

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Compliance Investigation of Southeastern  
 Services, Inc. for apparent failure to disclose  
 required information on each of its applications  
 for alternative access vendor certificate,  
 competitive local exchange company certificate,  
 and interexchange company certificate.

Docket No. 050363-TP

Filed: August 29, 2005

**SOUTHEASTERN SERVICES, INC.'S MOTION TO DISMISS  
 NORTHEAST FLORIDA TELEPHONE COMPANY'S  
 PROTEST OF PROPOSED AGENCY ACTION ORDER  
 AND PETITION FOR FORMAL ADMINISTRATIVE HEARING**

Southeastern Services, Inc. ("SSI or the "Company"), by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files this Motion to Dismiss Northeast Florida Telephone Company's Protest of Proposed Agency Action Order and Petition for Formal Administrative Hearing and, as grounds therefor, states:

1. Southeastern Services, Inc. ("SSI") is a company lawfully doing business in the State of Florida and certificated by the Florida Public Service Commission ("the Commission") to provide Competitive Local Exchange Company ("CLEC") services, Interexchange Company ("IXC") services, and Alternate Access Vendor ("AAV") services. SSI's regulated operations are subject to the jurisdiction of the Commission pursuant to Chapter 364, Florida Statutes.

2. SSI's principal place of business in Florida is Macclenny, Florida. Pleadings, orders, notices, and other papers filed or served in this matter should be served upon:

Mark Woods, Sr., President  
Southeastern Services, Inc.  
Post Office Box 365  
Macclenny, Florida 32063-0365

Suzanne Fannon Summerlin  
Suzanne Fannon Summerlin, P.A.  
2536 Capital Medical Boulevard  
Tallahassee, Florida 32309

3. On July 8, 2005, the Florida Public Service Commission (hereinafter “the Commission”) issued Order No. PSC 05-0734-PAA-TP (hereinafter “the PAA Order”) accepting and approving Southeastern Services, Inc.’s (“SSI’s”) offer of settlement of this matter. Subsequently, Northeast Florida Telephone Company (hereinafter “Northeast Florida”), on August 2, 2005, filed a Protest of Proposed Agency Action Order and Petition for Formal Administrative Hearing (hereinafter “the protest.”)

4. The Commission should dismiss Northeast Florida’s protest as Northeast Florida has no standing to file a protest of this PAA Order, the so-called “disputed issues of material fact” Northeast Florida identifies in its protest are either not in dispute or are outside the scope of this docket, and it is inappropriate to permit a competitor to participate in an enforcement proceeding.

5. SSI provides phone-to-phone Voice over Internet Protocol (“VoIP” or “IP telephony”) services by way of the public internet. Northeast Florida claims that SSI’s VoIP services are interexchange telecommunications services that Northeast Florida states are subject to the access charges applied to traditional switched interexchange telecommunications services. Northeast Florida has demanded that SSI pay Northeast Florida access charges for SSI’s VoIP services. This dispute is currently being litigated in Baker County Circuit Court

6. Also being litigated in Baker County Circuit Court is SSI's Counterclaim against Northeast Florida for anti-trust actions that has survived a Motion to Dismiss by Northeast Florida.

7. Northeast Florida's protest of the Commission's order accepting SSI's offer of settlement in the instant Docket is an attempt, pure and simple, to destroy SSI as a competitor by having SSI's certificates cancelled or suspended, as well as to shoe-horn policy issues regarding the provision of VoIP services into an enforcement docket.

8. Northeast Florida has proposed eight issues as "disputed issues of material fact" in its protest. Northeast Florida's Issues "a", "b" and "c" question whether SSI has the technical, financial and managerial capability to provide services as a CLEC, IXC and AAV. Northeast Florida's Issue "d" relates to whether Mr. Woods knew or should have known he had a felony conviction when he completed the CLEC, IXC and AAV certificate applications. Northeast Florida's Issues "e" and "f" go to the policy question of whether VoIP services are interexchange telecommunications services the provision of which require a company to possess an IXC certificate and whether such the revenues generated by the provision of such VoIP services are required to be reported as interexchange telecommunications services revenues for purposes of the payment of regulatory assessment fees. Northeast Florida's final proposed Issues, Issues "g" and "h," relate to whether it is in the public interest for SSI to be certificated as a CLEC, IXC and AAV and what action the Commission should take in light of SSI's amended applications.

9. Northeast Florida's proposed disputed Issues "a," "b" and "c" questioning whether SSI has the required technical, financial and managerial capability to provide

CLEC, IXC and AAV services are completely beyond the scope of this docket. This docket was initiated to investigate SSI's compliance with one specific requirement—the requirement of disclosure of any felony conviction by the company's officers.

10. Northeast Florida's proposed Issue "d" questions whether Mr. Woods knew or should have known whether he had a conviction at the time he completed SSI's applications for the Company's CLEC, IXC and AAV Certificates. There is no disputed issue regarding Mr. Mark Woods' failure to acknowledge his grand theft conviction on SSI's applications for certificates to provide CLEC, IXC and AAV services. Mr. Woods has admitted that he, in fact, does have a felony conviction for grand theft dating from twenty-five years ago, but at the time he completed SSI's applications for its CLEC, IXC and AAV Certificates, he believed that this conviction had been cleared from his record as a result of statements the attorney he hired to restore his civil rights following that conviction made to him. There is no basis on which Northeast Florida can dispute Mr. Woods' own belief, regardless of whether Northeast Florida believes it was well-founded or not. As SSI is Northeast Florida's one and only competitor in Baker County, Northeast Florida's motivation in pursuing such a formal administrative hearing is perfectly transparent and completely inappropriate.

11. Northeast Florida's proposed Issues "e" and "f" are issues not relevant or appropriate for this compliance/enforcement docket. Whether SSI has provided VoIP services pursuant to SSI's IXC Certificate or whether SSI has reported SSI's VoIP revenues as interexchange telecommunications services revenues to the Commission for regulatory assessment fees in a fashion consistent with Northeast Florida's argument regarding SSI's VoIP services, are policy issues being litigated in Baker County Circuit



Court for the express reason that this Commission declined to exercise jurisdiction and that Northeast Florida chose not to file a complaint based on those issues with the Commission, but chose to pursue damages against SSI in circuit court.

12. Northeast Florida's proposed Issues "g" and "h" are completely inappropriate for this docket. Whether it is in the public interest for SSI to maintain its CLEC, IXC and AAV Certificates and what action the Commission should take regarding Mr. Woods' acknowledgement of his felony conviction and his explanation for why the acknowledgement had not appeared on the certificate applications are not issues that the Commission can appropriately permit Northeast Florida to weigh in on. As a competitor with a purely economic interest in seeing SSI lose its Certificates, Northeast Florida has no standing to represent the public or to participate in this matter and offers no information relevant to the Commission's decision on these issues.

13. As the Court stated in *Agrico Chemical Company v. Department of Environmental Protection*, 406 So.2d 478 (2<sup>nd</sup> DCA 1981), at p. 482:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. While petitioners in the instant case were able to show a high degree of potential economic injury, they were wholly unable to show that the nature of the injury was one under the protection of chapter 403.

Chapter 403 simply was not meant to redress or prevent injuries to a competitor's profit and loss statement. Third-party protestants in a chapter 403 permitting procedure who seek standing must frame their petition for a section 120.57 formal hearing in terms which clearly show injury in fact to

interests protected by chapter 403. If their standing is challenged in that hearing by the permit applicant and the protestants are then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing and proceed on the permit directly with the applicant.

It is clear that this proceeding was not intended to address Northeast Florida's purported "injury" regarding SSI's nonpayment of access charges on SSI's provision of VoIP services. It is also clear that the only interest Northeast Florida represents is that of a competitor who believes its profit and loss statement may be affected by SSI's continued existence.

14. As early as October 16, 2002, SSI submitted an informal Complaint by letter to the Commission requesting that the Commission resolve its dispute with Northeast Florida regarding the VoIP policy issues Northeast Florida is now attempting to raise in its protest of the Commission's PAA Order.

15. SSI's undersigned counsel submitted a letter dated October 8, 2003, and personally addressed the Commission at its November 3, 2003, Internal Affairs Meeting, requesting that the Commission intervene and assert its jurisdiction over the VoIP policy issues involved in the civil suit initiated by Northeast Florida against SSI in Baker County Circuit Court. Northeast Florida addressed the Commission at that Internal Affairs Meeting, arguing against SSI's request, and stating that the Commission cannot award money damages and, therefore, it was entirely appropriate for the Baker County Circuit Court to decide these policy issues. After discussion and consideration, the Commission declined SSI's request that it intervene and assert its jurisdiction over the VoIP policy issues raised by Northeast Florida in its Complaint in the Baker County Circuit Court proceeding.

16. In response to SSI's *Motion to Dismiss Northeast Florida Telephone Company's Complaint or, in the Alternative, to Hold in Abeyance Northeast Florida Telephone Company's Complaint*, Northeast Florida argued to the Baker County Circuit Court that the Commission did not wish to entertain these policy issues and, by way of proof of such assertion, submitted a copy of the minutes of that Internal Affairs Meeting to the Court. (See Attachment A hereto.) However, after the Baker County Circuit Court upheld SSI's right to litigate its Anti-Trust Counterclaim against Northeast Florida, Northeast Florida apparently has decided that maybe the Commission is, after all, the appropriate forum for these policy issues. By writing a letter to inform the Commission regarding Mr. Woods' inadvertent error on SSI's application forms, Northeast Florida launched yet another attack against SSI in its attempt to destroy the Company. Northeast Florida now seeks to have the Commission address the identical policy issues Northeast Florida is currently litigating against SSI in the Baker County Circuit Court proceeding by filing this protest to the Commission's PAA Order. The Commission should not permit Northeast Florida to strategically manipulate the Commission's regulatory process in its anti-competitive campaign against SSI, its ONE AND ONLY competitor.

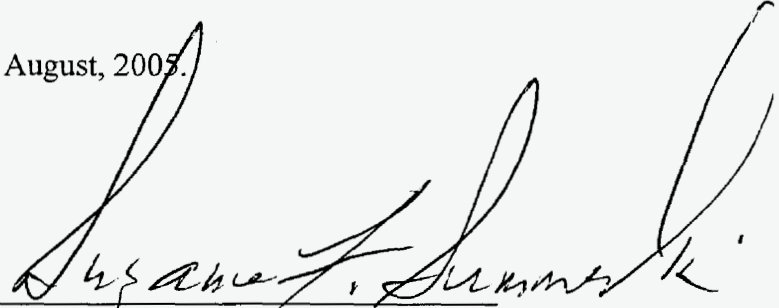
17. Simply put, in regard to SSI maintaining its CLEC, IXC, and AAV Certificates, there are no facts under which Northeast Florida would believe SSI has "sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served." Northeast Florida does not have standing to intervene in this matter nor does Northeast Florida, in any way, shape or form, represent the public's interest in this matter.

16. In response to SSI's *Motion to Dismiss Northeast Florida Telephone Company's Complaint or, in the Alternative, to Hold in Abeyance Northeast Florida Telephone Company's Complaint*, Northeast Florida argued to the Baker County Circuit Court that the Commission did not wish to entertain these policy issues and, by way of proof of such assertion, submitted a copy of the minutes of that Internal Affairs Meeting to the Court. (See Attachment A hereto.) However, after the Baker County Circuit Court upheld SSI's right to litigate its Anti-Trust Counterclaim against Northeast Florida, Northeast Florida apparent has decided that maybe the Commission is, after all, the appropriate forum for these policy issues. By writing a letter to inform the Commission regarding Mr. Woods' inadvertent error on SSI's application forms, Northeast Florida launched yet another attack against SSI in its attempt to destroy the Company. Northeast Florida now seeks to have the Commission address the identical policy issues Northeast Florida is currently litigating against SSI in the Baker County Circuit Court proceeding by filing this protest to the Commission's PAA Order. The Commission should not permit Northeast Florida to strategically manipulate the Commission's regulatory process in its anti-competitive campaign against SSI, its ONE AND ONLY competitor.

17. Simply put, in regard to SSI maintaining its CLEC, IXC, and AAV Certificates, there are no facts under which Northeast Florida would believe SSI has "sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served." Northeast Florida does not have standing to intervene in this matter nor does Northeast Florida, in any way, shape or form, represent the public's interest in this matter.

WHEREFORE, SSI respectfully requests that the Commission dismiss Northeast Florida Telephone Company's Protest of Proposed Agency Action Order and Petition for a Formal Administrative Hearing.

Respectfully submitted this 29th day of August, 2005.

A handwritten signature in black ink, appearing to read "Suzanne F. Summerlin". The signature is written in a cursive style with a large, sweeping initial 'S'.

SUZANNE F. SUMMERLIN  
Suzanne Fannon Summerlin, P.A.  
2536 Capital Medical Boulevard  
Tallahassee, Florida 32308  
(850) 656-2288

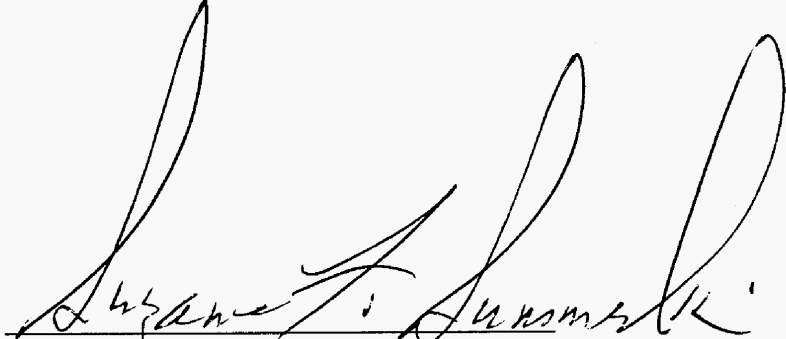
ATTORNEY FOR  
SOUTHEASTERN SERVICES, INC.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via  
U.S. Mail or hand delivery (\*) this 29th day of August, 2005, to the following:

C. Lee Fordham, Esq.\*  
Office of General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Kenneth A. Hoffman, Esq.  
Rutledge, Ecenia, Purnell & Hoffman, P.A.  
215 S. Monroe Street, Ste. 420  
P. O. Box 551  
Tallahassee, Florida 32301



Suzanne Fannon Summerlin, Esq.

IN THE CIRCUIT COURT OF THE EIGHTH  
JUDICIAL CIRCUIT IN AND FOR BAKER  
COUNTY, FLORIDA

Case No. 02-2003-CA-0141

NORTHEAST FLORIDA TELEPHONE  
COMPANY, a Florida Corporation,

Plaintiff,

vs.

SOUTHEASTERN SERVICES, INC.,  
a Florida Corporation,

Defendant.

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**PLAINTIFF NORTHEAST FLORIDA TELEPHONE COMPANY'S  
NOTICE OF FILING DEFENDANT SOUTHEASTERN SERVICES, INC.'S  
REQUEST FOR FLORIDA PUBLIC SERVICE COMMISSION  
INTERVENTION AND TRANSCRIPT OF NOVEMBER 3, 2003  
FLORIDA PUBLIC SERVICE COMMISSION  
INTERNAL AFFAIRS MEETING**

Plaintiff, Northeast Florida Telephone Company, by and through its undersigned counsel, hereby files a copy of the letter dated October 8, 2003 from Suzanne F. Summerlin, counsel for Defendant, Southeastern Services, Inc. ("SSI"), requesting that the Florida Public Service Commission move to intervene in the above styled cause and the original transcript from the November 3, 2003 Internal Affairs Meeting of the Florida Public Service Commission wherein the Florida Public Service Commission denied SSI's request.

Respectfully submitted,

John S. Cooper, Esq.  
Florida Bar No. 0910340  
100 West Call Street  
Starke, Florida 32091  
(904) 964-4701 (Telephone)  
(904) 964-4839 (Telecopier)

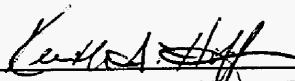
-- and --

Kenneth A. Hoffman, Esq.  
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860-681-6515 (Telecopier)

-- and --

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2120 L Street, Northwest  
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(202) 828-5568 (Telecopier)

Co-Counsel for Northeast Florida Telephone Company

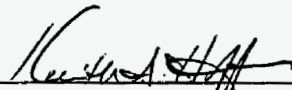
By:   
Kenneth A. Hoffman, Esq.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished by Hand Delivery this 18<sup>th</sup> day of December, 2003:

Suzanne Fannon Summerlin, Esq.  
Suzanne Fannon Summerlin, P.A.  
2536 Capital Medical Boulevard  
Tallahassee, FL 32309

  
\_\_\_\_\_  
Kenneth A. Hoffman, Esq.

NFTC\nnoticeoffiling

LAW OFFICES OF  
SUZANNE FANNON SUMMERLIN, P.A.

2536 CAPITAL MEDICAL BOULEVARD  
TALLAHASSEE, FLORIDA 32309

TELEPHONE (850) 656-2288  
TELECOPIER (850) 656-5589

October 8, 2003

Chairman Lila A. Jaber  
Commissioner Terry Deason  
Commissioner Rudy Bradley  
Commissioner Braulio Baez  
Commissioner Charles M. Davidson  
Dr. Mary Andrews Bane, Executive Director  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

RE: Request for Florida Public Service Commission Intervention in  
*Northeast Florida Telephone Company v. Southeastern Services, Inc.*  
Baker County Circuit Court Case No. 02-2003-CA-0141

Dear Chairman Jaber, Commissioners, and Dr. Bane:

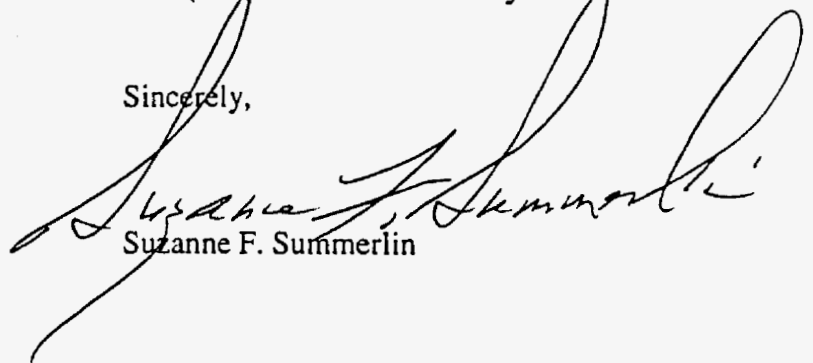
I represent Southeastern Services, Inc. ("SSI"). Attached please find a copy of SSI's *Motion to Dismiss Northeast Florida Telephone Company's Complaint or, in the Alternative, to Hold in Abeyance Northeast Florida Telephone Company's Complaint* filed September 24, 2003, in *Northeast Florida Telephone Company v. Southeastern Services, Inc.*, Case No. 02-2003-CA-0141. Also attached is a copy of the *Complaint* Northeast Florida Telephone Company filed against my client on September 4, 2003. Northeast Florida seeks payment from SSI of \$1,025,053.43 in "intrastate originating access charges" for the Voice Over Internet Protocol ("VoIP") services SSI provides.

In addition, I have included a copy of a federal court decision issued September 4, 2003, by the United States District Court for the Western District of Washington, *Washington Exchange Carrier Association, et. al. v. LocalDial Corporation*. In this decision, the federal court stayed all aspects of a suit filed by local exchange companies in Washington seeking the payment of access charges by LocalDial Corporation, a VoIP provider, and referred the core policy issues to the Washington Utilities and Transportation Commission.

SSI requests that the Florida Public Service Commission intervene in the Baker County Circuit Court proceeding to assert its exclusive jurisdiction over the telecommunications policy issues at the heart of this suit. As you are aware, SSI has an informal complaint pending before the Commission regarding these same issues. As you are also already aware, the Federal Communications Commission is currently addressing the identical policy issue of whether VoIP services providers should be required to pay access charges on those services. SSI's attached *Motion to Dismiss Northeast Florida Telephone Company's Complaint or, in the Alternative, Hold in Abeyance Northeast Florida Telephone Company's Complaint* contains SSI's arguments regarding the Florida Public Service Commission being the only entity with jurisdiction to determine these crucial telecommunications policy issues. Northeast Florida's *Complaint*, also attached, contains its arguments as to why the Circuit Court is the appropriate venue for its suit.

I believe the attached pleadings thoroughly set out SSI's support for its request that the Florida Public Service Commission intervene in this proceeding to assert the Commission's exclusive jurisdiction. Nonetheless, I would appreciate an opportunity to present this request for intervention and to answer any questions at the next Internal Affairs Meeting scheduled for October 20, 2003. SSI must schedule a hearing on its *Motion to Dismiss* in the very near future, so we would appreciate the Commission's earliest consideration of this matter. I may be reached at (850) 656-2288. Thank you for your consideration of this matter.

Sincerely,



Suzanne F. Summerlin

SFS/sbh

cc: Harold McLean, General Counsel, FPSC

Beth Keating, Chief, Telecommunications Bureau, Division of Legal Services, FPSC

Ms. Sally Simmons, Chief, Bureau of Competitive Markets, FPSC

✓ Kenneth A. Hoffman, Esq., Attorney for Northeast Florida Telephone Company

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION



IN RE: Consider request for FPSC intervention  
in Baker County Circuit Court Case No.  
02-2003-0141-CA; Northeast Florida Telephone  
Company vs. Southeastern Services, Inc.  
Guidance and a decision on intervention is  
sought.

---

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

PROCEEDINGS: INTERNAL AFFAIRS

ITEM NUMBER: 4

DATE: Monday, November 3, 2003

PLACE: 4075 Esplanade Way, Room 140  
Tallahassee, Florida

TRANSCRIBED BY: MARY ALLEN NEEL  
Registered Professional Reporter

ACCURATE STENOTYPE REPORTERS, INC.  
2894-A REMINGTON GREEN LANE  
TALLAHASSEE, FLORIDA 32308  
(850)878-2221

## PARTICIPANTS:

BENJAMIN DICKENS, on behalf of Northeast Telephone Company.

MICHAEL GROSS, on behalf of FCTA.

TRACY HATCH, on behalf of AT&T Communications.

TOM MCCABE, on behalf of TDS Telecom.

SUZANNE SUMMERLIN, on behalf of Southeastern Services, Inc.

MICHAEL TWOMEY, on behalf of AARP.

BETH KEATING and MARY BANE, FPSC Staff.

## PROCEEDINGS

1  
2 CHAIRMAN JABER: Our final item, 4.

3 DR. BANE: Ms. Summerlin is not signed up,  
4 Madam Chairman, but she wants to speak.

5 MS. KEATING: Commissioners, this item is  
6 staff's request for guidance on whether to  
7 intervene in Baker County Circuit Court on a  
8 dispute between Northeast Florida Telephone  
9 Company and Southeastern Services, Inc.

10 We are recommending that you allow us to  
11 petition to intervene, and we're also  
12 recommending that we ask the court to abate its  
13 proceedings and refer those issues that are in  
14 the Commission's jurisdiction back to the  
15 Commission to allow the Commission to handle  
16 them as it sees fit.

17 There are a number of options that we've  
18 laid out too for how you can address those  
19 issues if the court does in fact refer them  
20 back, but --

21 CHAIRMAN JABER: Okay. We've got -- I do  
22 have some people signed up to speak, Mr. Gross,  
23 Florida Cable; Ben Dickens, Northeast Florida  
24 Telephone Company. But recognizing this was  
25 originally because of the request of

1 Ms. Summerlin, we'll let you start.

2 MS. SUMMERLIN: Well, if you decide to go  
3 with Ms. Keating's recommendation, then I don't  
4 need to be talking at all. But anticipating --

5 CHAIRMAN JABER: Well, you don't know that  
6 yet.

7 (Laughter.)

8 MS. SUMMERLIN: But anticipating that they  
9 may have some other views, it's a very simple  
10 request that my client is making. Northeast  
11 Florida had gone to court to try to get payment  
12 of access charges from Southeastern Services,  
13 SSI, who is my client.

14 This is not an issue that the Commission  
15 wants 59 Circuit Courts across the State of  
16 Florida looking at, obviously dealing with just  
17 Florida right now. We believe that the  
18 appropriate place for this to be discussed and  
19 these decisions to be made are at the  
20 Commission.

21 We are not conceding any positions that we  
22 may take at a time in the future when the  
23 Commission addresses these issues. It's just  
24 simply that the PSC in my view has jurisdiction  
25 over this issue. Irregardless of these changes

1           that have been made to the statute in this last  
2           year, I think it's clear that whether or not  
3           VOIP services should be subject to access  
4           charges needs to be determined here at this  
5           Commission after the full discussion of all the  
6           -- there's a whole constellation of issues that  
7           go with this core issue.

8           Clearly, the FCC is looking at this right  
9           now. What we really would prefer is that the  
10          issue be -- that the core issues be brought from  
11          the Circuit Court to the PSC, and the PSC sits  
12          and waits for the FCC to make the decision.  
13          That to me is the -- (gap in tape) -- that we  
14          may make arguments about what telecommunications  
15          issues are versus other types of issues, but  
16          there's no reasonable way to assume that this is  
17          not something that falls within the umbrella of  
18          what the Commission is supposed to be doing.  
19          And it just simply doesn't make any sense for  
20          this argument to be going on over in Baker  
21          County, and my client should be able to deal  
22          with this here at the PSC.

23          We filed an informal complaint, which you  
24          know if you read any of this stuff, back in  
25          October of 2002. Reasonably, nobody dealt with



1           that complaint, because as you remember, the CNM  
2           Network's declaratory statement case, the  
3           Commission was concerned about what to do at  
4           that time, and the FCC is dealing with this  
5           issue, so it was put off for a period of time.

6           Obviously, Northeast Florida was not  
7           interested in being patient, so they filed their  
8           suit. They want to go after my client, my  
9           little client, for a million dollars plus. And  
10          it's a big ticket issue, and it's something with  
11          many, many ramifications. Obviously, you've got  
12          a number of people that are interested in it.  
13          And I want to reserve some opportunity to rebut  
14          whatever comes up.

15          CHAIRMAN JABER: Ms. Summerlin, you touched  
16          on something I wanted to ask you about. The  
17          AT&T petition that's pending in front of the  
18          FCC, I understand your position about the PSC  
19          having jurisdiction, but could you speak to  
20          whether the FCC also has jurisdiction, and why  
21          would -- you're obviously proposing that we  
22          exercise the option of intervening, asking the  
23          court to hold the case in abeyance until we  
24          decide the issue. But what's wrong with holding  
25          it in abeyance until the FCC decides the issue?

1 MS. SUMMERLIN: The thinking that I have  
2 here is that the FCC is going to make decisions,  
3 but the 99% likelihood is that the state  
4 commissions are going to have to implement  
5 whatever the FCC brings up. We're talking about  
6 the State of Florida, a Circuit Court in the  
7 State of Florida versus the Utility Commission  
8 in the State of Florida.

9 My view is that the PSC needs to take this  
10 matter back and abate any action on it until the  
11 FCC has decided that pending proceeding and then  
12 take whatever that issue -- the outcome of that  
13 issue and figure out from that point what to do  
14 on the state level. Who knows what the FCC is  
15 going to come up with and what kind of charge  
16 they may give the states to work with them on.  
17 You know, we don't know. Nobody knows what the  
18 upshot of that's going to be.

19 But as far as the State Commission, which  
20 is supposed to be regulating telecommunications  
21 issues versus a State Circuit Court, I think  
22 there's really no question.

23 I cited in the request I sent over here a  
24 decision from the State of Washington, the U.S.  
25 District Court. A U.S. District Court found it

1 appropriate to refer these policy issues to the  
2 State of Washington's Utility Commission, and I  
3 think that says a lot for the reasonableness of  
4 that approach.

5 As I said before, I'm not conceding any  
6 arguments that SSI or Southeastern may bring up  
7 at any later proceeding that we may have here at  
8 the Commission, but that's not the point. The  
9 point is the subject matter here needs to be at  
10 the Commission. What the ultimate decision is  
11 about how much the Commission regulates VOIP  
12 providers, that's another whole issue. I mean,  
13 there's a whole bunch of stuff that's going to  
14 have to happen in that arena. But in terms of  
15 the initial -- having it in the right forum, it  
16 needs to be in the State Commission.

17 CHAIRMAN JABER: Okay. And I may be  
18 reading more into what you've said, but does  
19 that -- you're not wanting to concede arguments,  
20 appropriately so, I understand, at a future  
21 state proceeding. Does that mean that if the  
22 FCC decides in a fashion that's favorable to  
23 you, your argument here will be, "State  
24 Commission, you've been preempted by the FCC"?

25 MS. SUMMERLIN: Well, I would never concede

1           that we won't make arguments like that if it  
2           seems to be appropriate at a later time.  But  
3           right now, I think that as opposed to a State  
4           Circuit Court versus the State Utilities  
5           Commission, the State Commission is where this  
6           matter needs to be.

7           That doesn't mean that the FCC does not  
8           preempt this Commission on some issues, but the  
9           point is, once the FCC finishes its proceeding,  
10          there may be -- we don't know at this point what  
11          the rule is going to be for the FCC.

12          My client doesn't have the luxury of saying  
13          to the State Circuit Court, "Send this matter up  
14          to the FCC."  Northeast Florida clearly has  
15          clearly already thrown the ball out into the  
16          court.  It's not anything that my client has  
17          initiated.  My client has no choice but to  
18          respond.

19          CHAIRMAN JABER:  Can you move to dismiss it  
20          because it's an issue pending at the FCC?

21          MS. SUMMERLIN:  We have filed a motion to  
22          dismiss stating that the Florida PSC has  
23          exclusive jurisdiction in the State of Florida  
24          over telecommunications issues generally.  That  
25          does not mean that the FCC on some points is not

1 going to preempt the PSC. What we have also  
2 alluded to in our motion to dismiss is that the  
3 FCC is currently dealing with a proceeding on  
4 this very issue.

5 You know, we've done everything we can, and  
6 that pending motion to dismiss has not been set  
7 for hearing yet. That's why I have asked for  
8 the PSC to intervene.

9 CHAIRMAN JABER: Okay. Commissioners, do  
10 you have questions of Ms. Summerlin at this  
11 point?

12 Mr. Dickens? I would like to skip the  
13 order, Mr. Gross, and go to Mr. Dickens, because  
14 you are -- Northeast Florida Telephone Company  
15 has brought the complaint in Circuit Court;  
16 right?

17 MR. DICKENS: Yes.

18 CHAIRMAN JABER: So go ahead.

19 MR. DICKENS: I'll be glad to --

20 COMMISSIONER DEASON: I didn't know  
21 Mr. Dickens worked this late.

22 MR. DICKENS: Can we continue this?

23 CHAIRMAN JABER: Today. Welcome.

24 MR. DICKENS: Yes. Thank you. Thank you.  
25 For the record, I'm Ben Dickens representing

1 Northeast Florida Telephone. I've been here  
2 with you all day, so I'll try to be brief,  
3 feeling your pain.

4 CHAIRMAN JABER: I'm so sorry.

5 MR. DICKENS: Let me kind of put this in  
6 some context for you. Okay? This is indeed a  
7 million dollar case. It's a million dollars in  
8 lost access charges, the way Northeast Florida  
9 looks at it.

10 In the prior item, or I think it was Item  
11 No. 2 when you were talking about the report,  
12 there was a brief discussion with your staff  
13 about the fact that AT&T pays originating access  
14 charges on phone-to-phone voice over Internet  
15 protocol service. That's what this is. This is  
16 originating phone-to-phone long distance toll  
17 telephone service using the Internet as a  
18 transmission link.

19 The Northeast Florida facilities that  
20 Ms. Summerlin's client is using are provided  
21 under a local resale agreement that restricts  
22 the use of those facilities for local purposes,  
23 not long distance. And there's an associated  
24 general subscriber tariff that's also involved  
25 in reference to the resale agreement, because

1 what they've purchased out of the tariff are PRI  
2 circuits which is, of course, ISDN. But both  
3 the tariff and the resale agreement restrict  
4 those for local purposes.

5 COMMISSIONER DAVIDSON: So you're saying --  
6 I mean, basically is your argument factually  
7 that this case, the case doesn't belong at the  
8 PSC? It belongs in court is your argument?

9 MR. DICKENS: Correct. I think that the  
10 Commission may have a stake in it. I think that  
11 intervening and asking the court to stay the  
12 proceeding and send it to never-never land at  
13 the FCC is -- excuse me, but, you know, I'm just  
14 speaking from the heart, being from Washington  
15 -- is, you know, a chain saw approach, when  
16 maybe a scalpel is the better instrument here.

17 And I do -- I will address how I think we  
18 can maybe make the Commission warm and fuzzy  
19 with your stake in this if it should become more  
20 evident.

21 CHAIRMAN JABER: I don't think we can stand  
22 any more warm and fuzzy today.

23 (Laughter.)

24 MR. DICKENS: But anyway, what happened  
25 is, Northeast Florida and SSI executed this

1 resale agreement for local services, and then  
2 SSI ordered some more circuits under their local  
3 agreement and service ordering form and didn't  
4 tell us at all, just didn't tell Northeast  
5 Florida at all what they were using the  
6 facilities for. And later Northeast Florida  
7 discovered that indeed, SSI, even though it has  
8 an interexchange carrier certificate, had built  
9 a long distance service around the use of these  
10 local facilities. And it represents a great  
11 deal or amount of lost access minutes on the  
12 originating side, the same stuff AT&T pays for  
13 to my client.

14 So what do we do? Do we come to the  
15 Commission? You know, we're trying to figure  
16 this out. How do we address my client's  
17 economic loss, their concern, their claim?

18 Well, we do some research, and we discover  
19 that you can't award money damages,  
20 unfortunately. We look at the agreement that we  
21 signed with SSI. The agreement says the  
22 enforcement of rights coming out of this  
23 agreement goes to Circuit Court in Baker  
24 County. We look at the case law. The case law  
25 from this Commission in the Supra case says



1 fraud claims are properly resident in Circuit  
2 Court. This Commission regulates rates, but  
3 fraud claims are properly filed in Circuit  
4 Court.

5 There's also a Supreme Court case called  
6 Deltona vs. Mayo that's also on point, a 1977  
7 case.

8 But in any event, we filed in Circuit Court  
9 to enforce our rights. We filed a fraud claim.  
10 We filed an unfair and deceptive trade practice,  
11 and breach of contract, and common law claims of  
12 conversion and unjust enrichment. I think I  
13 remembered all five.

14 In any event, now what you have before you  
15 is a recommendation that you intervene in the  
16 case and either decide that the question of  
17 whether access applies to voice-over-Internet or  
18 not or let the FCC do it. And I guess what  
19 we're saying is, we're not necessarily asking  
20 the Circuit Court to make a regulatory  
21 determination.

22 We filed a fraud claim, which is a serious  
23 civil claim. We have professional liability,  
24 and so does our client, for making frivolous  
25 lawsuits. We didn't undertake this lightly.

1 But you don't -- for better or worse, the  
2 Commission does not decide tort claims. You  
3 don't decide fraud claims and contract  
4 breaches. Sometimes we wish you did.

5 In any event, I said earlier that we don't  
6 necessarily -- we don't contest the fact that at  
7 some point the Commission may have a stake in  
8 this litigation. We're not asking the Circuit  
9 Court to decide or to establish regulatory law.  
10 But if you intervene and ask the court to stay  
11 the case pending a regulatory determination of  
12 all the complex voice-over-Internet issues, like  
13 computer-to-computer calling, phone-to-computer,  
14 and the whole complicated ball of string that's  
15 in Washington on this, our justice will be  
16 delayed a long time. I've had cases that took  
17 11 years to decide at the FCC, contested cases  
18 with a plaintiff and a defendant.

19 So we're asking you please do not do that,  
20 because we feel like we're entitled to our day  
21 in court. We're not stepping on the  
22 Commission's toes.

23 If the Commission needs or feels the need  
24 to have some involvement in this case, we think  
25 that the far better way to protect the

1 Commission's stake is to have your staff monitor  
2 the case. We'll be glad to meet with the staff  
3 whenever the staff would like us to meet with  
4 them. And if it becomes necessary to act in an  
5 amicus -- a friend of the court, an amicus role,  
6 we would support that. I mean, we're not going  
7 to at all argue to the court that it's  
8 inappropriate for the Commission to show up.

9 But please don't make the determination now  
10 that without -- we just filed the complaint.  
11 Ms. Summerlin just filed the motion to dismiss.  
12 We responded to it. The Court hasn't ruled.  
13 It's very premature to take the very harsh step  
14 of asking the court to stay our lawsuit for what  
15 may be an indeterminate period of time, when we  
16 don't think that we've really stepped on the  
17 Commission's toes.

18 I want to mention the Washington case that  
19 Ms. Summerlin mentioned that was referred to the  
20 Washington Commission by a federal court. That  
21 case did not involve fraud. It was a straight  
22 access charge claim. That's not the kind of  
23 case we brought.

24 We believe we can prove what we filed, or  
25 else we wouldn't have done it.

1           So anyway, please don't intervene and ask  
2           for a stay. Take a more measured approach, such  
3           as acting in a friend of the court capacity.  
4           we'll support you in any way we can to do that  
5           and cooperate in any way we can with you and  
6           your staff.

7           Thank you.

8           CHAIRMAN JABER: Thank you, Mr. --

9           MR. DICKENS: Do you have any questions?  
10          I'm sorry.

11          CHAIRMAN JABER: Thank you, Mr. Dickens.  
12          Commissioners, do you have questions at this  
13          point?

14          Okay. Mr. Gross?

15          MR. GROSS: Good afternoon once again,  
16          Chairman Jaber and members of the Commission.  
17          Michael Gross on behalf of the FCTA.

18          I would just like to point out that  
19          presently I'm not aware of any FCC or FPSC  
20          requirement that VOIP providers pay access  
21          charges. Now, of course, there's a lot of  
22          different VOIP technologies out there, and  
23          that's one of the problems that I think the FCC  
24          has faced in the past and one of the reasons  
25          they've avoided addressing the issue.

1           As you all know, the number of states that  
2           are either investigating, workshopping, or  
3           moving towards regulation of VOIP is growing as  
4           we speak.

5           In our opinion, a uniform national policy  
6           would be indicated under these circumstances  
7           rather than have a multiplicity of states ruling  
8           in different manners on the obligations or  
9           regulatory status of VOIP providers. I think it  
10          would create uncertainty and have a chilling  
11          effect on deployment and investment with respect  
12          to a nascent technology.

13          I know that the Commission has already  
14          addressed this issue in two or three different  
15          contexts. There was a VOIP workshop and the CNM  
16          petition for declaratory statement. In that  
17          proceeding, the FCTA filed a brief in opposition  
18          to the petition for declaratory statement and  
19          did refer to -- I believe it was the FCC's  
20          intercarrier compensation docket, where they  
21          actually made statements to the effect that  
22          access charges do not currently apply to VOIP,  
23          which just left the whole issue uncertain at  
24          this point.

25          Presently at the FCC, there is the AT&T

1 declaratory statement, or declaratory ruling at  
2 the FCC, petition, and then a similar petition  
3 for declaratory ruling that has more recently  
4 been brought by Vonage arising out of their  
5 dispute with the Minnesota Commission, which you  
6 probably all know resulted ultimately, or at  
7 least at this point, in a permanent injunction  
8 against the Minnesota Commission's attempts to  
9 regulate VOIP on the basis that VOIP is an  
10 information service.

11 Now, the Minnesota Commission is asking for  
12 reconsideration of that permanent injunction at  
13 this point in time. But the issue has also been  
14 pending for quite a while in the FCC's  
15 intercarrier compensation docket.

16 But what is more promising is that -- as  
17 far as an FCC resolution in the near term, is a  
18 series of public statements that have been  
19 coming out of the FCC Wireline Bureau. And as  
20 recently as October 30th in TR Daily, Michael  
21 Powell was quoted in a public statement as  
22 saying that the FCC is going to initiate an  
23 NPRM, a notice of proposed rulemaking, this  
24 year. So obviously, that would be either this  
25 month or next month.

1           And Chairman Powell explained that the NPRM  
2 would be on a faster track than a notice of  
3 inquiry, because the notice of inquiry has an  
4 additional step that after the notice of  
5 inquiry, then an NPRM would be initiated, where  
6 going directly to the NPRM and soliciting  
7 comments, that the FCC would be able to more  
8 directly dispose of these VOIP-related issues.  
9 And in the public statement, he made it very  
10 clear how aware the FCC is of how problematic  
11 the issue is and the necessity of an expeditious  
12 ruling.

13           COMMISSIONER DAVIDSON: So it's your  
14 position for us to intervene?

15           MR. GROSS: So our position is that -- that  
16 was some background -- to intervene, because I  
17 think --

18           COMMISSIONER DAVIDSON: Thank you.

19           MR. GROSS: Okay. I'm sorry. I'm a  
20 lawyer.

21           COMMISSIONER DAVIDSON: It's not like you  
22 to --

23           (Laughter.)

24           MR. GROSS: I'm a lawyer. Right. I've  
25 been accused of being verbose in the past.

1 I think the -- I agree with the statement  
2 that -- or the question that Chairman Jaber  
3 raised a few moments ago about why not just ask  
4 the court to abate the action pending a ruling  
5 by the FCC. And my concern is that the PSC has  
6 the credibility and the authority to go in and  
7 intervene and get the attention of the Circuit  
8 Court and take charge of this issue, and then,  
9 assuming the issue does end up back here, defer  
10 to the FCC. But if the FCC doesn't rule for,  
11 you know, an inordinate period of time, then  
12 perhaps some other action might be indicated at  
13 that time.

14 CHAIRMAN JABER: Mr. Gross, Mr. Dickens in  
15 his presentation said, "Look, these are issues  
16 related to fraud, and we're seeking damages, and  
17 that's something that the PSC has no  
18 jurisdiction over." If that's correct, then --

19 MR. GROSS: I would agree that as far as  
20 their claim is based on common law and  
21 contractual issues, and if it can be resolved  
22 solely on those issues, then perhaps it should  
23 remain in the Circuit Court. But any also issue  
24 on VOIP vis-a-vis access charges --

25 CHAIRMAN JABER: Okay. Have you done a



1 review, any sort of review of the claim in  
2 Circuit Court to determine whether it's issues  
3 limited to fraud?

4 MR. GROSS: I've taken a cursory look at  
5 it, but I really would feel it would be  
6 inappropriate for me to express a legal opinion  
7 on the merits of those claims at this point.

8 CHAIRMAN JABER: Okay. Anyone else --

9 MR. GROSS: Thank you.

10 CHAIRMAN JABER: -- to address the  
11 Commission? We've got -- Mr. McCabe, are you  
12 standing up because you're --

13 MR. MCCABE: I would like to --

14 MR. TWOMEY: Go first, please.

15 CHAIRMAN JABER: Mr. McCabe, and then  
16 Mr. Twomey.

17 MR. MCCABE: Tom McCabe with TDS Telecom.  
18 We do support Northeast's position.

19 The question I have is, I guess what I'm  
20 doing is looking for direction from the  
21 Commission. We are one of the small local  
22 exchange companies in the state that has lost 1  
23 million terminating minutes a month from AT&T  
24 and 92% of the terminating minutes from another  
25 long distance provider that's a major provider,

1 and those are significant access revenues for a  
2 small company.

3 We don't know what restitution we're going  
4 to have in terms of being able to recover these  
5 monies. If we defer to the FCC, unfortunately,  
6 I mean, we -- this issue was brought to the  
7 Commission over a year ago, and at that time the  
8 Commission --

9 CHAIRMAN JABER: Yes, and as I recall, all  
10 of you kind of showed up and said, you know, the  
11 FCC is just -- we expect in the spring -- wasn't  
12 it the spring? Right?

13 MR. MCCABE: Exactly.

14 COMMISSIONER BAEZ: Which spring?

15 CHAIRMAN JABER: It was in the spring we  
16 decided that the FCC would decide that issue.  
17 And I remember, I was adamant in terms of  
18 waiting because of that representation, and I  
19 remember asking staff to come back to us if that  
20 didn't happen that spring. And frankly, I've  
21 dropped the ball and haven't asked staff about  
22 it since then.

23 MR. MCCABE: And it might be December when  
24 the FCC issues the NPRM, but it's still going to  
25 be months before anything happens. And then

1 from --

2 CHAIRMAN JABER: Well, you didn't come back  
3 to us.

4 MR. MCCABE: -- there, there will be  
5 appeals.

6 CHAIRMAN JABER: Why haven't you come back  
7 to us?

8 MR. MCCABE: Why haven't we come back?

9 CHAIRMAN JABER: Yes. You heard what we  
10 said at that agenda. I specifically directed  
11 staff, we did -- it was a consensus decision  
12 that if something hadn't happened in a certain  
13 period of time that --

14 MR. MCCABE: From TDS's perspective, we are  
15 just starting to see the fringes of it. We know  
16 the City of Quincy has a CLEC certificate.  
17 They've come out and said that they're going to  
18 be providing voice over IP. They're not in  
19 service yet.

20 At the time, my position was to come back.  
21 Northeast was trying to evaluate what was in the  
22 best interests for them. Another one of the  
23 other small LEC providers, it was only two  
24 months ago where they lost over a million and a  
25 half minutes of terminating traffic. So all of

1 sudden, yes, we're starting to have some really  
2 big concerns out there in terms of this  
3 revenue.

4 Then when we have the CLEC -- I mean, I  
5 don't know how to go about negotiating a resale  
6 agreement. I can have a deposit requirement in  
7 there. Well, if I'm losing, you know, 500,000  
8 minutes in access, they're saying they don't  
9 have to pay it, but what if it's determined that  
10 they do have to pay it? How am I going to get  
11 it? I mean, these --

12 CHAIRMAN JABER: Okay. So it's your  
13 position that --

14 MR. MCCABE: We support Northeast's  
15 position. We think that that proceeding should  
16 go forward. However, at the same time, I think  
17 it would be well within this Commission's  
18 interest to move forward on a determination on  
19 whether -- the whole issue of access and voice  
20 over IP.

21 CHAIRMAN JABER: So as it relates to the  
22 damages and the fraud issue, you think that  
23 appropriately belongs in court?

24 MR. MCCABE: Yes, ma'am.

25 CHAIRMAN JABER: You are urging us to make

1 a decision on the policy issue.

2 MR. MCCABE: That's correct. However, if  
3 you were to determine that it doesn't belong in  
4 court, our position would be that you go ahead  
5 and take this issue, and you don't defer it to  
6 the FCC.

7 CHAIRMAN JABER: Commissioners, do you have  
8 any questions of Mr. McCabe?

9 Mr. Twomey.

10 MR. TWOMEY: Madam Chair and Commissioners,  
11 I would --

12 CHAIRMAN JABER: Well, Mr. Hatch, you want  
13 to speak to? Come on.

14 MR. HATCH: Go ahead.

15 CHAIRMAN JABER: No, I think I would like  
16 to hear from all the industry first. Go ahead.

17 MR. HATCH: We would support the SSI  
18 request that you assert jurisdiction over the  
19 subject matter and then defer pending the FCC.

20 At the end of the day, regardless of who's  
21 winning or who's losing, the FCC will make this  
22 decision, and it will make whatever decision you  
23 make in the interim probably wrong, because you  
24 will not guess consistent with what the FCC did.  
25 It just statistically probably won't happen.

1                   COMMISSIONER BAEZ: You can say it's  
2 consistent --

3                   CHAIRMAN JABER: So why are we going --  
4 yes, so why -- as I recall, this is --  
5                   (Simultaneous conversation.)

6                   MR. HATCH: It would be a fortuitous  
7 occurrence that it matches precisely what the  
8 FCC decided it was going to do.

9                   CHAIRMAN JABER: As I recall, this is why I  
10 was so adamant in having that issue possibly  
11 decided in the spring by the FCC so that this  
12 agency would not expend resources and waste its  
13 time deciding an issue that would only be  
14 preempted.

15                   MR. HATCH: I agree with you, and I still  
16 think -- well, now that the FCC is in fact  
17 moving, there's just so much pressure for them  
18 to move that they can't --

19                   CHAIRMAN JABER: Just because an FPRM is  
20 going to be issued doesn't mean movement.

21                   Mr. Twomey. Mr. Twomey, and then we'll let  
22 Ms. Summerlin respond.

23                   MR. TWOMEY: Madam Chair --

24                   CHAIRMAN JABER: Oh, you're not done?  
25                   (Laughter.)

1                   CHAIRMAN JABER: Go ahead, Tracy. I'm  
2 sorry. Go ahead.

3                   MR. HATCH: To your question about the  
4 fraud complaints, it is true that you don't -- I  
5 won't concede you don't have damages  
6 jurisdiction, because I'm still going to fight  
7 that sooner or later, someday. But the real  
8 point is, if the core subject matter of the case  
9 at issue is whether access charges apply, if  
10 access charges don't apply, it obviates their  
11 fraud and their conversion and their unjust  
12 enrichment claims.

13                   CHAIRMAN JABER: Go ahead, Mr. Twomey.

14                   MR. TWOMEY: Madam Chair and Commissioners,  
15 I want to start by saying just because you're  
16 paranoid doesn't mean that someone still isn't  
17 out to get you. Okay?

18                   MR. GROSS: Or from your lips to God's  
19 ears.

20                   (Laughter.)

21                   MR. TWOMEY: This isn't, as Mr. Dickens  
22 says, a million dollar case. It might be a \$100  
23 million case or more.

24                   When I was railing with my Florida utility  
25 watch hat on trying to get the Governor to veto

1 this legislation, one of the things I pointed  
2 out repeatedly was the fact that they had built  
3 into this legislation the VOIP trigger, that  
4 using some totally unrelated issue would trigger  
5 circumstances whereby you would be divested of  
6 the necessity and responsibility of hearing the  
7 access fee cases that are before you now, the  
8 three cases, and that the rate increases would  
9 probably jump by 50 to \$100 million more per  
10 year automatically. And we're at that point  
11 now.

12 As your staff has indicated in the last  
13 page of the recommendation, if -- let me get my  
14 glasses out. They say at the middle of the  
15 second page under the paragraph "Current  
16 Statutory Provisions," down about the middle,  
17 Section 364.164(8), Florida Statutes --

18 COMMISSIONER BRADLEY: Did you say on the  
19 last page?

20 MR. TWOMEY: Sir?

21 COMMISSIONER BRADLEY: Last page?

22 MR. TWOMEY: Of the staff part, sir, yes.

23 COMMISSIONER BRADLEY: Oh, okay.

24 MR. TWOMEY: There's only two pages of your  
25 staff's discussion.



1                   COMMISSIONER DAVIDSON: Are you under  
2 "Current Statutory Provisions"?

3                   MR. TWOMEY: Yes, sir. And it says that  
4 provision of the statute further states that if  
5 the FCC or the FPSC issues a final order  
6 determining VOIP service or its functional  
7 equivalent are not subject to the payment of  
8 access charges to local exchange companies as  
9 specified in the LECs's tariffs or  
10 interconnection agreements, then the LECs are  
11 allowed to reduce their access charges to their  
12 respective reciprocal compensation rates in a  
13 revenue-neutral manner as if the FPSC had  
14 approved each LEC's petition to reduce its  
15 access charges.

16                   Now, as you all will recall, I think, the  
17 petitions before you now ask to reduce access  
18 fees to -- I think it's roughly in the  
19 neighborhood of a little bit under a penny for  
20 BellSouth and someplace in the neighborhood of  
21 -- I want to say two cents for the other two,  
22 Sprint and Verizon. Those reductions from their  
23 current levels require lost access revenues of  
24 355.5 million and corresponding rate increases  
25 in an equal amount.

1           The reciprocal compensation rate is  
2 something on the order of one-tenth of one  
3 cent. So instead of going to one penny,  
4 BellSouth would go down to a tenth of a penny.  
5 Instead of going down to two cents, Verizon and  
6 Sprint would be going down to one-tenth of one  
7 cent. Okay?

8           Now, at one time I started to try and  
9 calculate how much revenue that would add, and I  
10 gave up. I mean, I could do it, but I just  
11 stopped. I didn't have time.

12           COMMISSIONER BAEZ: We know you could.

13           MR. TWOMEY: But it's a boat-load of money.  
14 And the LECs can tell you. If you ask the LECs  
15 how much more would it take to get down to  
16 one-tenth of one cent, they could tell you.  
17 They've figured it out, I'm sure.

18           So we're at the point now that if you all  
19 take into your bosom this case and decide that  
20 access fees aren't appropriate, the good news  
21 is, you don't have to hear those cases in mid  
22 December. The bad news is, you don't have to  
23 hear those cases in December because the statute  
24 these folks drew up says that if that happens,  
25 either by yourselves or the FCC, all bets are

1 off, the cases are off, they come in, and they  
2 reduce their rates on access down to one-tenth  
3 of one cent and raise their local rates even  
4 more than they're now proposing, and you don't  
5 have a thing to say about it.

6 COMMISSIONER DAVIDSON: Well, I don't think  
7 anyone has suggested that we say -- that we make  
8 that statement that VOIP is not subject to  
9 regulation. I think the argument is this is  
10 within the subject matter of the PSC and it  
11 would come here, but not that we would issue the  
12 declaration that would then trigger the scenario  
13 you've just described.

14 MR. TWOMEY: well, it seems to me,  
15 Commissioner, that if it comes here, you've got  
16 -- a coin toss isn't right, but you have two  
17 choices, as I see it. You say that access  
18 charges are in fact owed to the LECs, and I'm  
19 not going to take a position on that, or you say  
20 they don't.

21 And if you say they aren't because you want  
22 to allow and encourage the propagation of this  
23 new technology and all that kind of thing, kind  
24 of like the business with the Internet and ISP  
25 charges not being taxed, if you do that, then

1           you trigger that provision, and the local rate  
2           increases are going to go up even higher than is  
3           being requested now, and you won't have a say  
4           about it.

5                     There won't be any public interest test.  
6           There won't be any residential benefit test.  
7           There won't be any test at all. They'll do it,  
8           because they drew the statute that way to say  
9           that it happens automatically as if you decided  
10          in their favor.

11                    COMMISSIONER DAVIDSON: Well, I understand  
12          your concern, but a court can't make the  
13          determination of whether the payment of switched  
14          network access rates or other intercarrier  
15          compensation related to VOIP is -- I mean, that  
16          really is an issue within the purview of the PSC  
17          or the FCC.

18                    MR. TWOMEY: Yes, sir. But what  
19          Mr. Dickens -- your staff has given you a couple  
20          of choices here, and so I want to make a  
21          recommendation. I've given you my fear. My  
22          fears are real. If this happens, what I said is  
23          going to -- you know, if you make a decision on  
24          this, you know, you take it in voluntarily and  
25          decide this, you need to know that if you make

1 the decision that access fees aren't charged,  
2 rates are going to go through the roof.

3 COMMISSIONER DAVIDSON: well, what if we  
4 decide phone to phone, VOIP for phone to phone  
5 is subject to access fees, maybe phone to PC is  
6 not, PC to PC is not, and PC to phone is not,  
7 but perhaps phone to phone is. And I'm not  
8 saying that's what we would do, but there are  
9 lots of scenarios. Or, as Commissioner Baez  
10 just said, what if we hold that in abeyance and  
11 don't make that determination?

12 MR. TWOMEY: well, sir, that may be true.  
13 And as you will recall, courts typically --  
14 although this is not a court, but it's an  
15 administrative court. Courts are typically  
16 loath to make decisions they don't have to. And  
17 Mr. Dickens has said we've styled our case in  
18 the nature of fraud and tort and so forth, and  
19 we're seeking damages, none of which you can  
20 decide. Now, if it turns out -- so you can't  
21 decide the core issues in this case, as he  
22 says. We're losing money. We want that. Okay?

23 I would suggest to you that you stay out of  
24 the case. There's no problem. If he wins or  
25 loses and they take it to the First DCA and

1           somebody else in another circuit gives a  
2           contrary decision, then you have conflict cert.  
3           You know, it can go to -- typically -- I mean,  
4           it could essentially go to the Supreme Court.

5           You don't need to do it. And so I'm --  
6           without having read in detail the pleadings, I  
7           find his answer to be appealing. You can't  
8           decide the damages issue. You can't decide the  
9           tortious or fraud issue. So I would say leave  
10          it with the Circuit Court, see what they do, and  
11          don't take onto yourself a decision that might  
12          increase the rates of the customers of this  
13          state another \$100 million.

14           COMMISSIONER BAEZ: Mr. Twomey --

15           CHAIRMAN JABER: Mr. Twomey --

16           COMMISSIONER BAEZ: Oh, I'm sorry. Go  
17          ahead.

18           CHAIRMAN JABER: With regard to what you  
19          said on the court deciding the fraud issue or  
20          not, let's say hypothetically speaking, even if  
21          legally the court shouldn't decide any policy  
22          decisions, but they do, as it relates to the  
23          statute, a court decision doesn't trigger the  
24          statute.

25           MR. TWOMEY: It does not. Only --

1                   CHAIRMAN JABER: The statute is clear, PSC  
2 or FCC.

3                   MR. TWOMEY: Yes, ma'am.

4                   CHAIRMAN JABER: So what the court may or  
5 may not do won't trigger the implementation of  
6 the petitions being accelerated.

7                   MR. TWOMEY: That's correct.

8                   COMMISSIONER BAEZ: well, my question is  
9 related to that. You're saying all of this with  
10 the full knowledge that on some level, for some  
11 indeterminate time -- we don't know how that  
12 is. We've heard lot of talk about how long it  
13 might take or how long it might not take.

14                   The fuse is already lit on this thing. I  
15 mean, there's going to be an FCC decision. That  
16 trigger -- and that's certainly something that  
17 we can't control. I mean, do you feel that? I  
18 mean, do you agree with that? Regardless of  
19 what our participation winds up being or not --

20                   MR. TWOMEY: Mr. Dickens said that he's had  
21 cases take 11 years to get resolved. Okay?

22                   As somebody that represents consumers,  
23 little old ladies, little old men, the elderly,  
24 I'm not -- I could care less about how -- right  
25 now, how the FCC or the Commission comes down on

1 this. I argued that this trigger was  
2 irrelevant, it didn't belong in there, and that  
3 -- it just didn't belong.

4 So, you know, my answer to you,  
5 Commissioner, is that if you're saying to me,  
6 I'm going to wrestle you down and take five  
7 bucks from you now, or I might do it next month,  
8 I'm going to pick next month.

9 COMMISSIONER DAVIDSON: I would pay 20 to  
10 see it happen now.

11 (Laughter.)

12 MR. TWOMEY: You know what I'm saying. If  
13 you defer --

14 (Simultaneous conversation.)

15 MR. TWOMEY: If you defer this decision,  
16 it's in the interest of ratepaying consumers to  
17 defer this decision as long as possible, even if  
18 it's known with certainty that it will happen  
19 next year. Okay? But it's not known that it  
20 will happen next year.

21 COMMISSIONER BAEZ: You're right. Can you  
22 still -- is there a solution in your mind where  
23 we can still -- we can still respect the  
24 jurisdiction of this Commission and not -- and  
25 not do anything to trigger -- you see what I'm



1 saying?

2 MR. TWOMEY: Yes, I do.

3 COMMISSIONER BAEZ: And I'm having trouble  
4 turning my back on this when it's so clearly --  
5 when we so clearly have something to do with  
6 it. I think even Mr. Dickens would agree with  
7 that. Do you see what I'm --

8 MR. TWOMEY: Yes, I do. And I think the  
9 answer is, as he suggested, track the case, if  
10 you need to, file an amicus. It will drag on a  
11 little bit. And then I think the best idea is  
12 for me and the AARP and others to try and get  
13 legislation filed that rips out that damnable  
14 VOIP trigger provision.

15 COMMISSIONER DAVIDSON: You should go over  
16 to Baker County and talk to the judge as well.  
17 We're bringing it --

18 MR. TWOMEY: Anyway, that's -- those are my  
19 fears, which are real. And you're right. It  
20 may -- the fuse is lit. That doesn't mean it  
21 can't be --

22 COMMISSIONER BAEZ: No, but it could take  
23 -- it could take 11 years. I mean, we really  
24 don't know. You're absolutely right.

25 MR. TWOMEY: And we would like it to. You

1 know, better to live to fight another day. So  
2 my advice would be stay out of it, except to  
3 monitor it, track the case, if you feel it  
4 necessary to have amicus pleading, and then see  
5 what happens.

6 CHAIRMAN JABER: Ms. Summerlin, I promised  
7 you an opportunity to respond, and then  
8 Commissioner Baez has a question.

9 MS. SUMMERLIN: I'm not going to belabor  
10 anything. I just have to respond to the fraud  
11 thing.

12 This business about this being a fraud  
13 case, there are five counts to this complaint,  
14 and they are Circuit Court -- they're the counts  
15 that you would litigate in a Circuit Court. The  
16 problem is, the core issue here is whether  
17 access charges are appropriate for providers of  
18 voice services. That's the core. That's the  
19 gut of it.

20 If that decision is determined in the  
21 appropriate regulatory forum, wherever that --  
22 whether it ends up here or at the FCC level,  
23 obviously, the FCC is going to make the  
24 decision. If there were --

25 CHAIRMAN JABER: What were the five counts,

1 Ms. Summerlin? I think that's important.

2 MS. SUMMERLIN: Unjust enrichment,  
3 conversion, breach of contract, the resale  
4 agreement, the tariff.

5 COMMISSIONER BAEZ: Can I just ask a  
6 question? I can't even -- I can't remember  
7 having stepped into a courtroom where I wasn't a  
8 defendant, so -- maybe more on that --

9 (Laughter.)

10 COMMISSIONER BAEZ: Ms. Summerlin, what  
11 you're describing is a defense. I guess you've  
12 thrown up this -- what you keep saying, this  
13 core question is in fact a defense, or am I  
14 missing -- am I forgetting a couple of chapters  
15 here?

16 COMMISSIONER DAVIDSON: Did you raise this  
17 as a defense?

18 COMMISSIONER BAEZ: Did you raise this as a  
19 defense?

20 MS. SUMMERLIN: I filed a motion to dismiss  
21 for lack of subject matter jurisdiction. Until  
22 that's determined, then you file your answer and  
23 defenses at a late point.

24 COMMISSIONER BAEZ: Okay. All right.

25 CHAIRMAN JABER: But the reason I asked

1           what counts there are is because there is a  
2           provision in your resale agreement, which you  
3           enclosed for us, and I appreciate that, that  
4           does specifically say any legal proceeding will  
5           come in front of the court for Baker County.

6           MS. SUMMERLIN: Well, Commissioner, or  
7           Chairman --

8           CHAIRMAN JABER: Not for long.

9           MS. SUMMERLIN: I guess what Mr. Twomey was  
10          talking about, it's the same concept. It's like  
11          you all sitting here today at agenda on these  
12          very major dockets that you've got and calling  
13          up the judge over in Baker County and saying,  
14          "what do you think about this?" I mean, this is  
15          how we're turning this whole thing upside-down.

16          The guts of this case are policy issues  
17          that have not been determined yet by anybody.  
18          There's nobody saying that a VOIP provider has  
19          to pay access charges. There's no regulatory  
20          body anywhere saying that. It's a pending,  
21          live, open issue. And Northeast Florida is  
22          jumping the gun. That's the bottom line.

23          Now, they're going to say that my client is  
24          a terrible evil guy because he's over there  
25          providing these VOIP services and not paying

1 every penny of access charges that Northeast  
2 Florida wants. I mean, I would do the same  
3 thing if I was in his position.

4 But the point is, this decision has to be  
5 made by the appropriate regulatory body. You  
6 have an entire scheme, statutory scheme here,  
7 and there are so many possible ramifications to  
8 this kind of a decision, it can't be just left  
9 over for a company that has decided -- I guess  
10 let me go back to the idea of what's appropriate  
11 for a Circuit Court. If a phone company owes  
12 another phone company money and there is no  
13 issue whatsoever about that debt being owed,  
14 then that's an appropriate place to go to. You  
15 go to the Circuit Court to --

16 COMMISSIONER DAVIDSON: You know what? I'm  
17 going to have to interject here. I disagree  
18 with this. I'm going to point out what the  
19 Chairman is saying. This is compelling, and I  
20 just hadn't looked at this before. And it's not  
21 just a choice of forum; it's an exclusive choice  
22 of forum called paragraph 28.1. Thank you so  
23 much, Chairman.

24 "Any matter pertaining to this agreement  
25 shall be submitted exclusively for trial before

1 the Circuit Court, or if such court shall not  
2 have jurisdiction" -- and that's for the court  
3 to decide, not us -- "then before any other  
4 court or administrative body. The parties  
5 consent and submit to the exclusive jurisdiction  
6 of any such court and agree to accept service of  
7 process."

8 I mean, there are very specific bases for  
9 disregarding an exclusive choice of forum  
10 agreement, and that's not for us to decide.  
11 That's for the court to decide. I mean, I  
12 understand the policy issues, but this is --  
13 that paragraph is critically important for me.

14 CHAIRMAN JABER: Ms. Summerlin, that's what  
15 I was trying to reconcile. I haven't heard  
16 anything yet in your presentation that  
17 distinguishes the importance of that provision  
18 in a mutually executed resale agreement.

19 MS. SUMMERLIN: Two parties cannot confer  
20 jurisdiction where it doesn't exist. And the  
21 argument that we are making is that the  
22 Commission has exclusive jurisdiction in the  
23 state of Florida over issues dealing with  
24 telecommunications.

25 If the court -- the court -- currently we

1 have a motion to dismiss, and the court has to  
2 have a hearing on that to make a determination  
3 on whether to grant it or not. What I am here  
4 asking the Commission to do is to intervene and  
5 weigh in on this issue to point out that these  
6 policy issues -- if you read this complaint, I  
7 don't think it will take much time to realize  
8 that the fundamental issue here is whether  
9 access charges apply to a provider of VOIP  
10 services. That's the fundamental issue.

11 Nobody has determined that issue. And just  
12 because there's a resale agreement that says  
13 that any dispute on that resale agreement should  
14 take place in a particular Circuit Court, that  
15 does not dispose of this much more fundamental  
16 jurisdictional issue in terms of the statutory  
17 scheme and the policies regarding  
18 telecommunications that need to be determined by  
19 the Florida PSC and the FCC.

20 CHAIRMAN JABER: The resale agreement was  
21 filed here and approved by the Commission  
22 administratively?

23 MS. SUMMERLIN: Uh-huh.

24 CHAIRMAN JABER: No one took issue with  
25 that provision?

1 MS. SUMMERLIN: Those are not uncommon  
2 provisions. That does not --

3 CHAIRMAN JABER: Okay. No one took issue  
4 with that provision that you all recall?

5 MS. SUMMERLIN: Not that I'm aware of. I  
6 was not involved with them at the time that they  
7 did that.

8 CHAIRMAN JABER: All right. Commissioners,  
9 what's your pleasure? Commissioner Baez, or  
10 have you already asked your -- what's your  
11 pleasure? I hate to borrow --

12 COMMISSIONER DAVIDSON: I'm not speaking  
13 until I hear from Commissioner Deason.

14 CHAIRMAN JABER: There you go. I hate to  
15 borrow from things Mr. Twomey says every once in  
16 a while, but he said loath to taking on cases  
17 where you don't have to. I'm just loath to  
18 taking on more cases, period.

19 So, Commissioners, what's your pleasure?  
20 If the majority of the Commissioners feel it  
21 necessary to --

22 COMMISSIONER DAVIDSON: I say we intervene,  
23 create a docket, and put Commissioner Baez, or  
24 it will be Chairman Baez, as the head of that  
25 docket.



1 COMMISSIONER BAEZ: Have you got two more?

2 CHAIRMAN JABER: And is there a second?

3 (Laughter.)

4 COMMISSIONER BAEZ: I think maybe I can put  
5 my hundred dollars on the table; right?

6 CHAIRMAN JABER: Commissioners, you know,  
7 all of the parties have done a great job in  
8 giving us both sides of the issue.

9 Ms. Summerlin's point is that you've got to  
10 reach the policy question to even get to the  
11 allegations of fraud and unjust enrichment, and  
12 I don't want to make light of that.

13 On the other hand, lots of fuses have been  
14 lit, frankly, not just at the FCC. We do --  
15 without getting into the merits of the cases we  
16 have pending in front of, those fuses have been  
17 lit as well.

18 But I do have an appreciation for what  
19 Mr. Twomey pointed out with regard to triggering  
20 that part of the statute, and I find comfort  
21 that a court deciding certain aspects doesn't  
22 trigger that part of the statute. And I  
23 recognize the risk you take, as you may have  
24 conflicting decisions, but is that really a  
25 problem we have?

1                   COMMISSIONER BAEZ:  What are -- maybe I do  
2                   have a question of our staff.  What are our  
3                   options post motion to dismiss?

4                   MS. KEATING:  Post the court's decision?

5                   COMMISSIONER BAEZ:  Post the motion to --  
6                   after the motion to dismiss is ruled on.

7                   See, the way I'm seeing it is that the  
8                   motion to dismiss is actually throwing up the  
9                   question for the court to say, yeah, we do have  
10                  jurisdiction, or no, we don't have jurisdiction,  
11                  and it is going to answer -- it is going to  
12                  answer one of the fundamental questions.

13                  CHAIRMAN JABER:  Ms. Summerlin's motion to  
14                  dismiss.

15                  COMMISSIONER BAEZ:  Right, that motion to  
16                  dismiss, exactly.

17                  MS. KEATING:  You could still intervene  
18                  and, as I think a couple of the speakers  
19                  indicated, act as a friend of the court,  
20                  probably file an amicus.  I have a little  
21                  nagging concern in the back of my head about  
22                  what ramifications an amicus on this issue might  
23                  have for purposes of triggering the statute.  
24                  It's not really a decision, but then again,  
25                  presumably --

1           COMMISSIONER BAEZ:  Have we ever -- has  
2           this Commission ever appealed, you know, really  
3           affirmatively appealed a decision of a Circuit  
4           Court on the grounds that, hey, that was our  
5           decision to make and not yours?

6           CHAIRMAN JABER:  We have to be a party,  
7           don't we?  Don't we have to be a party?  That's  
8           why --

9           MS. KEATING:  I think you have to actually  
10          be a party.

11          CHAIRMAN JABER:  And even an amicus --

12          COMMISSIONER BAEZ:  Doesn't even get you in  
13          the --

14          CHAIRMAN JABER:  Right.  It's my  
15          recollection -- and we would have to ask  
16          Mr. Smith and Mr. Melson, but it's my  
17          recollection even as an amicus, that doesn't  
18          confer rights as a party.  You have to file a  
19          petition to intervene.  Lots of people are  
20          shaking their head yes.

21          COMMISSIONER BAEZ:  Too many people shaking  
22          their head.

23          CHAIRMAN JABER:  Too many people shaking  
24          their head.

25          COMMISSIONER BAEZ:  You know, I'll tell

1           you, Commissioners, I have a problem turning a  
2           blind eye. I do appreciate Mr. Twomey's take on  
3           all that, because I -- (gap in tape) -- want to  
4           do anything by accident, but at the same time,  
5           you know, I can still see the area from which we  
6           can operate and still maintain control so that  
7           the bad things that Mr. Twomey purports to  
8           happen don't happen, and yet we're not shirking  
9           our responsibility or --

10           CHAIRMAN JABER: How do you address -- I  
11           appreciate that concern and don't necessarily  
12           disagree with it, but how do you address  
13           Mr. Dickens's point that the relief they're  
14           seeking in the Circuit Court is not relief we  
15           could address anyway? Are we holding up the  
16           relief they're seeking if we --

17           COMMISSIONER BAEZ: Well, let's see if --  
18           let's say that the motion plays out. Let's play  
19           it step by step. Let's say if the motion to  
20           dismiss plays out because the court ultimately  
21           answers the question that is placed before it  
22           and says do we have jurisdiction to, in essence,  
23           decide an access charge question or not, and  
24           they say no, we don't, where are we?

25           CHAIRMAN JABER: Well, it is not unheard of

1 for a court to say --

2 COMMISSIONER BAEZ: The Circuit Court can  
3 defer the question.

4 CHAIRMAN JABER: Yes, exactly. They could  
5 say go off and decide -- get the policy issue  
6 decided and then come back to us. And, you  
7 know, this came up not very long ago at internal  
8 affairs. Now, whether it's done at our urging  
9 or the court's urging is the question we have in  
10 front of us today.

11 COMMISSIONER BAEZ: Yes, right, exactly.

12 MS. SUMMERLIN: Can I say one thing?

13 CHAIRMAN JABER: Ms. Summerlin, and then  
14 Mr. Hatch.

15 MS. SUMMERLIN: We put a motion to dismiss,  
16 and in the alternative, to abate. So obviously,  
17 if there is anything left after the regulatory  
18 issues are decided, then you would go back to  
19 the Circuit Court to do that, the damages issue  
20 or anything else.

21 COMMISSIONER BAEZ: And I don't think  
22 anyone has disputed the fact that there may be  
23 issues that are properly before here, certainly  
24 not the fraud issues and the damages issues and  
25 the contract issues, and I don't dispute that.

1           But if the operation of the filings that  
2           have already been made are of the kind that are  
3           going to place this before us potentially as  
4           well -- and again, going back to an original  
5           question, what kind of responsibility does the  
6           Commission have to track down a decision that  
7           perhaps wouldn't have been -- that we wouldn't  
8           have agreed with, and only for our lack of  
9           saying what we thought, you've got a decision on  
10          this.

11           You know, I'm tempted just to wait for this  
12          motion to dismiss to play out and then see,  
13          but, you know --

14           CHAIRMAN JABER: Mr. Hatch, and then,  
15          Commissioners, I'm going to ask you for a  
16          motion.

17           MR. HATCH: Commissioner Jaber, just a  
18          point to the question of sort of where does this  
19          belong and how does the process work out. If  
20          you will recall, Home Shopping Network sued GTE  
21          circa 1988 in Circuit Court in Tampa. GTE moved  
22          for primary jurisdiction referral to the  
23          Commission. The circuit judge removed the  
24          telecommunications-related issues that were  
25          within the jurisdiction of the Commission to the

1 Commission, and the Commission conducted a  
2 proceeding, held a hearing, issued its decision,  
3 and that decision was then sent back to Tampa so  
4 that the issues --

5 COMMISSIONER BAEZ: Without participation  
6 of the Commission. I guess -- the mechanics of  
7 that, the mechanics of that are possible in this  
8 case. The question is --

9 MR. HATCH: But it was not without -- when  
10 you say without the participation of the  
11 Commission, what happened was that the  
12 Commission issued its order, the Commission as a  
13 party in that case, or as an implicated entity,  
14 for lack of a better word, because the judge  
15 allowed us to appear. We sent an official order  
16 of the Commission to the court, and that was the  
17 Commission's participation in the Circuit Court  
18 action.

19 COMMISSIONER BAEZ: But that was after --  
20 that was after the Circuit Court removed --

21 MR. HATCH: Yes. He referred the case to  
22 the Commission, and the Commission heard --

23 COMMISSIONER BAEZ: He referred the case to  
24 the Commission --

25 MR. HATCH: -- that piece of the case and

1 then shipped their answer to him back.

2 COMMISSIONER BAEZ: And my question is, do  
3 you remember if the Circuit Court shipped those  
4 issues or that part of the case to the  
5 Commission on the Commission's affirmative  
6 request, or it was just based on the petition of  
7 GTE?

8 MR. HATCH: I don't know. You might ask  
9 David Smith. He might remember how it came. I  
10 was on --

11 COMMISSIONER BAEZ: Where is David Smith  
12 when you need him?

13 MR. HATCH: -- the legal staff. I got it  
14 -- I inherited it when it came here. In terms  
15 of how it got here, that had been done I think  
16 in cooperation with the Commission in terms of  
17 formulating the motion for primary jurisdiction  
18 referral. I wasn't involved in that piece.  
19 That piece I can't give you the specific  
20 information on.

21 But the judge referred it here with several  
22 counts of the complaint that were essentially  
23 the subject matter, understanding that this was  
24 a complaint for damages and for fraud and for  
25 breach of contract. It was basically the same



1 issues you've got here. But the  
2 telecommunications-related issues were shipped  
3 here for your -- for the Commission's  
4 determination because of primary jurisdiction.

5 CHAIRMAN JABER: Mr. Dickens and Mr. Gross,  
6 you want to respond that? You have more  
7 information?

8 MR. DICKENS: Thank you, yes. Yes. I have  
9 an even older case than the Home Shopping  
10 Network case involving GTE and AT&T over the  
11 seven-day holding time study litigation that  
12 Mr. Deason undoubtedly remembers from the '70s.

13 COMMISSIONER DAVIDSON: When he was a  
14 toddler.

15 MR. DICKENS: Yes, and the --  
16 (Laughter.)

17 COMMISSIONER DEASON: Easy.  
18 (Simultaneous conversation.)

19 MR. DICKENS: But in that case, in that  
20 case, the court held on to the case. And we  
21 don't think that the Commission has subject  
22 matter jurisdiction over tort claims and  
23 contract breach claims, and the contract clause  
24 that you all focused on I think established  
25 that.

1           But if after the motion to dismiss is  
2           decided the Commission sees a telecommunications  
3           issue that it just has to address, if  
4           Ms. Summerlin presses the court for a primary  
5           jurisdiction referral and if we lose it, we  
6           would be arguing that the court should refer  
7           that to the Commission if it refers it at all,  
8           you know, do something in the next period of  
9           time, because we're deathly afraid of this  
10          open-ended, "Give us the case and then we'll let  
11          the FCC decide." That's a multi-year case for  
12          limbo.

13                 And so -- when courts do make primary  
14                 jurisdiction referrals, they usually give a time  
15                 frame.

16                 COMMISSIONER BAEZ: Do we have to make that  
17                 decision now?

18                 CHAIRMAN JABER: Well, as long as we don't  
19                 have this lengthy discussion if it comes back.

20                 (Laughter.)

21                 COMMISSIONER DEASON: I've got a solution.  
22                 Just get the Baker County court to order the FCC  
23                 to make a decision within a time certain.

24                 CHAIRMAN JABER: Mr. Gross, final word, and  
25                 we'll come back to your question, Commissioner

1 Baez. I don't know the answer to your question.

2 MR. GROSS: Assuming the court upon hearing  
3 the motion to dismiss refers the case to the  
4 Commission, one possible response of the  
5 Commission is that this is an issue that  
6 requires a uniform national policy to be decided  
7 by the FCC.

8 COMMISSIONER DAVIDSON: We get that.

9 MR. GROSS: Okay. Now, as to the rate  
10 rebalancing, I just have two points to make. As  
11 rate rebalancing progresses, assuming that it  
12 does -- I understand the Commission hasn't  
13 exercised its discretion yet, but the  
14 acceleration clause becomes less problematic as  
15 access charges are reduced. If the acceleration  
16 clause is triggered by an FCC ruling during the  
17 course of the rate rebalancing, the kind of rate  
18 increases that the ILECs would have to make in  
19 order to accelerate to the recip comp level, it  
20 would be well worth Commissioner Davidson's \$20  
21 to see them attempt to do that.

22 so I think the practical reality is, I  
23 think the ILECs would have a tough time with  
24 kind of the rate shock that would --

25 COMMISSIONER DAVIDSON: That \$20 was to see

1 Commissioner Baez tackle Mr. Twomey.

2 MR. GROSS: Thank you. That's all.

3 CHAIRMAN JABER: Okay, Commissioners.

4 Let's move this along. I'm ready for a motion.

5 Again, in the interest of disclosure, I  
6 would much rather err on not doing anything  
7 today. If you want staff to informally monitor,  
8 fine.

9 The amicus idea, the more and more I think  
10 about the amicus idea, frankly, I still think it  
11 requires a hearing, because we as a body have  
12 never spoken on that issue, so I wouldn't even  
13 know where to start in terms of providing  
14 friendly advice to the court. I don't see the  
15 difference between having a brief as a friend of  
16 the court or an official Commission order,  
17 because I think we still need to take input and  
18 feedback and have a hearing on that policy  
19 issue.

20 That's where I am, Commissioners.

21 Commissioner Bradley?

22 COMMISSIONER BRADLEY: I'll make a motion.

23 CHAIRMAN JABER: You do it.

24 COMMISSIONER BRADLEY: My motion would be  
25 for us not to intervene, but to monitor the

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Baker County case and see how the motion to dismiss is ruled upon.

COMMISSIONER DAVIDSON: Second.

CHAIRMAN JABER: There's a motion and a second. All those in favor say aye.

(Simultaneous affirmative responses.)

CHAIRMAN JABER: That resolves Item 4, and that concludes internal affairs. Thank you.

(Conclusion of consideration of Item 4.)

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CERTIFICATE OF TRANSCRIBER


STATE OF FLORIDA:

COUNTY OF LEON:

I, MARY ALLEN NEEL, do hereby certify that the foregoing was transcribed by me from an audiotape, and that the foregoing pages numbered 1 through 58 are a true and correct transcription of the aforesaid proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing matter.

DATED THIS 9th day of December, 2003.

  
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