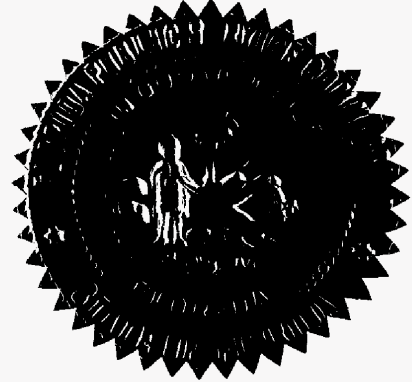


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 050194-TL

In the Matter of:

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.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, July 5, 2005

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

REPORTED BY: LINDA BOLES, RPR, CRR
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1 APPEARANCES:

2 JUSTIN G. WITKIN, ESQUIRE, representing Miami-Dade
3 County BellSouth customers.

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

6 RICHARD D. MELSON, ESQUIRE, and KIRA SCOTT, ESQUIRE,
7 representing the Florida Public Service Commission Staff.

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P R O C E E D I N G S

CHAIRMAN BAEZ: Commissioners, we are now on Item 5.

MS. SCOTT: Good morning, Commissioners. Kira Scott on behalf of Commission staff.

Item 5 addresses staff's recommendation in Docket 050194-TL, which involves a complaint brought by Florida BellSouth customers who paid fees to BellSouth related to Miami-Dade County Ordinance Section 24-44, also known as the Manhole Ordinance.

The customers request that the Commission order BellSouth to comply with Section A.2.4.6. of the General Subscriber Service Tariff and refund all fees collected in violation thereof.

BellSouth has filed a motion to dismiss the complaint. Staff recommends that the Commission grant in part and deny in part BellSouth's motion to dismiss. Staff believes that the Petitioners have standing to bring the complaint before this body and to seek a refund for all affected customers of any charges collected in violation of the tariff. However, staff believes that the other relief requested by the Petitioners, specifically the injunctive relief and attorney's fees, falls outside of the Commission's subject matter jurisdiction.

Furthermore, staff believes that BellSouth's alternative request to refer the complaint to the Division of

1 Regulatory Compliance and Consumer Assistance for consideration
2 pursuant to Rule 25-22.032 is inappropriate in this instance.

3 If the Commission approves staff's recommendation in
4 Issue 2, this docket should remain open pending further
5 proceedings.

6 BellSouth has requested oral argument, and staff
7 recommends granting its request. The parties are present, and
8 staff is available for any questions.

9 CHAIRMAN BAEZ: Thank you, Ms. Scott. Commissioners,
10 we have a preliminary Issue 1 on oral argument. Is there a
11 motion?

12 COMMISSIONER DEASON: Move staff.

13 COMMISSIONER BRADLEY: Second.

14 CHAIRMAN BAEZ: Moved and seconded. All those in
15 favor, say aye.

16 (Unanimous affirmative vote.)

17 CHAIRMAN BAEZ: Ms. Scott, what would you suggest?

18 MS. SCOTT: On the issue of granting --

19 CHAIRMAN BAEZ: On oral argument: Five a side, ten a
20 side?

21 MS. SCOTT: I suggest --

22 CHAIRMAN BAEZ: That's okay. We'll do ten a side and
23 hope they can -- don't worry. It's just me playing around.
24 Ten a side, Ms. White.

25 MS. WHITE: Yes, Chairman Baez. Nancy White for

1 BellSouth Telecommunications, and hopefully I'll try not to
2 take ten.

3 CHAIRMAN BAEZ: That's what I was going to suggest
4 too, as well.

5 MS. WHITE: For the most part we support the staff
6 recommendation. We support the staff recommendation with
7 regard to the recommendation that a class action procedure is
8 not appropriate before the Commission, and there aren't any
9 provisions for that at the Commission or in the administrative
10 procedures.

11 We support the staff recommendation that injunctive
12 relief is not appropriate and it is not within the Commission's
13 authority, and we support the staff rec with regard to the fact
14 that the Commission does not have jurisdiction to award
15 attorney's fees. Those are all pretty much bolstered by the,
16 by the court, by the case, case law.

17 We do, however, have concerns with the fact that the
18 staff has recommended that the Commission -- that the
19 complainants have standing. We don't dispute that in the
20 instance of overcharges the Commission has authority to
21 investigate that and to order refunds. But what we have here
22 are complainants that aren't really saying there's been an
23 overcharge. What they're saying is this, this tariff hasn't
24 been audited by BellSouth pursuant to the tariff and,
25 therefore, all the money that's been collected has to be

1 refunded. That's not the same thing.

2 Let me take just a minute to set the stage on this.
3 Back in the early '80s, Miami-Dade County passed an ordinance
4 that was effective against all the utilities where they said
5 you couldn't have one person down in a manhole. If you had one
6 person in a manhole, you had to have somebody on top at all
7 times. BellSouth opposed that ordinance. It was passed
8 anyway. It's the only county in the state of Florida that has
9 this kind of ordinance. In fact, it's the only county in
10 BellSouth's nine states that have this ordinance.

11 So what we do, because it's cheaper this way and we
12 don't believe it's necessary, instead of putting two
13 technicians in the manhole, what we do is we hire a security
14 company to place a security guard on top of the manhole while
15 our technician is in the manhole. It's cheaper -- we abide by
16 the ordinance, but it's cheaper for us.

17 Under the tariffs we have we're allowed to pass the
18 cost of the ordinance on to our customer. That's another
19 reason why we've chosen the security company, because it's
20 cheaper, and if we're having to pass the costs on, we want it
21 to be as cost-effective as possible. It costs us about a \$1.5
22 million, \$1.8 million a year to comply with this ordinance. We
23 do not make money from this. What we do is we take the
24 vouchers that are submitted by the security company, we add
25 some accounting information to that, and that's what we use to

1 determine how much the pass-on is. The pass-on is only imposed
2 on citizens of Miami-Dade County, not the entire state.

3 We believe that the complainants here -- I mean,
4 they've not -- all they've said is we're members or we're
5 citizens of Miami-Dade County, and BellSouth has charged too
6 much because they haven't audited the pass-on charge. I mean,
7 that's just not sufficient. For standing you have to show that
8 there's an immediate injury in fact. They have not said,
9 BellSouth, you've overcharged for this pass-on, you have
10 charged more than your costs are, or, BellSouth, you have
11 charged and kept money that was more than a cost. They've just
12 said, you haven't audited. Our tariff says we will reconcile
13 the pass-on charge every six months and decide whether it needs
14 to be increased or decreased. Over the 20 years that this
15 ordinance has been in effect, this pass-on amount has gone up
16 and down probably over a dozen times. Right now it's at
17 8 cents a month per line.

18 So we don't feel like the complainants have proven
19 the requirements to show standing under the Agrico Chemical
20 Company test, which is the seminal test. They don't allege,
21 the complaint doesn't allege that they paid more than they
22 should have in fees, and, therefore, we don't believe that it
23 satisfies the first prong of the Agrico test, which requires a
24 demonstration of injury in fact which is of sufficient
25 immediacy to entitle a person to a, to a hearing.

1 The tariff doesn't require refunds. What it states
2 is that an estimated monthly amount of the cost shall be billed
3 to the affected subscribers each month, and an adjustment to
4 reconcile these estimates to the actual cost incurred for the
5 six-month period of each year shall be applied. What that
6 means is that every six months you look at it, you say, okay,
7 have we been charging too much? In that instance we lower the
8 charge on a going-forward basis. Have we been charging too
9 little? In that instance we increase the charge on a
10 going-forward basis.

11 So while we can be required to make adjustments on a
12 prospective basis to address over or undercollections, there's
13 nothing in the tariff that says refunds are appropriate. And,
14 therefore, we believe the complainants have not met the
15 standing test of Agrico Chemical Company. Thank you. I'll
16 save a couple of minutes for rebuttal, if need be.

17 CHAIRMAN BAEZ: Sir.

18 MR. WITKIN: Good morning. Justin Witkin on behalf
19 of the Petitioners. I'll also try to limit my remarks and be
20 brief.

21 First, directly to respond to BellSouth's counsel,
22 with respect to standing, the complaint alleges exactly what
23 she says. We have not alleged, that is, that the Petitioners
24 in the class, the broader base of customers, BellSouth
25 customers, were overcharged. It's in Paragraph 25 of the

1 complaint. Don't take my word for it. Look at the complaint.
2 It's in there. There's no question about that. The standard
3 in Agrico is clear. As the staff noted in its recommendation,
4 we have met, we have more than met the standard of Agrico for
5 standing to proceed before this Commission. I don't think
6 that's really the issue. I think that the issue before this
7 Commission is how best and most efficiently to enforce the
8 tariff. That's what this is about. That's what this
9 proceeding is about.

10 Going back again to set the context, 20 years ago
11 this Commission agreed and allowed BellSouth to pass along a
12 Manhole Ordinance under certain conditions: That they audit
13 and reconcile. Now we heard about prospective changes and not
14 having refunds. None of that is in the tariff. That's what
15 this Commission, that's the authority -- within the authority
16 of this Commission. That's where the expertise of this
17 Commission will come into play in interpreting the tariff. But
18 that's not why we're here today. We're here on BellSouth's
19 motion to dismiss.

20 What I'm interested in is finding or suggesting to
21 the Commission the most efficient way to achieve just that, to
22 enforce the tariff. We've got a situation where for more than
23 20 years BellSouth, by its own admission, has now failed to do
24 what it said it would do in its tariff. It's failed to conduct
25 the audits and it's failed to reconcile the charges that it

1 incurred with the pass-on that it's charged my clients and its
2 customers, and it's done so admittedly.

3 In response to a staff question, BellSouth provided
4 certain data about the charges it incurred over the last 20
5 years, and for a number of those years it is clear that the
6 amount that BellSouth was charging its customers was greater
7 than the amount of expense that it incurred in complying with
8 the Manhole Ordinance. So while BellSouth represents to this
9 Commission that they didn't intend to make money out of this,
10 out of this Manhole Ordinance fee, that's exactly what they've
11 done. Their charges to their customers exceeded their costs by
12 their own admission, unsubstantiated admission surely put forth
13 in the best light for BellSouth.

14 So how do we enforce the tariff? How does this
15 Commission best enforce the tariff so that the customers of
16 BellSouth can quickly and efficiently get what they bargained
17 for, get what the contract between BellSouth and their
18 customers provides for?

19 Well, first is the standing. I think there's no
20 question that this Commission has jurisdiction to address the
21 complaints. Does the Commission have the authority to order
22 refunds? That's well, well settled. I'm not going to go into
23 all the case law that says that.

24 Going beyond that, addressing the question of
25 injunctions and attorney's fees, does this Commission have the

1 authority to order that BellSouth do what it said it would do
2 in its tariff? Well, that's really the question, I guess,
3 before this court. I would argue that the comprehensive
4 regulatory scheme from 364.03 to 364.05 to 364.08 to
5 364.238 and on and on gives this Commission that authority. If
6 you can't order that a, that an entity regulated by this
7 Commission do what it said it will do in its tariff, it seems
8 to me to thwart the legislative purpose.

9 That said, if that can't happen, what this Commission
10 should do is use its expertise, interpret the tariff, address
11 this suggestion that the tariff somehow only applies
12 prospectively, that reconcile doesn't mean that you're actually
13 going to charge what you said you were going to charge, and
14 that you're not going to give your customers who you've
15 overcharged the difference. Interpret that argument, address
16 that argument, fix the damages and send it back to the court
17 from which the case was removed.

18 This matter got here based on BellSouth's argument
19 that this Commission could award all of the relief that the
20 Plaintiffs were seeking in court. That's what they argued.
21 And I submitted -- I'm not going to go over it again today, but
22 I submitted and attached the oral argument. And now we're
23 here, and this Commission should set the damages, figure out
24 what the overcharge was, and send it back to that court because
25 there's no question that that court can award the rest of the

1 relief, the injunctive relief. That is, force BellSouth to do
2 what it said it would do when it got this Commission to agree
3 to its tariff 20 years ago, 20 plus years ago, and that it can
4 award the rest of the relief.

5 And let me go further and suggest that it would be
6 highly inefficient to do anything else. If this Commission
7 were to fix the amount of the overcharge and to determine that
8 the amount had to be refunded, and it's clearly within the
9 Commission's authority to order that refund, this matter would
10 still proceed in circuit court. The matter was not dismissed,
11 it was abated. And so what we would have would be this
12 Commission taking action on behalf of the consumers, the
13 customers of BellSouth on a class-wide basis, and then we'd be
14 back in court and we'd be asking for class certification and
15 sending out notice and asking for injunctive relief and asking
16 for attorney's fees, all the things that BellSouth is arguing
17 this Commission doesn't have jurisdiction to do. So let's not
18 repeat, let's not double the effort here. I would suggest that
19 this Commission use its authority, use its expertise to
20 interpret the tariff, that's the first issue, I suppose; and,
21 secondly, to fix the damages, and then to let the court, under
22 I think it's 120.08, enforce the order of this Commission. Let
23 the court grant the relief to the class without the need for
24 redundancy and inefficiency. Thank you.

25 CHAIRMAN BAEZ: Thank you, Mr. Witkin.

1 Commissioners, questions?

2 COMMISSIONER DEASON: Mr. Chairman, I have some
3 questions.

4 CHAIRMAN BAEZ: Go ahead, Commissioner Deason.

5 COMMISSIONER DEASON: First of all, let me -- I'm
6 sorry, sir, what is your name?

7 MR. WITKIN: Justin Witkin.

8 COMMISSIONER DEASON: Witkin?

9 MR. WITKIN: Yes, sir.

10 COMMISSIONER DEASON: Okay. Mr. Witkin, I'm a little
11 unclear as to exactly the relief that you are seeking. Is it
12 to have this Commission determine the amount of overcharges, if
13 any? And, if there are overcharges, to have those overcharges
14 refunded to the entire customer class so affected?

15 MR. WITKIN: Yes, that is the relief that we're
16 asking for.

17 COMMISSIONER DEASON: So I'm a little unclear then as
18 to why your position is that we should interpret the tariff and
19 determine the overcharge, if any, and then relinquish
20 jurisdiction to the court.

21 MR. WITKIN: What I'm suggesting, Commissioner, is
22 that in the interest of efficiency, given that this matter
23 proceeds in circuit court, that is, it has only been abated, it
24 has not been dismissed and will continue to proceed following
25 the final determination of this Commission, that there should

1 be some consideration given to that efficiency, to that need
2 for efficiency. What I'm saying is that this Commission
3 clearly has the authority, the jurisdiction, if you will, to
4 order that refund. But in light of the fact that we intend to
5 proceed in circuit court once that refund is granted, if the
6 Commission deems it appropriate, and given that the
7 Commission -- that there is an argument that there is no
8 authority to issue the injunctive relief, that is, to force
9 BellSouth to do what it said it would do in its tariff on a
10 prospective basis, that the Commission make those findings, set
11 those findings out and then allow the court, which has
12 concurrent jurisdiction, to order that relief through the same
13 mechanism that will order, we hope, the injunctive relief that
14 the Petitioners seek.

15 COMMISSIONER DEASON: Okay. I have a question for
16 staff concerning injunctive relief. But let me go back for a
17 moment to the question of what this Commission should do and
18 what the court should do.

19 If we go forward with this case and if it is proven
20 that there have been overcharges and this Commission orders a
21 refund of those overcharges and those refunds are actually made
22 and we confirm that, what is there left for the court to do
23 other than perhaps award attorney's fees?

24 MR. WITKIN: To me, sir?

25 COMMISSIONER DEASON: Yes.

1 MR. WITKIN: I believe that what's left is for the
2 court to issue the injunctive relief that we seek. That is, to
3 force BellSouth to comply with its own tariff. It's been 20
4 plus years --

5 COMMISSIONER DEASON: Let me interrupt you there.

6 MR. WITKIN: Sure.

7 COMMISSIONER DEASON: I'm a little unclear as to --
8 apparently you're interpreting the staff's recommendation on
9 injunctive relief is that we do not have the authority to
10 enforce our own tariffs, and I don't think that is the case.

11 So let me ask staff, in your recommendation
12 concerning injunctive relief, your recommendation is that we
13 don't have the, the jurisdiction or the ability to award the
14 injunctive relief. I did not interpret that to mean that we,
15 this Commission does not have the authority to enforce tariffs.
16 And if that is the case, please explain.

17 MS. SCOTT: You're right, Commissioner, the
18 Commission does have authority to enforce tariffs. And if that
19 means that that is requiring BellSouth to comply with the
20 tariff, then you have the authority to do so.

21 COMMISSIONER DEASON: And, and we have the authority
22 to do that on a prospective basis. And retroactively if there
23 have been overcharges due to noncompliance with the tariff, we
24 have the means to remedy that in the form of refunds, do we
25 not?

1 MS. SCOTT: Yes, sir.

2 COMMISSIONER DEASON: Okay. Mr. Witkin, then I'm
3 unclear as to what the court needs to decide other than the
4 fact that perhaps maybe you're due some attorney's fees.

5 MR. WITKIN: If, in fact, this Commission can order
6 the refund of any overcharges and can order BellSouth to comply
7 with its tariff on a prospective basis, and that order is a
8 standing order such that we don't have to file a new lawsuit
9 somewhere down the road, then the remainder of our relief would
10 be, in fact, attorney's fees. That's correct.

11 COMMISSIONER DEASON: Let me ask, are you saying
12 that, that BellSouth has violated the tariff because it did not
13 conduct audits, or is it that the, that the -- let me ask you
14 this. Be precise as to exactly what you're alleging has been a
15 violation of the tariff.

16 MR. WITKIN: Sure. The tariff A.2.4.6. requires that
17 BellSouth do two things: It requires that it audit the manhole
18 fees or charges every six months and, based on that audit,
19 reconcile the amount that it has charged its customers for that
20 six-month period with the amount of the actual charges
21 incurred. We allege that BellSouth has failed to do both of
22 those things. It has failed to do the audit every six months
23 as it was required to do in order to charge the manhole fee,
24 and that we also allege that the amount that they charged,
25 which we now know is true because of BellSouth's admission, was

1 more than the actual costs incurred. And so to the second
2 point we then allege that BellSouth failed to reconcile, which
3 we believe must mean refund, the amount of those charges, the
4 overcharges to their customers.

5 COMMISSIONER DEASON: Well, let me ask you this. Has
6 there been systematic overcharges or is it the fact that we're
7 at the point that during the, during the normal review and
8 true-up that over time you're going to either be in an
9 overcollected or an undercollected position and that you
10 correct that on a going-forward basis, and that up and down
11 variation -- right now we're just in a situation where there's
12 been an overcollection, but that it's going to be corrected in
13 the future? Is it problematic, is it systematic within the
14 system that there have been constant, consistent overcharges
15 that need to be corrected, or is it during the simple up and
16 down phases of this reconciliation process that just at this
17 point we happen to find ourselves in a situation of
18 overcollection?

19 MR. WITKIN: Commissioner, unfortunately I can't
20 answer that question with a lot of detail because we're at the
21 stage of the proceedings here where we've had no discovery.
22 We've had only the submission of BellSouth unsubstantiated as
23 to what they incurred in costs for certain periods of time, and
24 even by their own admission it seems to be speculative. I'm
25 not able to tell you whether for each of the --

1 COMMISSIONER DEASON: Let me interrupt you here. If
2 there's been -- if you have no information as to what the
3 precise history has been on the charges and the collections, on
4 what basis do you allege that there have been overcharges?

5 MR. WITKIN: To begin, they haven't done an audit in
6 20 plus years. In 20 plus years the charge has been 11 cents
7 every six months for every customer of BellSouth. Based on
8 that fact alone, we, in good faith, could come into this court,
9 not this court, but to court and now this Commission and say
10 that they had not complied with their tariff. We now know
11 that, in fact, they did charge more for certain periods of time
12 than they actually incurred in costs.

13 And to go back to the Commissioner's last question,
14 whether over the entire cycle there's been some sort of evening
15 out isn't really the issue because BellSouth customers come and
16 go. So a customer who may be in the system for two years where
17 they were getting overcharged and then moves so that they're no
18 longer subject to the Manhole Ordinance fee doesn't really care
19 if somewhere down the road those charges go back up, the
20 charges incurred or the costs incurred by BellSouth go back up
21 such that they were getting a good deal. They were
22 overcharging --

23 COMMISSIONER DEASON: Sir, if we were to follow that
24 logic, we would just have to disband basically half of what
25 this Commission does, things like fuel adjustment and all of

1 that. I don't see -- that argument does not hold water in the
2 context of what we do at this Commission, in my humble opinion.

3 And let's get back to the reality of it. If, in
4 fact, what you allege is true and that one customer may have
5 been overcharged one cent a month for one year, it's 12 cents.
6 It costs more to try to find, hunt that customer down and
7 provide a 12-cent refund check. Have you thought about the
8 logistics and the practicality of what you're asking?

9 MR. WITKIN: Commissioner, what I know is that in
10 their tariff, in BellSouth's tariff they were required to do
11 two things, that they haven't done that. If it's one cent for
12 one year for one customer times thousands and thousands of
13 customers in Dade County, then those thousands of customers
14 have not gotten the benefit of that contract between BellSouth
15 and those customers, and that's, that's wrong. And if there's
16 no relief for that, then, then, then I'm surprised.

17 COMMISSIONER DEASON: Okay. That's all I have, Mr.
18 Chairman.

19 CHAIRMAN BAEZ: Commissioners, any other questions?
20 I'm trying to get -- I think Commissioner Deason's
21 questions clarified some of it for me, Mr. Witkin.

22 Is it, is it a question of, and maybe staff can chime
23 in as well, is it a question -- are we getting stuck on
24 semantics? If there is -- and I think now after the issue has
25 been raised the staff might have some idea of how we have to,

1 in fact, audit compliance with the tariff going backwards. Are
2 we really getting caught in semantics? When you say injunctive
3 relief, you're just -- what I hear is let's, let's see if,
4 let's see if the tariff has been violated, let's see if the
5 tariff has been adhered to, and then, and then follow from that
6 what the results are.

7 I will tell you -- and we're just -- without the
8 benefit of more process and more discussion, I think you heard
9 Commissioner Deason allude to the, the practical
10 impossibilities of doing a year-to-year search and refund kind
11 of scheme. So there, there seems to me to be some level of a
12 reconciliation scheme implied by the language, at least the
13 language that I've heard of the tariff. But that's not what
14 we're, that's not what we're here on.

15 Is it really just -- to me it's just a question of
16 let's, let's get BellSouth onboard following their tariffs.
17 And if there are corrections and adjustments to be made, that
18 will be made clear by, by what the numbers show over the course
19 of 20 years. But I, I don't see where things like damages or
20 concepts of damages and, and injunctive relief and certainly
21 attorney's fees have any place here because we've never dealt
22 with them here. I mean, I think -- and there are people that
23 have been here much longer than I have, but I can't remember
24 ever accepting those kinds of, that concept into our
25 deliberations. So this, this quickly starts boiling down as to

1 whether Ms. White's client did what they were supposed to do.
2 But that's a regulatory matter. And whatever the correction of
3 that results will be handled as a regulatory matter and not as,
4 not as, not in terms of damages and class actions and so forth.

5 And I guess my question to staff is is there a way to
6 get past all of this standing argument and who, whether it's
7 here properly and whether it even needs to be dismissed,
8 whether what all we have to say is, you know what, BellSouth
9 said in black and white that they were going to have, every six
10 months they would have some, some kind of audit procedure over
11 the charge of their tariff and that adjustments would be made,
12 and can't we just solve this by having this one last great
13 reconciliation? I mean, the numbers, the numbers could be
14 staggering, they may, they may be de minimus. I mean, over the
15 course of 20 years things have a habit of evening out. But, I
16 mean, is this a practical solution to it at least for our
17 purposes?

18 MS. SCOTT: Yes, Chairman. Staff believes that the
19 Petitioners have standing just based on the fact that they have
20 paid the fee.

21 CHAIRMAN BAEZ: Yeah, I don't -- I'm not sure I buy
22 the standing argument; otherwise, we can never -- and whether
23 we're calling it a complaint or not. Certainly customers can
24 complain that, that BellSouth or whoever the service provider
25 is isn't, isn't providing service according to the terms of its

1 tariff. I've got to believe that that's possible. Perhaps
2 Mr. Witkin's, the, the scale of Mr. Witkin's clients gives
3 people pause to be thinking that some other process is at work
4 here. But I just see this as a customer complaint, you know.
5 I mean, am I wrong or --

6 MS. SCOTT: Staff agrees with you.

7 CHAIRMAN BAEZ: Okay. And I interrupted you,
8 Ms. Scott. You were about to say what it is that you all think
9 needs to be done.

10 MS. SCOTT: Well, staff believes that there's no
11 question that the Petitioners have standing just based on the
12 fact that they've paid the fee. And now that they're asking
13 the Commission to look at the tariff to make sure that
14 BellSouth is compliant, in compliance with it, and that's
15 pretty much the issue. It's kind of simple to us, to staff.
16 And we have gotten into a lot of just legal semantics here with
17 the use of injunctive relief, those terms, and also class
18 action. It's much more simple than that.

19 COMMISSIONER DEASON: Mr. Chairman.

20 CHAIRMAN BAEZ: Commissioner.

21 COMMISSIONER DEASON: You know, what I'd like to see
22 is a determination of the facts and if there have or have not
23 been overcharges. And if there have been overcharges, to see
24 that customers are made whole in some appropriate manner,
25 whether it be actual refunds or some reconciliation on a

1 going-forward basis, whatever the facts would show.

2 But I'm at a little bit of a loss in answer to a
3 direct question about whether this is a systematic problem or
4 whether we're just in some phase of a cycle of assessment and
5 true-up and, you know, redetermination.

6 The Petitioner -- not on the question -- Mr. Witkin's
7 clients -- he said he didn't know. So I think we need to know
8 that. And if we just need to hold in abeyance the, the
9 question of dismissal until we get a handle on that and whether
10 we allow discovery and let Mr. Witkin know that, or if we just
11 assign our staff auditors to go in and look at the records and
12 make them file that and then determine what we should do, I'm
13 not really sure. But I'm reluctant at this point to open this
14 up to a full-fledged evidentiary hearing with all of the costs,
15 time and expense associated with that when we don't even know
16 what the facts are yet.

17 CHAIRMAN BAEZ: And I started to interrupt and I
18 apologize, but I agree with you. I think this more and more is
19 becoming to me how do we -- the issue that needs to be
20 addressed at least from our perspective or my perspective
21 anyway is clear. There's a tariff that we need to figure out
22 whether, you know, what the numbers are, what the impact has
23 been, you know. And it sounds so much more complicated when
24 it's a tariff going back to '83, but I'm sure that that's
25 easily enough resolved. But to find the most efficient vehicle

1 to get those answers, you know, is it a hearing or is it not a
2 hearing? I don't know. I don't think a hearing is very
3 efficient in many respects. If it's just a question of whether
4 it's in the context of a complaint and the staff asking for
5 information and getting the kind of information that they need
6 will do it, then it's up to, up to legal staff to kind of
7 figure out what we need to do, either you do hold it in
8 abeyance, as was suggested, or do we even need to reach these,
9 these motions if the result is, you know, if we get to a
10 result, if we get to a resolution of what the real issue is?
11 Do we have to go through all the, all the legal process in
12 order to get there? I don't even know if there was a question
13 in there. Do you see what I'm saying? I mean, this can be --
14 you know, it's coming to us as one thing, it's sounding sort of
15 like another, and I'm having trouble finding -- I can see what
16 the problem is. I just don't know how to get to the solution.

17 COMMISSIONER DEASON: I can ask a question, if
18 that's --

19 CHAIRMAN BAEZ: Sure.

20 COMMISSIONER DEASON: What is the most efficient
21 legally permissible way to determine if there have been
22 overcharges?

23 CHAIRMAN BAEZ: Ah, that's, that's what it was.

24 MR. MELSON: I'm not sure there is a best way. One
25 way that is consistent with what's been filed is to rule today

1 on the motion to dismiss, which basically leaves this case
2 alive, let staff do its investigation, let discovery get
3 started. At some point staff may come back with a proposed
4 agency action that says, based on our investigation, we found
5 X, Y and Z, we propose that as a way to resolve the issue. It
6 may be that after some discovery BellSouth moves for a summary
7 final order saying basically the facts are not in dispute,
8 here's what the resolution needs to be. I don't think, I don't
9 think setting it directly for hearing is efficient. But
10 letting the complaint go forward and follow our ordinary
11 processes which may lead down either one of those paths seems
12 to me to be a way to move it forward.

13 MS. WHITE: Chairman Baez.

14 CHAIRMAN BAEZ: Yes.

15 MS. WHITE: I have a suggestion, if I might. What
16 about the Commission, the staff conducting an audit of the
17 charge and cost of compliance with the Miami-Dade Manhole
18 Ordinance?

19 CHAIRMAN BAEZ: Wouldn't that be, wouldn't that be
20 just --

21 MS. WHITE: Well, I think where Rick was going,
22 flat-out discovery, which is more when you're going down the
23 path to a regular hearing.

24 CHAIRMAN BAEZ: Well, there's -- and just something
25 that Mr. Melson said struck a chord. There are some messages,

1 I don't know what else we would call them, that you want to
2 leave out of here now. I'm just speaking for myself, I don't
3 know what the rest of the Commissioners think, but there are
4 certain messages you do want to leave here with. One of them
5 is I think the standing argument is shaky because these are
6 customers, after all. I mean, to say that a customer in
7 whatever shape or form they take doesn't have standing to say,
8 hey, BellSouth, you know, you're not following your tariff, how
9 do we get that, to me is a little, it's difficult to, difficult
10 to, to agree with.

11 The other part of it is I think we need to once again
12 make clear that, and I think Commissioner Deason spoke on this,
13 we also need to make clear that things, things like attorney's
14 fees and, you know, I forget what the other, what the other --
15 injunctive relief, the injunctive relief, you know, we've got
16 to sort of clear up maybe again that, that there are limits to
17 what our jurisdiction and what our ability to, to entertain
18 certain actions are. And what the future life of that is in
19 another forum, I don't know, but certainly it's not, it's not
20 here. So those are certainly two messages that maybe
21 Mr. Melson's suggestion, Commissioner, makes sense is to
22 actually say that as long as we're preserving now what, what
23 the form takes, does it have to be an audit or does it have to
24 be discovery, how do we preserve that kind of flexibility or
25 how do we simplify it a little bit?

1 MR. MELSON: Commissioners, if you felt an audit was
2 the most efficient way to proceed, again, I, I would encourage
3 you to rule on the motion to dismiss today and deal with the
4 standing issue. But you could then very easily hold the case
5 in abeyance, direct staff to conduct an audit and bring that
6 back before you decide, you know, how to proceed. That -- by
7 holding it in abeyance while a staff audit took place, you
8 would avoid the time and expense of the parties engaging in
9 discovery that might not be necessary based on the audit
10 results.

11 CHAIRMAN BAEZ: Ms. Salak.

12 MS. SALAK: I would just suggest you may not want to
13 rule specifically that it's an audit or a discovery, that I
14 think we could look at it. And we may do things informally. I
15 think there are other methods besides the strict audit that may
16 be cheaper and more efficient, so --

17 CHAIRMAN BAEZ: Well, and I'd try to find some -- you
18 know, the efficiency aspect of it is probably not something
19 that we can identify readily --

20 MS. SALAK: Correct.

21 CHAIRMAN BAEZ: -- sitting up here. That has to
22 really take all the circumstances. Okay. So I'd certainly be
23 in favor of maintaining that flexibility as part of our
24 decision.

25 MS. SALAK: Thank you.

1 CHAIRMAN BAEZ: But, you know, to the extent that
2 staff's recommendation sort of allows for that and keeps the,
3 keeps the question alive and, and certainly settles some of the
4 more mundane questions, if there are any, as part of the case,
5 I'm okay with it.

6 Commissioners, any comments or questions?

7 COMMISSIONER DEASON: Well, let me float a motion and
8 see where we are.

9 CHAIRMAN BAEZ: All right.

10 COMMISSIONER DEASON: And it may need some
11 fine-tuning, and I would welcome that from either Commissioners
12 or staff.

13 CHAIRMAN BAEZ: Fair enough.

14 COMMISSIONER DEASON: As to the question of standing,
15 I think that we can, we can deny the motion to dismiss in terms
16 of a lack of standing, that the customers have standing to
17 bring a complaint concerning a violation of a tariff and
18 potential overcharges. But that -- so we would deny the motion
19 to dismiss on that basis. But we would hold this docket in
20 abeyance, would direct our staff to investigate, by whatever
21 appropriate means, to investigate the history of the, this
22 tariff and the associated assessments, collections and true-ups
23 and reconciliations that have taken place and report back. And
24 at that time we would be in a better position to determine the
25 most efficient way to proceed. And, and if, if a motion to

1 dismiss is appropriate at that time, then one could be
2 entertained. Or maybe not dismissal but, what is it, summary
3 order.

4 That's, that's my motion. And I am welcome to some
5 clarifications from anybody that needs some fine-tuning to
6 that.

7 CHAIRMAN BAEZ: Does staff -- Mr. Melson, do you have
8 any questions?

9 MR. MELSON: The only thing I would consider adding
10 to it is to strike the claim for attorney's fees because we
11 clearly don't have jurisdiction over that. I probably would
12 not specifically address the injunctive relief because, as
13 Mr. Scott said, while we call it by a different name, we could
14 ultimately get to essentially the same place.

15 COMMISSIONER DEASON: I would amend the motion then
16 to include the determination that we do not have the ability
17 to, to assess attorney's fees.

18 CHAIRMAN BAEZ: And, Commissioner Bradley, I'm sorry.
19 You had a question or --

20 COMMISSIONER BRADLEY: No. I'm going to second the
21 motion.

22 CHAIRMAN BAEZ: All right. Commissioners, there's a
23 motion to deny the motion to dismiss on, on standing, to hold
24 the docket in abeyance pending some, some level of
25 investigation by whatever appropriate means staff sees fit to,

1 to employ, and to return to us with a, with a further, with any
2 further determinations that are necessary. And in addition to
3 that, the claim for attorney's fees is stricken. And the --
4 there is no mention -- we will not address the injunctive
5 relief for reasons already discussed. And there's a second.
6 All those in favor, say aye.

7 (Unanimous affirmative vote.)

8 CHAIRMAN BAEZ: Thank you all, and thank you for all
9 the input from all the parties.

10 (Agenda Item 5 concluded.)

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1 STATE OF FLORIDA)
 :
 2 COUNTY OF LEON)

CERTIFICATE OF REPORTER


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I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 7TH DAY OF JULY, 2005.



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