IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HARRIS CORPORATION,

appellant/cross-appellee

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

appellee/cross-appellant

v.

Julia L. Johnson, et al., as members of the FLORIDA PUBLIC SERVICE COMMISSION,

appellees/cross-appellees.

Case No. 90,366

On appeal from Fla. Public Service Commission Order PSC-97-0385FOF-TL

ANSWER BRIEF OF APPELLEE AND CROSS-APPELLANT BELLSOUTH TELECOMMUNICATIONS

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Appellee/cross-appellant BellSouth Telecommunications, Inc. ("BellSouth") files this Answer Brief in response to the Initial Brief of Appellant Harris Corporation ("Harris"). Pursuant to Rule 9.210(c), F.R.A.P., this Answer Brief not only responds to the initial brief but also addresses the related issues presented by BellSouth's cross-appeal.

The question presented in this appeal is two-fold. First, has BellSouth violated any rule or by charging Harris, on a tariffed basis, for the use of certain buried cable owned by BellSouth? The answer, as the Order Below correctly notes, is no -- BellSouth violated nothing in charging for the use of its cable, and should not be required to refund anything. Second, can BellSouth legally continue to charge Harris, should Harris elect to continue using the cable? It is in answering this question that the Florida Public Service Commission (the "Florida Commission") erred. If BellSouth's charges to date were lawful, then there is no basis to preclude such charges in the future. BellSouth's charges for the use of its cable remain appropriate under controlling FCC authority, and the Florida Commission is not authorized to countermand that authority.

STATEMENT OF THE ISSUES ON APPEAL

On Appeal:

Did the Florida Public Service Commission err in holding that BellSouth had violated no applicable rule or regulation by collecting tariffed charges for Harris' use of BellSouth's buried cable since January 1, 1989.

On Cross-Appeal:

Did the Florida Public Service Commission err in decreeing that despite the fact that BellSouth had violated no rules or regulations by charging for the use of its buried cable, BellSouth may not continue to do so but rather must allow the use of its cable free of charge in the future, should Harris desire to continue using it.

INTRODUCTORY STATEMENT

FCC regulations govern how telephone companies' regulated facilities are "booked" for accounting purposes. This appeal turns on the account to which the buried cable at issue should have been booked when it was installed.

Briefly, beginning in the early 1980s the FCC "deregulated" facilities which had to that point been booked to account 232, known as "Station Connections - Inside Wire". The end result of this process was that telephone companies were required to amortize all existing "inside wire" which had previously been capitalized and booked to account 232. This allowed the companies to recover the cost of those facilities via rate of return regulation, following which they were to cease charging for the use of those facilities. Harris complains that BellSouth's buried cable should have been booked to account 232 and amortized, and that at the end of that process Harris should have been allowed to use BellSouth's cable free of charge. BellSouth, on the other hand, contends that its buried cable was appropriately booked to account 242, known as "Aerial, Buried and Underground Cable", and was therefore unaffected by the FCC's deregulation of assets in account 232.

Accordingly, this Court is called on to determine the appropriate accounting classification for the buried cable at issue. If it should have been booked to account 232 when installed, then it should have been amortized pursuant to FCC requirements and BellSouth should not continue to charge Harris for its use. On the other hand, if the cable was appropriately booked

to account 242, then BellSouth acted appropriately in imposing tariffed charges for its use, and is entitled to continue to do so until either (i) the FCC orders otherwise, (ii) Harris elects to discontinue its use of the cable, (iii) Harris decides to purchase the cable, or (iv) the cable wears out.

STATEMENT OF THE CASE AND FACTS

Harris' statement of the case and facts is unduly argumentative. Accordingly, BellSouth provides its own statement of the case and facts pursuant to Rule 9.210(c), F.R.A.P.

A. Statement of the Case

On September 7, 1995, Harris filed a Petition and Complaint against BellSouth with the Florida Public Service Florida Commission. (Vol. 1; R. 1) Harris sought to require BellSouth to refund charges collected on a tariffed basis for the use of buried cable at Harris' Palm Bay facilities since January 1, 1989. Harris further sought to proscribe the imposition of such charges in the future.

On September 28, 1995, BellSouth filed and answer to Harris' petition. (Vol. 1; R. 19). BellSouth disputed Harris entitlement to any of the relief requested.

On August 1, 1996, Harris and BellSouth filed a joint motion asking the Florida Commission to accept a stipulated statement of material facts and to convert the proceeding below to an informal proceeding. (Vol. 1; R. 146) The joint motion was granted by the Florida Commission's prehearing officer on August 1, 1996, via

order PSC-96-0984-PCO-TL. (Vol. 1; R. 150) The stipulated facts on which the Florida Commission proceeded are set forth at pages 2 **and** 3 of the order on appeal, which is included in the attached Appendix of the Appellee/Cross-Appellant. (See Vol 2; R. 271-72)

On August 7, 1997, the Florida Commission resolved Harris petition via entry of its Final Order Resolving Petition and Complaint, order no. PSC-97-0385-FOF-TL (the "Order Below"). (Vol. **2;** R. 270) The Order Below rejected Harris' request for a refund of the charges previously paid, finding that the charges to date had not been inappropriate, but purported to prohibit BellSouth from continuing to collect such charges prospectively. This is the order at issue in both Harris' appeal and BellSouth's cross-appeal.

B. Statement of the Facts

As noted, the pertinent facts on which the Florida Commission based its ruling consist of the two-page stipulation reproduced at pages 2 and 3 of the Order Below. (Vol **2;** R. 271-72) No purpose would be served by reprinting them yet again in this Answer Brief. However, both the stipulation and the Order Below assume a level of familiarity with the context and the technical features at issue. The following sections attempt to provide that background.

(1) Terminology and Configurations

The following glossary is provided as an aid to understand the terminology utilized herein and in the Order Below, and the generic configuration of the systems at issue.

Account 232: "Station Connection - Inside Wire" - The FCC required telephone companies to book regulated assets to specific accounts, which dictated the manner in which the assets (and their cost) were accounted for. Account 232 "Station Connection - Inside Wiring" was essentially just what it sounds like -- the wiring inside a customer's building that connected the customer's terminal station (i.e. the telephone) to BellSouth's outside network.[1] See 47 CFR §31.232.[2] It was the assets booked to this account that the FCC required telephone companies to amortize and eventually stop collecting tariffed charges for.

Account 242: "Aerial, Buried and Underground Cable" - A descriptive term indicating the account to which telephone companies were required to book aerial, buried or underground cable, including cable (such as that at issue) which is located on/under a customer's property and used to connect a PBX with its terminal stations in other buildings. See 47 CFR §§ 31.242(1)-(3).

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[1]The term "Station Connection - Inside Wire" also included "inside cabling" used to connect PBX systems to their terminal stations, and such cabling was also booked to account 232. However, these "inside cables" used to connect PBX systems should not be confused with outside, underground cables chargeable to account 242, such as those at issue in this appeal. See In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and regulations with respect to accountins for Station Connections, etc., 85 F.C.C. 2d 818 at ¶20, n. 4 (1981).

[2]Since the cable at issue was booked when installed between 1969 and 1984, the appropriate treatment of that cable was governed by the rules then in place. All citations herein are from the version of the FCC Rules extant as 'of October 1982. The historical notations to the Rules in question reflect their adoption on December 5, 1963.

See also 47 CFR § 31.232, Note B (emphasizing that outside cable on private property used to connect a PBX with its terminal stations should be booked to a cable account rather than as a "station connection - inside wire" under account 232).

Customer Premises Equipment ("CPE") - a descriptive term meaning telecommunications equipment located on a customer's premises. Historically all CPE up to and including the telephones themselves were owned by the telephone company and furnished on a regulated basis. The FCC commenced the deregulation of CPE with its Computer II decision in 1980.[3] Thereafter CPE became the customers' responsibility, and customers could fulfill this responsibility in conjunction with anyone able to provide the necessary equipment.[4]

Demarcation Point - The point at which the customer's system interconnects with the telephone company's regulated network. This term is significant here because commencing in May 1994 the demarcation point became the dividing line (with respect to newly-installed facilities) between those that are the customer's responsibility and those the telephone company continues to provide on a regulated basis. All parties agree that the buried cable at issue is on the customer-side of Harris' demarcation point, though the cable was installed prior to the adoption of the "intrasystem

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[3]See infra at page 11.

[4]The term "CPE" initially referred to equipment only, as opposed to wiring. Deregulation efforts were later expanded to include "inside wire" and later "intrasystem wire", and the term CPE came to include that wire as well.

wire" concept and the parties disagree as to the significance of the fact that the cable is "embedded" rather than "newly-installed".

Embedded Cable - "Embedded" facilities are facilities that are already installed. In the context of this case, embedded cable is cable that was already installed and booked to account 242 when the FCC adopted the "intrasystem wire" concept. If this new concept was to have prospective application only, it would be limited to "newly-installed" facilities and would not apply to embedded facilities. If the concept was to apply retroactively, it would apply to both newly-installed and embedded facilities.

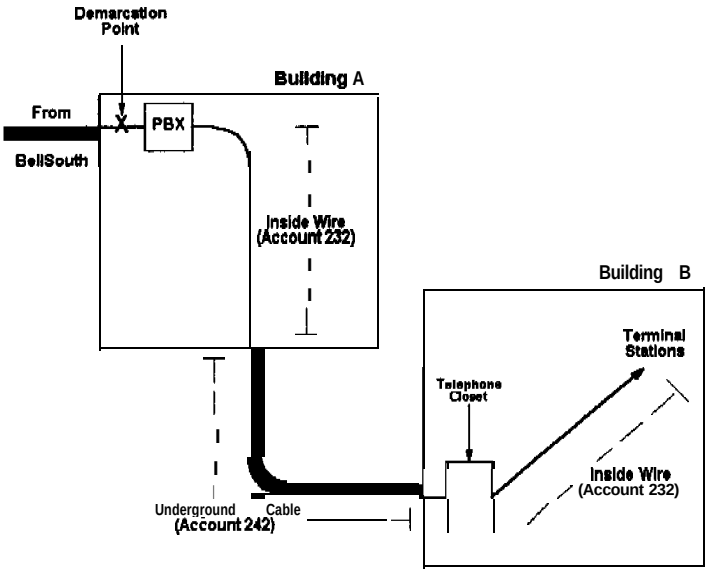
Private Branch Exchange ("PBX" - a customer-owned switch used to process telecommunications traffic for distribution to internal "terminal stations" (i.e. telephones). Typically allows reduced-digit dialing for internal calls.

Harris' system - Harris operates a multi-building "campus" and maintains its own communications system between and among the various buildings. BellSouth's network connects to Harris' system at Harris' "Private Branch Exchange" or "PBX" located in one building. Harris is responsible for transporting traffic from the PBX to the various "terminal stations" (i.e. telephones) throughout the campus.

Within its buildings, Harris transports traffic utilizing "inside wire". This wire was originally booked to account 232: "Stations Connections - Inside Wire". Pursuant to FCC regulations, these facilities were eventually amortized and deregulated;

BellSouth does not currently charge for their use. Between buildings, on the other hand, Harris transports its traffic using outside, buried cables installed and owned by BellSouth. This cable was booked to account 242 "Aerial, Buried and Underground Cable", and BellSouth charged a tariffed fee for its use. The FCC never issued regulations requiring cable booked to account 242 to be amortized and eventually provided for free, as it did with respect to inside wire booked to account 232. Therefore, unlike the inside wire, BellSouth continues to charge a tariff for the use of its buried cable.

The following diagram illustrates in a schematic sense the system in place at Harris' campus facility, and the location within that system of the buried cable at issue:



These facilities were in place when the FCC deregulated CPE. (See Vol. 2; R. 272) The "inside wire" labeled as being booked to account 232 has been amortized; there is no charge for the use of this wire and it is not at issue in this appeal. The outside,

buried cable labeled as being booked to account 242, on the other hand, has not been amortized and is still provided pursuant to tariff. (Vol. 2; R. 272) This is the cable at issue here.

(2) The Context

The telecommunications industry is in the midst of transition from a fully-regulated industry to, ultimately, an industry wholly responsive to market forces. The case at bar arises in the midst of that transition. Specifically, this case arises in the course of the FCC's process of deregulating the provision of "customer premises equipment" or "CPE" -- that portion of the system (e.g. telephones and in-house wiring) which it is now the customer's responsibility to provide.

Harris operates a multi-building campus in Palm Bay, Florida. (See Vol. 2; R. 271) Harris maintains its "private branch exchange" or "PBX" in one building which is connected to terminal stations (i.e. telephones) campus-wide through telephone closets in nine other buildings. (Vol. 2; R. 271) However, rather than providing its own cable to connect its PBX to the other nine buildings, Harris utilizes buried cable owned by BellSouth, which was installed by BellSouth's predecessor company at various times between 1969 and 1984.[5] (Vol 2; R. 271-72) The base issue in this appeal is whether, in the course of deregulating CPE, the FCC required BellSouth to amortize the cost of that cable and

[5]The underground cable **was** installed and formerly owned by AT&T. BellSouth is a Regional Bell Operating Company or "RBOC", which was divested by AT&T in the early 1980s pursuant to AT&T's antitrust settlement, and took ownership of the cable. For purposes of convenience, this brief will not generally distinguish between BellSouth and its predecessor, unless the difference is material to a particular issue.

eventually stop charging customers who elect to use it, or whether the cable remains part of BellSouth's regulated assets subject to tariff.

Briefly, during the period in which this cable was installed, Customers generally could not elect to purchase or install their own telecommunications equipment or systems. BellSouth was the sole provider of telecommunications services, and owned 100% of the communications equipment -- from the complex switching equipment to the wires or "loops" connecting to the customer's premises all the way down to the telephones themselves. At the same time, however, BellSouth's telecommunications business was subject to strict regulation at both the Federal and State level. Thus BellSouth was required to price its services and facilities according to approved "tariffs"; was required to book its assets to specified accounts, and was required to account for its affairs according to mandated regulatory accounting principles. BellSouth had no discretion to deviate from compliance with regulatory mandates unless and until the regulations themselves changed.

One effect of the transition from full regulation toward a more competitive environment involved responsibility for on-premises equipment. Beginning in 1980, the FCC began to deregulate CPE. See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry): Final Decision, 77 F.C.C. 2d 384 (1980). In other words, the FCC commenced the transition from a fully-regulated, integrated system in which the phone company owned everything up to and including the telephones, to one in which the customers are responsible for obtaining and installing their own wiring and equipment -- from

whoever they please at whatever terms they can negotiate -- with interconnection to BellSouth's network at what is now known as the "demarcation point".[6]

The demarcation point with respect to Harris' campus is at the PBX in Building 53. (Vol. 2; R. 271) The function performed by the buried cable at issue in this appeal -- the connection of multiple buildings in a campus-type environment -- now falls on the customer-side of the demarcation point. (Vol. 2; R. 271) There is no question but that if Harris were to ask BellSouth (or anyone else) to install this cable today it would be done on an unregulated basis, at whatever terms the parties could negotiate. However, the cable at issue was installed prior to the adoption of the "demarcation" concept as the determinant of which facilities to be deregulated, and the FCC specifically decreed that the concept would be applied prospectively only. Therefore, this "embedded" cable remains a part of BellSouth's regulated network facilities. To the extent Harris elects to use BellSouth's embedded cable -- and Harris has a number of other options -- BellSouth is entitled to compensation pursuant to its duly-filed and approved tariff.

(3) Chronology of Events

This case turns on a regulatory accounting issue -- the account to which the buried cable at issue should have been booked

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[6]The Order Below utilizes the term "inside wire", a term which has been greatly impacted by the creation of a demarcation point and the transition to customer responsibility for CPE. Previously, i.e. when the cable at issue here was buried, the term "inside" had meaning only to engineers; it simply meant wire that was inside a building. Now, however, the term has come to mean that portion of the system on the customer-side of the demarcation point, denoting that part of the system which is the customer's responsibility to provide.

when installed. The chronology of the FCC's deregulatory efforts is extraordinarily important on this issue. As explained in the argument section below, Harris utilizes the concept of a "demarcation point" and the resulting definition of "intrasystem wire" to argue that the cable at issue should have been booked to account 232. In a superficially definitional sense Harris is correct; the function for which Harris now utilizes the cable falls on the customer-side of the demarcation point, and thus the cable as Harris employs it falls within the current definition of intrasystem wire. However, this ignores a crucial point -- the chronology of the FCC's deregulatory efforts. BellSouth's cable was already installed when the "demarcation point" and "intrasystem wire" concepts came into play, and the FCC was very specific in stating that its adoption of these concepts was prospective only. Viewed in chronological context, then, Harris' argument is flawed because it attempts to apply the FCC's current construct retroactively.

The following chronology is illustrative:

1969	Installation of buried cable commences; cable booked to account 242 "Aerial, Buried and Underground Cable".
1969 - 1980	Entire telecommunications system -- inside and out -- is owned by telephone company. Terms "inside wire" and "demarcation point" have significance only to engineers, i.e. whether equipment is inside or outside a building
May 2, 1980	FCC deregulates provision of CPE, but does not include "inside wire".[7]

[7] In the matter of amendment of section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry): Final Decision, 77 F.C.C. 2d 384, ¶161 n. 57 (May 2, 1980)

March 31, 1981	FCC decrees that "Station Connections - Inside Wire" which were then "currently capitalized" to account 232 shall be expensed prospectively, while embedded costs would be amortized over ten years.[8] The order did not address outside cable booked to account 242; the FCC made clear that "inside wire" truly meant wire or cable inside a building.[9]
1984	BellSouth concludes installation of the buried cable at the Harris campus, all of which has been booked to account 242 "Aerial, Buried and Underground Cable".
May 2, 1984	FCC expands deregulation of inside wire by adopting "intrasystem wire" concept, i.e. deregulating all facilities on the customer-side of the demarcation point, including cable. Applied prospectively from May 2, 1984. FCC explicitly declines to apply concept to embedded facilities.[10]
August 28, 1984	BellSouth amends General Subscriber Service Tariff A13.1 "Extension and Tie Line Services" to comply with the FCC's intrasystem concept, detariffing new intrasystem wire but providing that embedded intrasystem wire would continue to be available at standard tariffed rates.
September 14, 1984	Florida Public Service Commission approves BellSouth's amended tariff.[11]

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[8] In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and resulations with respect to accountins for Station Connections, etc.: First Report and Order, 85 F.C.C. 2d 818 at ¶¶20, 33-35 (1981) (requiring amortization of "station connections -- inside wiring" which are currently capitalized in account 232 and expensing the cost of such facilities in the future). The significance of expensing or amortizing these costs is that eventually telephone companies would be precluded from charging for the use of these facilities.

[9] See In the matter of amendment of Part 31, Uniform System of Accounts, 85 F.C.C. 2d 818 at ¶20 n.4.

[10] Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring: Final Rule, 48 Fed. Reg. 50534 (November 2, 1983)

"In re Southern Bell Telephone & Telegraph Co. - Proposal to Discontinue Provision of New Complex Inside Wire, 84 F.P.S.C. 9:178 (September 14, 1984)

As is readily apparent, buried cable connecting a PBX to terminal stations in other buildings was not part of the "inside wire" being deregulated until the adoption on May 2, 1984, of the "intrasystem wire" concept, pursuant to which all cable on the customer-side of the demarcation point was to be deregulated. By that point the cable at issue was already installed, capitalized and booked to account 242.

SUMMARY OF THE ARGUMENT

Despite the complexity of the systems involved, the legal issues on appeal are simple. The cable at issue was buried between buildings on Harris' complex -- not inside them -- and was therefore appropriately booked to account 242. Accordingly, when the FCC required telephone companies to amortize "inside wire" which was then booked to account 232, neither the cable at issue nor BellSouth's accounting treatment of it was impacted.

Thereafter the FCC expanded the "inside wire" to be deregulated to include "intrasystem wire", a concept which would have included the cable at issue. However, the FCC specifically declined to apply its expanded concept retroactively. Since BellSouth's cable was already in place and booked to account 242, then, it was again not impacted by the FCC's order. It was and remains "242 cable" to this day, a regulated facility subject to tariff, and BellSouth was within its rights to charge for the use of this cable.

Finally, the Florida Commission simply misconstrues both the equities of this situation, which favor BellSouth, and its own authority. The FCC has never allowed BellSouth to "rebook" its "242 cable" to account 232 in order to bring it within the FCC's

earlier amortization order, let alone required BellSouth to do so. Under controlling FCC authority BellSouth is entitled to continue to treat its embedded cable as a regulated facility and obtain a return on its investment in this facility for so long as it continues to function and anyone wants to use it. The Florida Commission has no authority to countermand this authority and order what is in effect a confiscation of the remaining useful life of these facilities.

ARGUMENT AND CITATION OF AUTHORITY

Harris contends that the facilities in question constitute "complex inside wire" which the FCC, in the course of deregulating CPE, required to be amortized and then provided for Harris' use free of charge. As shown below, however, the FCC never required that the buried cable at issue be deregulated, amortized or otherwise treated any differently than it had always been. The cable at issue is "embedded" cable which the FCC specifically declined to address, and it therefore remains subject to the appropriate tariff -- duly filed and approved by the Florida Commission. Accordingly, the Florida Commission correctly refused to find that BellSouth had violated any rules or regulations by charging for the use of its buried cable pursuant to that tariff, but erred in holding that BellSouth cannot legally continue to do so.

A. The Order Below correctly concluded that BellSouth had violated no rules, regulations or statutes in charging for the use of its embedded buried cable

Harris contends that it should not have had to pay for the use of BellSouth's buried cable since January 1, 1989, because the FCC ordered such cable to be first amortized over a period of years and thereafter provided free of charge. To the contrary, however, the FCC specifically limited its mandate to facilities called "Station Connections - Inside Wire" which were recorded in a particular regulatory account, number 232, and it is uncontroverted that BellSouth never recorded the cable at issue to that account.

Harris counters that without regard to what BellSouth did unilaterally, the cable actually constituted "inside wire" and therefore should appropriately have been booked to account 232. In so arguing, Harris ignores the definition which was in place when BellSouth's cable was installed and booked, and relies instead on a definition of inside wire that was not adopted by the FCC until much later. In adopting its new definition the FCC specifically declined to apply it to "embedded" (i.e. pre-existing) facilities. Therefore, Harris is simply wrong in claiming that the cable at issue should have been booked to account 232, amortized and then provided for Harris' use free of charge. As the Florida Commission correctly held, BellSouth violated no rule, regulation or law in continuing to charge for the use of its cable.

(1) BellSouth's buried cable was appropriately booked to account 242

The FCC requires telephone companies to book their regulated facilities to a Uniform System of Accounts according to prescribed regulatory accounting principles. See 47 U.S.C. § 220(a)(2).[12] The FCC authority at issue in this appeal mandated amortization and deregulation of all assets which were then "currently capitalized" in a particular account, known as account 232 (Station Connections - Inside Wire). See In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and resulations with respect to accounting for Station Connections, etc.: First Report and Order, 85 F.C.C. 2d 818 at ¶¶20, 33-35 (1981)(requiring amortization [and eventual deregulation] of "Station Connections - Inside Wire" which were at that time capitalized in account 232). The significance of this is that once facilities booked to account 232 were amortized, the telephone company was to cease charging for the use of those facilities.

Harris contends that the buried cable at issue should have been booked to account 232, amortized as required by the FCC, and thereafter provided for Harris' use free of charge. That is incorrect. The appropriate classification of network facilities at that time was prescribed by Part 31 of the FCC's rules and

'*The Florida Commission also requires telecommunications companies in Florida to comply with the FCC's Uniform System of Accounts. See Rule 25-4.017, F.A.C.

regulations. See 47 CFR §31.02-82, *et seq.*[13] Account 232, entitled "Station Connections", included "the original cost of installing or connecting items of station apparatus and the original costs of inside wiring and cabling and of drop and block wires". 47 CFR §31.232(a) (emphasis added). At this time, however, the term "inside" meant inside a building, rather than the current connotation (adopted May 1984) of everything on the customer's side of the demarcation point. Thus in using the term "inside wiring and cabling", section 31.232(a) did not refer to outside cables such as the buried cable at issue here. See In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and resulations with respect to accounting for Station Connections, etc.: First Report and Order, 85 F.C.C. 2d 818 at ¶20 n.4. As Note B to section 31.232 makes clear, outside facilities connecting a PBX to terminal stations in other buildings (i.e. the buried cable at issue here) were not "station connections" or "inside wire" to be charged to account 232 but rather were to be charged to the appropriate account for outside facilities:

> NOTE B: the cost of outside plant, such as poles, wires, and cables whether or not on private property, used to connect a private branch exchange with its terminal stations shall be charged to the appropriate pole, wire and cable accounts.

47 CFR §31.232, note B (emphasis added).

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[13]All citations herein are from the version of the FCC Rules extant as of October 1982, which were originally adopted in 1963 and therefore bracket the period in which the cable at issue was installed. Part 31 has now been replaced with the current part 32. The current counterparts to the rules in question are 47 CFR §§ 32.2321 (customer premises wiring) and 32.2422 (underground cable).

The cable at issue is not inside any building, but is instead buried cable between and among the various buildings. Accordingly, as directed by Note B to section 31.232, the cable was appropriately booked to account 242 "Aerial, Buried and Underground Cable". See 47 CFR §31.242:1-3 Since the FCC only required amortization of station connections capitalized in account 232, and never ordered similar treatment with respect to buried cable capitalized in account 242, that should be the end of the inquiry. The cable was appropriately booked to account 242 and tariffed as a regulated facility, the FCC never took any action to alter that treatment or require (or even allow) a different treatment, and thus the cable remains regulated, booked to account 242 and subject to BellSouth's duly-approved tariff.

(2) No FCC order, rule or regulation since the cable was installed required BellSouth to "rebook" to account 232 or otherwise altered the cable's status as a regulated facility subject to tariff.

Beginning in 1977, the FCC began the process of deregulating customer premises equipment or "CPE". In the course of this evolution, the FCC eventually expanded the scope of what it considered to be CPE so that it would include, on a prospective basis, buried cable connecting a customer's multi-building PBX system. Thus it is clear that had BellSouth installed the cable at issue in 1996, it would have done so on an unregulated basis at whatever terms BellSouth and Harris were able to agree upon. However, it is equally clear that the FCC's transitional process did not alter the status of "embedded" cable, i.e., cable installed

prior to the FCC's expansion of its deregulation efforts. If, as is the case here, the cable was appropriately booked to account 242 when installed, then no order, rule or regulation required (or even allowed) BellSouth to "rebook" to account 232 or otherwise altered the cable's status as a regulated facility subject to tariff.

For present purposes, the FCC decision styled In the matter of amendment of section 64.702 of the Commission's Rules and Resulations (Second Computer Inquiry): Final Decision, 77 F.C.C. 2d 384 (May 2, 1980), can be considered the genesis of the FCC's effort to deregulate CPE. There the FCC determined that the provision of CPE was not a common carrier activity and was severable from the provision of common carrier transmission services, and required telephone companies to detariff all CPE. However, the FCC specifically decreed that its deregulation of CPE did not include inside wire. Id at ¶161, n. 57.

After issuing its Final Decision, the FCC issued a subsequent order in the same docket limited the detariffing requirement to new CPE installed after March 1, 1982. In the matter of amendment of section 64.702 of the Commission's Rules and Resulations (Second Computer Inquiry): Memorandum and Order, 84 F.C.C. 2d 50, ¶49 (December 30, 1980). The FCC did not determine at this time what to do with respect to embedded (i.e. already installed) CPE. Moreover, these deliberations remained irrelevant to the issue of what to do with respect to embedded inside wire, since thus far the FCC had declined to deregulate inside wire at all.

In March 1981 the FCC issued its First Report and Order in Docket 79-105, in which the FCC announced an intent to modify its accounting system to place the burden of costs associated with "station connections" on the causative rate payers, as opposed to the then current system, which in effect spread the cost over all present and future rate payers. See In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and regulations with respect to accountins for station connections, optional payment plan revenues and related capital costs, customer provided equipment and sale of terminal equipment -- First Report and Order, 85 F.C.C. 2d 818 ¶5 (March 31, 1981). In other words, the goal was to have the party causing the installation of a station connection pay for what was installed, rather than folding the cost into the telephone companies' rate base to be spread system wide under rate of return regulation. Accordingly, the FCC proposed to eventually (i.e. after further industry comment) deregulate all "station connections". Id at ¶¶ 31-32. Furthermore, and of particular significance here, the FCC ordered that all currently embedded "inside wire" booked to account 232 was to be amortized.[14] Id at ¶¶ 33-35. This is important because once these facilities were amortized they would thereafter be provided for use free of charge.

[14]Prospectively-installed "station connections - inside wire", which would otherwise have been capitalized and booked to account 232, was required to be expensed.

A "station connection" was defined as "costs that are currently capitalized in account 232, and consists of the original cost of inside wire and cabling . . . " Id at ¶20. By "inside cabling", however, the FCC did not refer to outside or buried cable such as the cable at issue here. Rather, the term "inside cabling" referred to small cables utilized for station installations inside a premises instead of wires, "such as those running from wall outlets of floor terminals to . . . cables used in installing small private branch exchanges". Id at ¶20, n. 5. Therefore, it is clear that the FCC's amortization requirement did not extend to outside, buried cable such as the cable at issue; such cable had been appropriately capitalized and booked to account 242 and was thus never within the scope of this exercise.

A dispute emerged with respect to the proposal to expense portions of "station connections" other than inside wire and cabling. Id at ¶¶ 22-24. Accordingly, the FCC directed that assets booked to account 232 be divided into two sub-classes -- "Station Connections - Inside Wire" and "Station Connections - Other". Id at ¶26. All "inside wire" facilities booked to account 232 were ordered to be amortized, and a separate proceeding was initiated to pursue deregulation of these facilities. In this respect, the FCC had to differentiate between inside wiring which would eventually be deregulated and other wire which, though inside a building, was more akin to cable and would therefore not be deregulated. This attempted differentiation was the initial use of

the concept of a "demarcation point" in the context of determining what was inside wire to be deregulated. See Id at ¶27.[15]

In re Amendment to Accounting Rules -- First Resort and Order dealt with simple one-premises arrangements. It limited its mandate to items capitalized in account 232. It did not discuss more complex, multi-building systems, and therefore had no need to address the issue of outside cable capitalized in account 242. The Order is important, however, because it is the seminal appearance of the demarcation point as the determinant with respect to what facilities within account 232 would be deregulated and what would remain "network facilities" for which the telephone company would be responsible. As discussed below, Harris relies heavily on the concept of a demarcation point in claiming that BellSouth's buried cable -- most of which had already been buried and booked to account 242 by this time -- should have actually been booked to account 232.

Two years later, the FCC specifically addressed more complex systems in its Final Rule, CC Docket 82-681, Detariffins of Customer Premises Eauipment and Customer Provided Cable/Wiring: Final Rule, 48 Fed. Reg. 50534 (November 2, 1983) (hereinafter the "Detariffing Rule"). Here the FCC adopted an "intrasystem concept" for "new detariffed PBXs" consisting of all equipment and "intrasystem wiring" on the customer-side of the demarcation point.

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[15]A more precise definition of the demarcation point was ultimately adopted at 97 F.C.C. 2d 527 (April 26, 1984), such that the demarcation point was on the subscriber's side of the telephone company's protective apparatus.

Id at ¶9. In this docket, for the first time, the FCC focused on "intrasystem wire" instead of "inside wire", and specifically included outside (e.g. buried) cable used to connect a customer's PBX to terminal stations located in other buildings on the same or contiguous property.[16]

The fact that the "intrasystem wire" concept was a new one in this context is important. This is the definition on which both Harris and the Florida Commission rely to conclude that the cable at issue in this appeal constitutes "complex inside wire" which should have been booked to account 232. However, by the time of the new rule's effective date, May 2, 1984, the buried cable at issue had already been installed and booked to account 242. The FCC was very clear in making the point that the concept of

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[16] "Harris is simply confused in claiming, at pages 17-18 and 22, that the FCC "interpreted" section 232 in this proceeding as including "intrasystem" wiring dating back at least to 1969". It is clear that the concept of "intrasystem wiring" as including outside cable connecting different buildings was newly-adopted in this docket. Indeed, the Notice of Proposed Rulemaking in this docket, 47 Fed. Reg. 44,770 at ¶¶ 22-23, specifically proposes adopting this concept as part of the effort to detariff CPE, in order to avoid the incongruity of detariffing equipment at both ends of a system yet leaving the connection between the component parts subject to tariff. The Detariffing Rule itself makes this point at paragraph 9, speaking of a "proposed" intrasystem concept and noting that intrasystem wiring would include outside cable between a customer's buildings if on the customer-side of the demarcation point. The intrasystem wiring concept was first considered and adopted in this proceeding, and when the FCC speaks of "all PBXs and the wires we have defined as intrasystem wiring", 48 Fed. Reg. 50534 at ¶61, it is speaking of the definition contained in that very order. See also the 1986 Second Report and Order in In re Amendment to Accounting Rules, at ¶5, in which the FCC states that the "intrasystem concept" was "established" in docket 82-681.

detariffing "intrasystem" wire was prospective only, applying to new CPE rather than to embedded CPE:

> [S]everal points were raised concerning our definition and detariffing of intrasystem wiring. AT&T and RTC asked that we make it clear that the detariffing of intrasystem wiring applies only to intrasystem wiring installed as part of a detariffed CPE system. We believe that point was clearly made in the [Notice of Proposed Rulemaking]. However, to avoid confusion as to our intent we reiterate that we are detariffing new intrasystem wiring installed with new CPE systems.

Id at ¶59.[17] Indeed, while the Detariffing Rule amended section 31.232 to add "Note F", pertaining to the accounting treatment for intrasystem wire provided prospectively on **a** detariffed basis, it did not delete "Note B" to section 31.232, referenced supra at 18, thereby confirming that embedded outside cable connecting PBX systems with their terminal stations, which **was** installed prior to the effective date of the Detariffing Rule, remained appropriately booked to account 242.[18]

Thus it is clear that the Detariffing Rule purposely declined to address "embedded" cable, including that which would otherwise fall within the definition of intrasystem wiring had it been installed after May 2, 1984. Accordingly, neither the Detariffing Rule nor the intrasystem wiring concept it adopted had (or have)

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[17]The FCC did allow telephone companies to ~~elect~~ to make the accounting changes retroactive, though only as far back as January 1, 1983. Detariffing Rule, 48 Fed. Reg. 50534 at ¶70. The record on appeal does not indicate that BellSouth made such an election.

[18]The actual amendments to the pertinent CFR sections are set forth in the appendix to the Detariffing Rule.

any applicability to the cable at issue here.[19] Cable used to connect a PBX to terminal stations between and among buildings can constitute "complex inside wire" because it is on the customer-side of the demarcation point, but only if that cable was not already embedded when the intrasystem concept was established, Because the cable at issue here was already embedded, Harris' reliance on the "intrasystem" concept in this case is misguided.

Under authority of the Detariffing Rule, BellSouth filed an amendment to its General Subscriber Service Tariff (A13.1 -- "Extension and Tie Line Services") on August 28, 1984, setting basic rates for PBX stations, among other things. The amended tariff accommodated the distinction in the Detariffing Rule between embedded intrasystem wiring and new intrasystem wiring by providing:

> In compliance with an order of the Federal Communications Commission in CC Docket No. 82-681, the provision of new intrasystem wiring .

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[19]As described in the FCC's Notice of Proposed Rulemaking in the Detariffing Docket:

> Under our bifurcation plan embedded CPE is that equipment or inventory which is tariffed or otherwise subject to the jurisdictional separation as of the bifurcation date (January 1, 1983 [the originally-proposed effective date]). Any other CPE which is acquired by a carrier or manufactured by an affiliated entity after that date is considered new CPE.

Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies: Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 at ¶6 (October 12, 1982). This directly refutes the Commission's concern, discussed in the succeeding section of this argument, with the perceived "incongruity" of treating newly installed intra-system wiring differently than embedded intra-system wiring.

> . . located on the customer's side of the demarcation point, inside a building or between customers buildings located on the same or contiguous property, will be the responsibility of that customer. The Company will not furnish, maintain, or repair such new intrasystem wire or cable facilities placed after June 30, 1984.

BellSouth General Subscriber Service Tariff A13.1.1D. At the same time, the revised tariff provided:

> Existing Company provided intrasystem wiring inside a building or between buildings located on the same or contiguous property, will continue to be available as required after June 30, 1984. The Company will continue to offer additional services on these facilities as long as such [embedded] wiring or cable facilities are available, at standard tariff rates and charges.

BellSouth General Subscriber Service Tariff A13.1.1D (emphasis added).[20] This amended tariff was specifically approved by the Florida Commission. See In re Southern Bell Telephone & Telegraph Company - Proposal to Discontinue Provision of New Complex Inside Wire, 84 F.P.S.C. 9:178 (September 14, 1984).

This Order, and the FCC authority on which it is based, confirmed the appropriate treatment for embedded intrasystem wiring -- the "outside" components (e.g. buried cable) of a customer's PBX system which were in place prior to September 14, 1984, the date on which the Florida Commission approved the revised tariff. The term "intrasystem wire" or "complex inside wire" applies only to those

[20]This tariff provision was later transferred to A113, G.S.S.T., "Obsolete Service Offerings - Miscellaneous Service Arrangements".

systems installed after that date; embedded intrasystem wiring continued to be subject to regulation and tariff.

This treatment of embedded intrasystem wiring has been reaffirmed several times. For example, the FCC initiated a docket, number 81-893, specifically for the purpose of implementing the detariffing of CPE. In In the matter of procedures for implementing the detariffins of customer premises equipment and enhanced services -- Resort and Order, 95 F.C.C. 2d 1276, at ¶¶ 163-64 (December 15, 1983), the FCC specifically considered the issue of whether intrasystem wiring should be removed from regulated service in connection with the removal from regulated service of associated CPE. The FCC specifically concluded that "intrasystem wiring currently owned by AT&T or the independent telephone companies should not be detariffed and removed from regulated service at this time . . ."

Further, on March 6, 1985, in this same docket, the FCC expressly reiterated its conclusion that embedded intrasystem wiring should not be detariffed and removed from regulated service. See In the matter of procedures for implementing the detariffing of customer premises equipment and enhanced services -- Opinion and Order on Reconsideration, 50 Fed. Reg. 9016 at ¶¶85-89 (March 6, 1985). This opinion issued over a year after the intrasystem wiring concept on which Harris relies was adopted, and the FCC was crystal clear in stating that embedded intrasystem wiring remained subject to regulation and remained subject to tariff.

Accordingly, the law is clear. The buried cable at issue in this appeal **was** appropriately booked to account 242, and was not affected by the FCC's decision to deregulate and require telephone companies to amortize "Station Connections - Inside Wiring" booked to account 232. Thereafter, when the FCC broadened its effort to deregulate CPE by adopting the concept of "intrasystem wiring" to include outside, buried cable connecting multi-building systems, the buried cable at **issue** here was already "embedded", and the FCC declined to include embedded cable in its expanded definition. The FCC ssecificallv and expressly rejected the notion that embedded cable should be detariffed. Therefore, the Order Below is correct in holding that BellSouth violated no rule or regulation in continuing to collect the appropriate tariffed charges for the use of its embedded cable.

B. The Order Below erred in purporting to prohibit BellSouth from continuing to charge for the use of its embedded buried cable, should Harris elect to continue using such cable.

As stated, the FCC determined in 1981 that "Station Connections - Inside Wire" which had previously been capitalized and booked to account 232 should be amortized and, eventually, provided free of charge. See In the matter of amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's rules and regulations with respect to accounting for Station Connections, etc., 85 F.C.C. 2d 818 at ¶¶20, 33-35 (1981) (requiring amortization of "station connections" -- inside wiring and connecting items -- which are currently

capitalized in account 232). Effective May 2, 1984, the FCC expanded its definition of inside wire by adopting its new "intrasystem" concept, thereby including outside cable used to connect new multi-building PBX systems in the definition of inside wire. See Detariffing Rule, 48 Fed. Reg. 50534 ¶9 (November 2, 1983) (adopting an "intrasystem concept" for "new detariffed PBXs" consisting of equipment and "intrasystem wiring" on the customer-side of the demarcation point). Nevertheless, the FCC specifically declined to include embedded cable, such as the cable at issue here, in its newly-expanded definition of inside wire. Therefore, the Order below correctly notes that BellSouth violated no rule or regulation in continuing to charge, on a tariffed basis, for the use of its embedded cable which was already in-place when the FCC adopted the "intrasystem" concept.

It is at this point that the Florida Commission erred. Despite holding that BellSouth had until now not violated any rule or regulation by continuing to charge for Harris' use of its buried cable, the Florida Commission decreed that BellSouth may not continue to do so in the future. In effect, The Florida Commission unilaterally detariffed BellSouth's buried cable -- utilized in both intra- and inter-state communications -- in violation of the preemptory effect of the FCC's regulations. See North Carolina Utility Comm'n v. F.C.C., 537 F.2d 787, 793 (4th Cir. 1976) (FCC regulation preempts local regulation as to facilities which by their nature are not separable from interstate communications, or which substantially effect interstate communications).

The Florida Commission essentially held that while BellSouth's buried cable was appropriately booked to account 242, and therefore not required to be amortized and detariffed, it could have been reclassified to account 232 and amortized as set forth in the Amendment to Accounting Rules -- First Report and Order. The Florida Commission perceived an FCC intent that embedded intrasystem wiring be recorded in account 232. The Florida Commission also noted that the embedded cable at issue technically fit the current definition of intrasystem wire, and felt it would be incongruous for new intrasystem wiring to be deregulated while embedded wiring remained regulated and subject to tariff. Accordingly, the Florida Commission held that it "would have been appropriate for BellSouth to reclassify these facilities to Account 232". Noting that had BellSouth done so it would have already recovered its investment, the Florida Commission ordered that BellSouth must discontinue charging for the use of its cable pursuant to the previously-approved tariff.

The Florida Commission's reasoning is flawed in several respects. First and foremost, there is absolutely no authority -- nor does the Florida Commission cite any -- requiring or allowing BellSouth to reclassify its embedded "242 buried cable" as "232 inside wire" simply because the "inside wire" category was expanded prospectively to include some 242 cable. Indeed, had the FCC intended to require or even allow reclassification of embedded facilities, it certainly would have said so in the Detariffing Rule, the 1984 order adopting the "intrasystem wire" concept. To

the contrary, however, the Detariffins Rule not only did not mention reclassifying to account 232 embedded facilities previously booked to account 242, but it specifically declined to apply the expanded "intrasystem" concept to embedded facilities.

Second, the Florida Commission erred in discerning an FCC intent that embedded cable be amortized and eventually provided free of charge. Amendment to Accounting Rules -- First Report and Order, the order requiring amortization, was specifically and explicitly limited to "Station Connections - Inside Wiring" which were "currently capitalized in account 232". See Amendment to Accountins Rules -- First Report and Order, 85 F.C.C. 2d 818 at ¶¶ 20, 35 (March 31, 1981) (emphasis added). As established above, the BellSouth cable at issue was neither "station connection - inside wire" nor capitalized in account 232. Had the FCC intended that embedded buried cable also be amortized, it had ample opportunity to do so in this and subsequent orders. Indeed, in the Detariffing Rule, the FCC specifically considered doing the very thing the Florida Commission has done here -- detariffing embedded intrasystem wiring, i.e. outside cable newly-captured within the expanded definition of intrasystem wire. As stated in the Final Rule:

> We proposed an intrasystem concept . . . Based on the intrasystem concept, we propose to detariff intrasystem wiring in the same way and on the same basis as we detariffed CPE in Computer II.

Detariffins Rule, 48 Fed. Reg. 50534 at ¶9. By emphasizing that detariffing would apply only to newly-installed systems, the FCC

affirmatively negated any intent to require reclassification and amortization of embedded cable.

Finally, there is nothing incongruous about treating embedded cable under regulation, subject to tariff, while newly installed cable is deregulated. This specific treatment is not just reference but required by BellSouth's tariff, which was duly-filed and approved by the Florida Commission. Furthermore, the FCC itself specifically acknowledged the dichotomy between embedded CPE, which remains subject to regulation, and new CPE, which is deregulated. As described in the FCC's Notice of Proposed Rulemaking:

> [T]he Commission stated that the detariffing of CPE would be accomplished through a bifurcated transition plan that distinquished between "new" and "embedded" CPE . . . Under our bifurcation plan embedded CPE is that equipment or inventory which is tariffed or otherwise subject to the jurisdictional separation as of the bifurcation date (January 1, 1983 [the originally-proposed effective date]). Any other CPE which is acquired by a carrier or manufactured by an affiliated entity after that date is considered new CPE.

Modifications of the Uniform Systems of Accounts for Class A and Class B Telephone Companies: Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 at ¶6 (October 12, 1982)(emphasis added).[21] The FCC clearly stated that embedded CPE would be treated differently than new CPE, and left the treatment of embedded CPE for other proceedings. Id. With respect to embedded cable booked to account 242, of course, no subsequent FCC proceedings ever allowed or even

[21] See also In the matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) : Memorandum and Order, 84 F.C.C. 2d 50 at ¶51 (1980).

proposed allowing amortization of embedded 242 cable, or otherwise limited telephone companies' ability to charge for the use of their cable pursuant to tariff. Accordingly, there is no incongruity in continuing to treat embedded CPE as a regulated facility, particularly where, as here, its owner has never been allowed to amortize and recover its cost under rate of return regulation.

The Florida Commission had absolutely no basis to conclude that BellSouth should or could have amortized its "242 cable", and has absolutely no authority to require that BellSouth now provide its buried cable free of charge. From the order below it appears as though the Florida Commission was attempting to impose its own (misguided) notion of what is equitable -- to "split the baby", using Harris' terminology. See Initial Brief of Appellant Harris at 17. However, BellSouth installed and paid for the assets at issue and has been responsible for maintaining them free of charge since that time. Absent a contrary directive by the FCC, BellSouth is entitled to reasonably anticipate income from these assets over their useful life. Because it precludes BellSouth's reasonable expectation in this regard, and in effect cuts short the usable life of BellSouth's assets, the Order below is confiscatory.

To the extent Harris does not wish to continue paying to use this cable, Harris can either purchase it outright or can install its own cable. However, the equities in this instance, to the extent they are applicable at all, clearly militate ~~against~~ the Florida Commission's confiscation of the remaining useful life of BellSouth's buried cable.

Conclusion

For the reasons stated, BellSouth respectfully requests that the Order Below be affirmed to the extent it held BellSouth's prior imposition of tariffed charges violated no rule or regulation, but requests that the order be reversed to the extent it purports to prevent BellSouth from continuing to collect such charges for the use of its buried cable.

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I certify that a true copy of the foregoing was served via U.S. Mail on the individuals listed below on this 11th day of July, 1997.

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