages in accordance with Florida law.

COUNT V-NEGLIGENT MISREPRESENTATION

44. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

45. Each billing cycle, FPL made a representation on its invoices to Plaintiff and the class regarding the amount of electricity used.

46. Due to the use of the thermal demand meters that FPL knew or should have known were defective, FPL was negligent because it should have known that the representations on the invoices as to how much electricity was consumed were false.

47. FPL intended that Plaintiff and the Class rely upon its representations as to the amount of electricity consumed.

48. Plaintiff and the Class reasonably relied upon FPL's representations as to the amount of electricity consumed and as a result were charged for electricity that was not consumed.

WHEREFORE, Plaintiff and class members demand an award against FPL for damages, plus interest, and such other relief as this Court deems just and proper.

COUNT VI—INJUNCTIVE RELIEF

49. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-26 above, as if fully set forth herein.

50. Plaintiff is entitled to an injunction on behalf of itself and the class to prevent FPL from using defective thermal demand meters and charging its consumers for more electricity than the consumers have actually used.

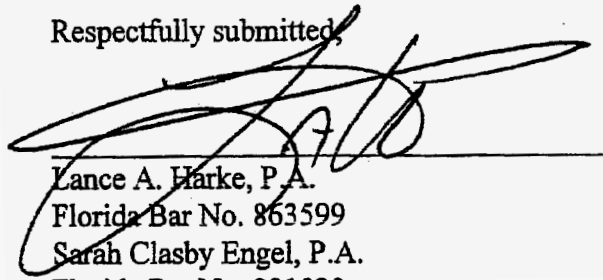
WHEREFORE Plaintiff respectfully requests that this Court enter an injunction prohibiting FPL from continuing its use of thermal demand meters to charge its consumers for more electricity than is actually used.

JURY DEMAND

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

Dated: May 13th 2004.

Respectfully submitted,



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Counsel for Plaintiff & Class Members

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent this 13th day of May, 2004 via facsimile and 1st Class U.S. mail to:

Robert B. Sendler, Esq.
David D. Austin, Esq.
FPL Law Department
700 Universe Boulevard
Juno Beach, FL 33408
561-691-7109 Telephone
561-691-7103 Facsimile

A handwritten signature in black ink, appearing to read "D. Austin", is written over a horizontal line. The signature is stylized and cursive.

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

ALBERT LITTER STUDIOS, INC, a Florida
corporation, on behalf of itself and all others
similarly situated,

Case No. 04-03155-CA-13

Plaintiff,

v.

FLORIDA POWER & LIGHT COMPANY,
a Florida corporation,

Defendant.

**ORDER ON
DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**

THIS CAUSE came before the Court on Defendant's Motion to Dismiss the Amended Complaint. On July 13, 2004, the Court, having reviewed the motion and the file, including the amicus brief filed by the Florida Public Service Commission, considered the oral arguments by both parties presented at a hearing, and being duly advised in the premises, **ORDERED** and **ADJUDGED** that defendant's motion is **DENIED**. This Order memorializes the Court's July 13, 2004 ruling.

After looking carefully at the Amended Complaint, the Court finds that plaintiff has alleged a tort claim over which the Court has jurisdiction. Thus, the case shall continue in its normal course through the court system. The Court will consider any matters submitted by the defendant upon any rulings by the Public Service Commission that defendant believes may assist the Court in determining how it should proceed in this matter. But the Court believes that it should function, and continue with this matter, independent of the Florida Public Service


Commission.

The defendant will file and serve its Answer to the Amended Complaint by August 2, 2004.

DONE and ORDERED in chambers in Miami-Dade County, Florida, this 25 day of

~~July~~, 2004.

August


HONORABLE JERALD BAGLEY

c: Counsel of Record

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FLORIDA
PUBLIC
SERVICE
COMMISSION

STATEMENT OF
AGENCY
ORGANIZATION
& OPERATIONS

STATEMENT OF AGENCY ORGANIZATION & OPERATIONS*

TABLE OF CONTENTS

Commission Mission Statement	1
Commission Goal	1
Goals for Economic Regulation	1
Goals for Regulation of Utilities	1
Goals for Service Regulation and Consumer Assistance	1
Commission Organization	2
Commission Staff Organization	3
I. Office of the Executive Director	3
II. Office of the General Counsel	4
Commission Operations	5
Principal Office and Contact Information	5
Designation of Agency Clerks	5
Conferences	5
Agency Conferences	5
Internal Affairs Meetings	5
Copies of Agendas and Staff Recommendations	5
Records of Commission Actions	5
Commission Staff	6
Mandatory Address Files	6
Parties	6
Assessment of Potential Proceedings	6
Commission Notice of Public Utility Hearings and Proposed Agency Action	7
Variances and Waivers of Commission Rules	13
Filing Documents Electronically	16

** Mandated by Rule 26-101, Fla. Administrative Code*

STATEMENT OF AGENCY ORGANIZATION & OPERATIONS

COMMISSION MISSION STATEMENT

Customers are served best by markets that facilitate the efficient provision of safe and reliable utility services at fair prices. The mission of the Florida Public Service Commission is to promote the development of competitive markets – as directed by state and federal law – by removing regulatory barriers to competition and by emphasizing incentive-based approaches, where feasible, to regulate areas that remain subject to rate-of-return regulation. Once markets become sufficiently competitive, the Florida Public Service Commission will eliminate regulatory involvement to the extent permitted by law.

COMMISSION GOALS

The Commission fulfills this mission by pursuing a number of goals, as follows:

GOALS FOR ECONOMIC REGULATION

- ◆ To the extent possible, streamline regulatory requirements to provide an open, accessible and efficient regulatory process that is fair and unbiased.
- ◆ Ensure that the regulatory process results in fair and reasonable rates while offering rate base-regulated utilities an opportunity to earn a fair return on their investments.
- ◆ Where feasible, use incentive-based regulatory mechanisms to encourage efficiency and innovation among regulated utilities to ensure that customer needs are met in a cost effective manner.
- ◆ Encourage and facilitate responsible use of resources and technology in the provision and consumption of utility services.

GOALS FOR REGULATORY OVERSIGHT

- Remove regulatory barriers which impede the development of competitive markets, as directed by law.
- ◆ Provide appropriate regulatory oversight to protect consumers.
- ◆ Ensure that all entities providing utility services to consumers comply with all appropriate requirements subject to the Commission's jurisdiction.

GOALS FOR SERVICE REGULATION AND CONSUMER ASSISTANCE

- ◆ Facilitate the provision of safe utility services at levels of quality and reliability that comply with established industry standards and practices.
- ◆ Inform utility consumers regarding utility matters.
- ◆ Expedite resolution of disputes between consumers and utilities.

COMMISSION ORGANIZATION

The Commission consists of five Commissioners appointed by the Governor from nominees selected by the Florida Public Service Commission Nominating Council for terms of four years, as provided in Chapter 350, Florida Statutes.

The Chairman is the chief administrative officer of the Commission, presiding at all hearings and conferences when present, setting Commission hearings, and performing those duties prescribed by law. In the Chairman's absence, the senior member of the Commission panel presides. The Chairman is elected by the Commission pursuant to law.

A majority of any Commission panel constitutes a quorum, and the Commission cannot take formal action in the absence of a quorum. A majority vote of the quorum determines Commission action. Where only two Commissioners are assigned to a proceeding and they do not agree on a final decision, the Chairman of the Commission, after appropriate review of the record, shall cast the deciding vote. When the Chairman is one of a two-member panel and the panel does not agree on a final decision, the matter shall be referred to the full Commission for disposition. In such an event, the full Commission shall review the record as appropriate.

COMMISSION STAFF ORGANIZATION

The Commission carries on its work through two primary functional units: The Office of the Executive Director and the Office of the General Counsel. The Offices of the Executive Director and the General Counsel are charged with implementing Chapters 350, 364, 366, 367, 368 and 427, Florida Statutes, and Sections 403.064, 403.501-403.539, and 403.9401-403.9425, Florida Statutes.

OFFICE OF THE EXECUTIVE DIRECTOR

The **Office of the Executive Director** advises the Commission on all technical and policy matters under the Commission's jurisdiction and, in coordination with the Office of the General Counsel, serves as the Commission's liaison with federal and state agencies as well as the Florida Legislature. Also, the Office of the Executive Director has authority over all divisions and offices, except the Office of the General Counsel, and directs activities, in part through a Deputy Executive Director.

A summary of the responsibilities of each office and division is provided below.

The **Division of the Commission Clerk and Administrative Services** is responsible for accepting official filings, maintaining the official case files, coordinating the Commission's records management program, and issuing all Commission orders and notices. The Director of the Division of the Commission Clerk and Administrative Services is designated as the Agency Clerk. The Division oversees all financial transactions and maintains the Commission's accounting records. Other responsibilities include administrative support services such as human resource programs; budget management; mail processing; computer network, hardware, and applications support; staff training; and purchasing.

The **Division of Competitive Markets and Enforcement** oversees the development of competitive markets and has responsibility for the issues associated with emerging competitive telecommunications markets. The division participates in formal and informal proceedings involving appropriate area code relief and number conservation plans and establishes policies and procedures governing intercompany contracts, arbitration of terms of intercompany contracts, and resolution of issues of contract interpretation. The division also resolves conflicts arising from changes in service providers. In addition, it evaluates the quality of service provided by telecommunications companies and conducts periodic on-site inspections of telecommunications facilities.

Issues involving conservation, tariff filings and territorial disputes in the natural gas industry are also the responsibility of this division. Finally, investigations are conducted to ensure compliance with applicable rules, tariffs, procedures, and laws and to identify and address anti-competitive activities.

The **Division of Economic Regulation** participates in formal and informal proceedings relating to the rates and earnings of rate base regulated companies in the electric, natural gas, water, wastewater, and telecommunications industries. The division has primary responsibility for processing rate changes and for conducting earnings surveillance to ensure that regulated utilities are not exceeding their authorized rates of return. The division is the official custodian for electric and water and wastewater tariffs, and administers tariff processing for the two industries. The division receives and maintains copies of annual financial reports and periodic surveillance reports for rate base regulated companies.

The division also participates in formal and informal proceedings relating to long-range electric utility bulk power supply operations and planning; electric utility territorial matters; power plant and transmission line siting, including the siting of power plants owned by nontraditional generating entities; service quality, including complaints; electric utility conservation goals and programs; emergencies due to operational events or weather; and fuel, conservation, and environmental cost recovery.

The **Division of Regulatory Compliance and Consumer Assistance** is responsible for evaluating electric and gas safety, conducting audits and reviews in all industries, responding to consumer complaints and conducting consumer outreach.

For auditing and safety purposes the division operates out of four district offices: Tallahassee, Orlando, Miami, and Tampa. The types of audits and reviews the division performs include financial, compliance, billing, and verification. The safety function involves safety evaluations of natural gas pipeline operations and new electric construction in the state of Florida. The safety function is also the lead contact for the Commission's participation in the State's Emergency Operations Center activities.

The consumer complaint bureau receives, processes, and resolves complaints and facilitates resolution of informal disputes between consumers and utilities. Customers may file complaints through a toll-free telephone number to the bureau's call center or by mail, facsimile, or E-mail.

The consumer outreach functions include compiling and relaying information about the Commission's regulatory decisions to utility customers and consumer groups. Outreach duties include informing utility customers of their rights, available assistance, and of how they can participate in customer service hearings and other forums to have their views heard by Commissioners.

The **Office of Federal and Legislative Liaison** serves as the Commission's liaison to the Legislature and to other state and federal agencies. This office provides the primary technical interface with federal agencies and the Legislature on regulatory matters, in coordination with and assistance from the technical divisions, the Office of the General Counsel, and the Office of the Chairman. This office is also responsible for facilitating collaborative working relationships with the federal agencies whose regulatory actions can affect Florida citizens and will respond to requests for information from federal agencies and Congress.

The **Office of Market Monitoring and Strategic Analysis** is responsible for monitoring and evaluating the impact of Commission decisions on market development in the energy, telecommunications, and water and wastewater industries. The office is also responsible for identifying and analyzing issues, strategies, and new technologies that will assist and enhance competitive market development. The office routinely reviews and assesses market activity in the affected industries and periodically reports their findings to the Commissioners. An annual report to the Legislature on the status of the development of competition in the telecommunications industry is prepared by this office.

The **Office of Public Information** functions as the Commission's liaison with the media and the public. The office monitors the daily reporting activities of dozens of state, regional and national media outlets to ensure that timely, accurate information regarding Commission decisions is disseminated to consumers. In this capacity, the office sustains a familiarity on a broad array of dockets and related activities affecting ratepayers or issues that have currency with the media.

The **Office of Standards Control and Reporting** provides oversight of Commission processes and reports in order to keep consistency of those processes and reports at a high level. The office assists in responding to surveys and questionnaires from governmental bodies and others and prepares periodic reports as needed. The office coordinates the content and format of the Commission's Web site. Duties also include production of the Commission's many informational brochures and other presentations.

OFFICE OF THE GENERAL COUNSEL

The **Office of the General Counsel** provides legal counsel to the Commission on all matters under the Commission's jurisdiction and, in coordination with the Office of the Executive Director, serves as the Commission's liaison with federal and state agencies as well as the Florida Legislature and political subdivisions of the state. In the course of evidentiary proceedings before the Commission, the Office of the General Counsel and its sections are responsible for presentations of staff positions in the proceedings including cross examination of witnesses and presentation of staff testimony where offered. In providing legal counsel to the Commission, the General Counsel's office employs three sections: an Appeals, Rules and Mediation Section, an Economic Regulation Section, and a Competitive Markets and Enforcement Section.

The **Appeals, Rules and Mediation Section** has responsibility for rulemaking, mediation, and defending Commission orders on appeal or otherwise challenged before state and federal courts. The section also provides legal counsel to the Commission and to the Commissioners including the preparation of notices, recommendations and orders. This section attends and conducts public hearings at the Commission's request; represents the Commission before state and federal courts; and advises in the promulgation of rules. The section reviews procurement contracts and provides counsel to the Commission on personnel, contracts and other administrative legal matters.

The ***Economic Regulation Section*** has responsibility for the procedural and legal aspects of rate cases and other formal proceedings before the Commission or the Division of Administrative Hearings and for proceedings in civil courts on behalf of the Commission. This section prepares recommendations to the Commission in conjunction with technical staff and prepares Commission orders with the assistance of technical staff.

The ***Competitive Markets and Enforcement Section*** has responsibility for the procedural and legal aspects of cases related to the development of competitive markets and other formal proceedings before the Commission or the Division of Administrative Hearings and for proceedings in civil courts on behalf of the Commission. This section prepares recommendations to the Commission in conjunction with technical staff and prepares Commission orders with the assistance of technical staff.

COMMISSION OPERATIONS

PRINCIPAL OFFICE AND CONTACT INFORMATION

The principal office of the Commission is located in Tallahassee, Florida. Its address is 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850. Business hours are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays. The telephone number and Web site for information about how to obtain publications, documents, forms, applications for certificates, and other information are (850) 413-6100/SUNCOM 278-6100, <http://www.psc.state.fl.us/contact/>, respectively.

The Public Service Commission provides a staff of information specialists who are available to answer questions from Florida consumers. To reach a PSC consumer representative, please call 1-800-342-3552, send a fax to 1-800-511-0809 or send an E-mail to contact@psc.state.fl.us.

DESIGNATION OF AGENCY CLERK

Blanca S. Bayó, Director of the Division of the Commission Clerk and Administrative Services, located at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; telephone number (850) 413-6770; fax (850) 413-7118, is designated as the Agency Clerk. The Agency Clerk is responsible for accepting official filings.

CONFERENCES

Anyone desiring a conference with the Commissioners or Commission staff with respect to matters over which the Commission has jurisdiction may request such a conference through the Commission Chairman, a Commissioner, the Division of the Commission Clerk and Administrative Services, the Executive Director, or the particular staff member involved. A written request concerning the purpose and anticipated duration of the conference should be furnished in order to avoid conflicts and facilitate the availability of staff members and records, if needed. In an emergency, the foregoing may be communicated by telephone. Nothing in this statement obviates the prohibition against *ex parte* communications in pending cases to determine substantial interests.

AGENDA CONFERENCES

Except as regards internal affairs, the Commission makes decisions and votes at agenda conferences. Generally, agenda conferences take place on the first, third, and fifth Tuesdays of each month at the Commission's office in Tallahassee. They may take place at other times and in other places as necessary. Agenda conferences are noticed in the *Florida Administrative Weekly* approximately ten (10) days in advance of each agenda conference. Generally, the Commission conducts its public business at agenda conferences with advice, assistance, and recommendations of staff. With regard to proposed Commission action, the Commission may call upon others to answer questions or elicit information where such solicitation does not violate the prohibition against *ex parte* communications in adjudicatory proceedings.

INTERNAL AFFAIRS MEETINGS

Internal affairs meetings are held for the purpose of discussing matters that are not docketed and that relate to the Commission's organization, functions, management, operations, finances, intra- and intergovernmental affairs, and for special presentations. Notice of the meetings is published in the *Florida Administrative Weekly*.

COPIES OF AGENDAS AND STAFF RECOMMENDATIONS

(1) The agenda for meetings is prepared by the Commission in time to ensure that a copy may be received at least seven (7) days before the meeting by any person in the state who has requested a copy and who pays the reasonable cost of the copy.

(2) Copies of staff recommendations for items on the agenda may be obtained from the Division of the Commission Clerk and Administrative Services upon request and payment of the applicable copying fee. Parties to a proceeding are entitled to one copy of the staff recommendation filed in the proceeding at no cost.

(3) The agenda and staff recommendations may be viewed on the Internet at <http://www.floridapsc.com>. (Click on "Dockets & Filings" and then "Agendas.")

RECORD OF COMMISSION ACTIONS

All official actions of the Commission are recorded and maintained by the Division of the Commission Clerk and Administrative Services. The minutes are open to public inspection during regular office hours (8:00 a.m. to 5:00 p.m.) at the principal office of the Commission in Tallahassee, Florida.

COMMISSION ORDERS

All orders of the Commission are recorded and maintained by the Division of the Commission Clerk and Administrative Services. Commission orders are open to public inspection during regular office hours at the principal office of the Commission in Tallahassee, Florida. Orders may be viewed on the Internet by going to <http://www.floridapsc.com>, clicking on the "Dockets & Filings" link, and then clicking on "Orders."

NOTICING ADDRESS FILES

The Division of the Commission Clerk and Administrative Services maintains a main noticing address file for purposes of distributing Commission agendas, notices of workshops and rulemaking and, where appropriate, other notices and orders. The division also maintains an individual noticing address file for each docket for purposes of distributing Commission notices and orders issued in that docket.

(1) Main File. The main noticing address file shall contain a single name, address, and telephone number for each utility subject to Commission jurisdiction, the Public Counsel, the Clerk of each Board of County Commissioners, and the chief executive officer of each municipality. This file shall also contain a name, address, and telephone number for each person requesting in writing to be included in the file on one or more of the following lists:

- (A) Persons requesting the Commission agenda
(subject to payment of subscription fee);
- (B) Persons requesting the weekly report of new dockets
(subject to payment of subscription fee);
- (C) Persons requesting the weekly summary of Commission orders
(subject to payment of subscription fee);
- (D) Persons requesting notices of Commission workshops;
- (E) Persons requesting notices of proposed rulemaking; and
- (F) Persons requesting copies of Commission notices of hearings and orders initiating industry-wide nonrule proceedings. Any person seeking to be on this list shall state with specificity how his or her substantial interests may be affected by Commission action in the categories of interest. (For instance, a customer's rates or service may be affected, or a regulated utility's rates or service may be affected.) Absent such a showing, a person will not be included on this list.

(2) Industry Categories. The three lists described in paragraphs (1)(D)-(F) are further subdivided into the following categories:

- ◆ Electric
- ◆ Natural Gas
- Telecommunications
- ◆ Water and Wastewater
- ◆ Practice and Procedure

(3) Noticing. Any person seeking to be included in the main noticing address file shall file a written request with the Division of the Commission Clerk and Administrative Services. The request shall state the name, address, and telephone number the person seeks to have placed in the file, as well as the lists and categories in which the person desires to be included. Persons entitled to practice before the Commission under Rule 28-106.106, Florida Administrative Code, may request inclusion in the file as representatives of their client. A request for inclusion in the rulemaking list does not constitute a request for a notice of change to a proposed rule under Section 120.54(3)(d), Florida Statutes.

(4) Purge of Main File. During the first quarter of each calendar year, the Division of the Commission Clerk and Administrative Services shall transmit to all persons listed in the main file under the lists described in (1)(A)-(F) a written request to confirm the name, address, and telephone number on file and the types of notices to be received. Any person who fails to confirm the foregoing in writing within 30 days after the date of the division's request shall be stricken from the main noticing address file.

(5) Addresses of Regulated Companies. Each regulated company, as defined in Section 350.113, Florida Statutes, shall, in writing, provide the division with a single official mailing address to be placed in the main noticing address file. Except in a docket where a company representative has previously provided an alternative address, the Commission is obliged only to transmit its orders, notices and other documents (such as regulatory assessment fee notices and annual report forms) to the official address. The Commission may, solely as a courtesy, transmit documents to additional addresses. Initial pleadings served by parties shall be transmitted to the official address on file. When a regulated company has filed a document in a docket and such document shows the name and address of counsel or other official representative and that name and address is different from the official mailing address, it shall be recorded in the docket mailing address file in lieu of the official address. All documents from that docket thereafter served on the regulated company shall be transmitted to that address.

(6) Docket File. Individual docket mailing address files shall be maintained as part of each docket file and contain the name, address, and phone number of each party of record, or its representative, and each person requesting copies of notices and orders issued in that docket and qualifying under this subsection.

Any person, other than a party of record, seeking to be on an individual docket noticing address file shall file a written request with the division. Such request shall state the name, address, and telephone number the person seeks to have placed in the file and, except for rulemaking dockets, shall state with specificity how his or her substantial interests may be affected by Commission action in that docket. (For instance, the docket may affect a customer's rates or service, or may have a potential effect on other utilities in similar circumstances.) Absent such a showing, a person will not be included in the docket noticing address file. Persons entitled to represent other parties before the Commission under Rule 28-106.106, Florida Administrative Code, may request inclusion in the file as representatives of their client.

(7) Change of Name, Address, Telephone Number. Each person included in the main noticing address file or in any docket noticing address file shall, in writing, notify the division (and any parties of record in a docketed matter) of any change in name, address, or telephone number. Any notice, order, or other document served on the name and address on file prior to the date of receipt of such written notification shall be considered properly served.

(8) The Director of the Division of the Commission Clerk and Administrative Services may grant requests to be placed in the main file under (1)(F) or requests to be placed in a docket noticing address file. The Chairman will rule on all such requests that the Division Director recommends be denied.

PARTIES

The Commission staff may participate as a party in any proceeding. Their primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration.

In cases assigned to the Division of Administrative Hearings, the Commission staff's role is to represent the public interest and be neither in favor of nor against any particular party, unless the Commission is enforcing rules or statutes through a show cause or similar proceeding, or unless the Commission is a respondent at the Division of Administrative Hearings. Staff is not a party in interest and has no substantial interests that may be affected by the proceeding. Commission staff's role shall be to assist in developing evidence to ensure a complete record so that all relevant facts and issues are presented to the fact finder. Any position that staff has prior to the hearing is preliminary; final positions are based upon review of the complete record.

When advocating a position, Commission staff may testify and offer exhibits, and such evidence shall be subject to cross-examination to the same extent as evidence offered by any other party.

ASSIGNMENT OF FORMAL PROCEEDINGS

(1) Formal proceedings may be assigned by the Chairman to panels of two, three or five Commissioners, to the Division of Administrative Hearings (DOAH), or to an individual Commissioner for hearings as provided in Section 350.01, Florida Statutes.

The assignment of proceedings shall be accomplished at the earliest practicable time, but not later than 45 days after a case is docketed in any event.

Assignment of cases to panels of two or three Commissioners shall be done randomly, unless the Chairman determines otherwise for good cause shown in a particular case. If a Commissioner becomes unavailable after assignment, he or she shall notify the Chairman, who shall make another assignment as soon as practicable.

(2) When a case is assigned for hearing to a panel of Commissioners, the hearing and deciding panels shall be identical. If a case is assigned to a DOAH Administrative Law Judge or individual Commissioner for a hearing, the case shall be assigned to the full Commission for decision.

(3) If a proceeding is assigned for hearing to a panel of two or three Commissioners or to a DOAH Administrative Law Judge or individual Commissioner, upon motion of a Commissioner or upon petition of those persons described in 350.01(6), a majority of the Commission may decide that the full Commission shall hear such a case.

(4) Petitions seeking to have the full Commission sit in a particular case may be filed as authorized by Section 350.01(6), Florida Statutes.

Applicants, petitioners, or eligible parties filing a pleading who desire a hearing before the full Commission shall so specify in their initial pleading.

Other persons eligible to make such a request shall do so within 15 days of notice of filing of the application or petition, or rendition of an order suspending proposed rates or of an order initiating a proceeding, whichever occurs first. In each case, these petitions or requests shall be disposed of by a majority of the Commission. Failure to file pleadings timely, and in the manner specified herein, may be considered just cause for denial of such pleadings.

(5) In cases filed pursuant to the provisions of Sections 364.05(5), 366.06(3), or 367.081(6), Florida Statutes, the initial decision whether to suspend all or part of the rates as filed shall be made by the full Commission, since whether a hearing will be required cannot be determined until that decision is made.

(6) Assignment of a proceeding to a panel does not preclude delegation of prehearing conferences or similar procedural matters to a single member of the panel.

COMMISSION NOTICE OF
PUBLIC UTILITY HEARINGS AND PROPOSED AGENCY ACTION

(1) Notice of public hearings other than rulemaking hearings shall be given by the Commission to the Clerk of the Board of County Commissioners of each county affected, the chief executive officer of each municipality in the area affected, all parties of record, and all persons who have requested notice of such proceedings.

(2) A summary of the subject matter and notice of hearing shall be published by the Commission in the *Florida Administrative Weekly*. The summary shall be drawn and notice given as required by the provisions of the statute under which relief is sought, if applicable, but shall not be published less than 14 days prior to the hearing.

(3) When the Commission determines that the health, safety, or welfare of the public requires an emergency hearing, notice may be accomplished by giving notice to those persons listed in Subsection 1 by any procedure that is fair under the circumstances and necessary to protect the public interest.

(4) The Commission may publish notice of its proposed agency action in the *Florida Administrative Weekly* or newspapers of general circulation in the area affected by its action. Any such publication may be used in establishing the date of receiving notice.

VARIANCES AND WAIVERS OF COMMISSION RULES

The person to be contacted to obtain information about variances and waivers of Commission rules is Blanca S. Bayó, Director, Division of the Commission Clerk and Administrative Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; telephone number (850) 413-6770.

Petitions seeking such variances or waivers must be filed with the Director of the Division of the Commission Clerk and Administrative Services in the manner set forth in Rule 28-104.002, Florida Administrative Code.

FILING DOCUMENTS ELECTRONICALLY

Filings by electronic transmission are accepted in accordance with the Commission's Electronic Filing Requirements.

Questions concerning the requirements and/or requests for a copy of the current requirements can be directed to the Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; telephone number (850) 413-6770. The current requirements can also be accessed on the Commission's Web site at <http://www.floridapsc.com/RandR/e-req.cfm>.

Special Conditions for e-filing, as stated in the requirements, include the following:

The party submitting a document for filing by electronic transmission acknowledges and agrees:

- a. That the original physically signed document will be retained by that party for the duration of the proceeding and of any subsequent appeal or subsequent proceeding in that cause, and that the party shall produce it upon request of the other parties or the Commission.
- b. That the party submitting the filing shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the Division as a result.
- c. That the filing date for an electronically transmitted document shall be the date the Division receives the complete document. If the document is received on a non-business day, or after 5:00 p.m. on a business day, it will be considered filed as of 8:00 a.m. on the following business day.
- d. That the Commission does not have the authority to grant an extension of time for certain jurisdictional filings, including motions for reconsideration and notices of appeal.
- e. That the official copy of an electronically filed document is the copy printed by the Division upon receipt, document-stamped, and filed in the docket.

STATEMENT OF AGENCY ORGANIZATION & OPERATIONS

- f. That all electronically filed documents are public records and will be published on the Commission's local area network and its Internet Web site. Confidentiality is waived for any information in documents submitted for e-filing.

The Commission does not accept filings submitted by facsimile ("fax") transmission.

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For Dade County, the cost per subscriber line is as follows:

	Cost to Dade County		
		Contractor A	Contractor B
Company	\$14,143,600		
Co. Adm.	\$ 200,000	\$ 200,000	\$ 200,000
Annual Charge Factor For	\$ 73,746		
Comm. Equip. Contractor		\$6,553,200	\$4,021,880
	\$14,617,346	\$6,753,200	\$ 4,221,880
Dade County Lines (MS&T)	\$ 864,402	\$ 864,402	\$ 864,402
Cost Per Line per year	\$ 16.91	\$ 7.82	\$ 4.89
Cost Per Line per month	\$ 1.41	\$.65	\$.41

1. The staff believes the company should also be able to recover cost incurred within the company in complying with this ordinance.
2. The annual charge factor is based upon the estimate of an outside contractor for \$190 radios at 800 each plus 1a base station at \$1,200 for \$153,000. The annual charge factor comes from the company's testimony in the Docket No. 810437-TR for Radio Equipment Exhibit LS-1 page 19 of 23 which is 48.2 (.482 x 153,000 = 737,746).
3. Broad gauge, in actuality it should go down where a contractor is involved but there will still be some expense.

There are at least 3 theories to spread the cost:

1. As shown above on a MS&T basis which causes people having more lines to bear a larger share.
2. On a per subscriber basis which will cause residence customers to bear more of the expense than methods 1 and 3.
3. Take MS&T as used in one but cause a ratio weighting the same as is in effect for B-1 to R-1 etc. This causes the business customer to bear the largest share. At this time the staff favors a single MS&T method at least until the first true up iteration.

From an accounting perspective, the company advises staff that it will track the cost to comply with this ordinance to include the following items:

1. Cost of contract employees providing the above manhole support.
2. A loading on this cost to represent Southern Bell administrative costs including review of bill, supervision of preparation of voucher, and payment of voucher.
3. The cost of clerical support including costs related to payroll such as Social Security Taxes, Relief and Pensions as well as salary costs for clerical time spent in assigning contract employees to Southern Bell work sites and associated administrative duties.
4. Applicable taxes will be tracked and included as costs.

The company intends to accomplish the above by a unique Reep Cost Job Order (account number) assignment will be used in developing these actual costs.

Addressing the semi-annual true up, the company advises that to initiate the company will use prior manhole data to establish a rate for Dade Counties. The estimated expense divided the number of access lines will be calculated and the whole amount printed on the other charges and credits section of the customers' bills.

Each month charges will be applied based on the number of access lines being billed on the billing date without regard to whether the service was in effect the entire month, i.e., credits will not be applied on disconnects and new connects will not be billed in arrears. Changes in service between the time applied and time bill is rendered will not affect the amount billed. At the company is advising that a proration method is burdensome but as experience is gained it may be appropriate to reconsider. The staff points out that it is not exactly covered in the tariff as filed.