

IN THE SUPREME COURT OF FLORIDA

HARRIS CORPORATION,)
)
Appellant/cross-appellee)
)
v.) CASE NO. 90,366
)
BELLSOUTH TELECOMMUNICATIONS, INC.)
)
Appellee/cross-appellant)
)
v.)
)
Julia L. Johnson, et al., as members)
of the FLORIDA PUBLIC SERVICE)
COMMISSION,)
)
Appellees/cross-appellees.)

ANSWER BRIEF OF CROSS-APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee/Cross-Appellee, Julia L. Johnson, etc., Commissioners of the Florida Public Service Commission, are referred to in this brief as the "Commission." Appellee/Cross-Appellant BellSouth Telecommunications, Inc., is referred to as "BellSouth." Appellant/Cross-Appellee, Harris Corporation, is referred to as "Harris." The Federal Communications Commission is referred to as the "FCC."

The Order on appeal, PSC-97-0385-FOF-TL, shall be referred to as the "Order" and is cited as "Or. ____ "

Citations to the record are referred to as "R. ____ " Citations to BellSouth's or Harris' Brief are respectively designated and referred to as "Br. ____."

Other acronyms used in the brief are: Uniform System of Accounts is referred to as "USOA". Private Branch Exchange is referred to as "PBX".

Finally, the terms "complex inside wire" and "intrasystem wiring" mean the same thing and may be used interchangeably.

STATEMENT OF THE CASE AND FACTS

The Commission relies upon its Statement of the Case and Facts set forth in its Answer Brief to Harris' Initial Brief. In addition, the Commission agrees with the statement of the case presented by BellSouth to the extent that it is not disputed below. BellSouth's statement of facts, in particular its interpretation of relevant terminology, is biased in its favor and is argumentative. The Commission specifically disagrees with BellSouth's statements in the subject areas set forth below.

Terminology and Configurations

Account 232 - Station Connection-inside wire provides: "This account shall include the original cost of installing or connecting items of station apparatus and the original cost of inside wiring and cabling." 47 C.F.R. 32.232 (1984). The account includes all wire on the customer's side of the demarcation point, not just that wiring inside the building as stated in BellSouth's brief. (BellSouth Br. 6.)

The Commission does not agree that the demarcation point is the dividing line with respect to newly installed facilities as stated by BellSouth. (BellSouth Br. 7.) The term demarcation point means the point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the telephone network (the local exchange provider) and the customer premises

wiring. See 47 C.F.R. 568.3; Rule 25-4.0345, Florida Administrative Code. The definition does not delineate between embedded and newly installed wire.

The Commission disagrees with the arguments beginning on page 9 of BellSouth's brief relating to the accounting treatment of the components of the system used by Harris. The Commission urges the Court to dismiss as argument BellSouth's discussion as to why it continues to charge a tariff for use of the wire.

The Context

BellSouth's discussion beginning on page 10 of its brief putting the issues before the Commission in context with the regulatory environment for telecommunications are adequate. Much of the discussion, however, lacks citation to appropriate authority. More important, BellSouth concludes its discussion with argument that the facilities are still embedded buried cable. The Court should disregard BellSouth's argument. (BellSouth Br. 12.)

Chronology of Events

Finally, while BellSouth provides a useful chronicle of events beginning on page 12 of its brief, the discussion is infiltrated with opinion and argument. For instance, on Page 13 of its brief, BellSouth declares the FCC was specific in its order that deregulation of inside wire was prospective only. The Commission found differently in its order where it stated: "It

is arguable that this embedded investment was addressed in [F]CC Docket 79-105. In that docket, the FCC ordered expensing and amortization of all inside wire." (Emphasis supplied.) (R. 281; OK. 12.)

The Court should rely on the stipulated facts and the issues to be decided as set forth in the Commission's Order (R. 271 - 272; Or. 2-3.) and to the Commission's discussion of the FCC's orders beginning on page 2 of its Answer Brief to Harris' Initial Brief.

SUMMARY OF ARGUMENT

This case was decided based upon the stipulated facts that were before the Commission and a developing body of rules, orders, and opinions of the Federal Communications Commission (FCC). The FCC had provided no definitive statement on the issue before the Commission and, therefore, this issue was a case of first impression.

The Commission correctly found the facilities at issue were complex inside wire. (R. 284, Or. 15.) FCC orders and rules defined complex inside wire and provided for its deregulation. In the process of deregulation, the FCC provided for systematic recovery of the costs of embedded intrasystem wiring: newly installed wiring would not be regulated and embedded wiring must be amortized within ten years and then deregulated. Report and Order, 85 FCC 2d 818 (1981). In its brief, BellSouth ignores the Commission's findings on the first stipulated issue' and clings to the notion that the facilities in question are buried cable.

The Commission recognized conflict was created in the FCC's accounting rules published in 1984 and thereafter because Account 232 contained Note B which specified buried cable should be recorded in Account 242². The complex inside wire at issue here

¹ What is the proper legal characterization of the facilities in question? (R. 271, Or. 2.)

² As noted in the Commission's Answer Brief to Harris, the Note B in question relates to Account 232, not Account 242 as

met the definition of buried cable defined in Note B. Prior to the FCC ordering complex inside wire deregulated, this inconsistency did not make a difference. That is why the Commission did not order BellSouth to provide a refund to Harris. After the FCC ordered deregulation of inside wire, the inconsistency made a big difference. BellSouth can no longer charge for the use of the wire.

The Commission has sufficient authority under FCC and Commission statutes, rules, and orders to require BellSouth to cease charging Harris for use of the wire.

The facilities are complex inside wire, therefore, BellSouth must comply with the FCC and Commission rules and orders. The Commission properly ordered BellSouth to cease charging Harris. The Commission's order was not confiscatory since BellSouth will continue to recover its investment through its base rates.

The Commission's findings are supported by the evidence and comport with the essential requirements of law. There has been no showing that its interpretation of its statutes, rules, or orders is clearly erroneous. The Commission's order should be affirmed.

misstated in the Order.

ARGUMENT

BellSouth does not address the Commission's finding that the facilities at issue are complex inside wire as an issue in its brief. BellSouth doggedly maintains the facilities at issue are buried cable and commences its argument from that point. Since this issue is indirectly raised by BellSouth, it will be addressed prior to addressing the issues raised in BellSouth's brief.

I. **THE COMMISSION CORRECTLY DETERMINED THE FACILITIES AT ISSUE ARE COMPLEX INSIDE WIRE.**

BellSouth presents its arguments in a manner that fails to consider the Commission's findings on the first issue presented in this case. That was: "What is the proper legal characterization of the facilities in question?" (R. 271, Or. 2.) The facilities, as described in the stipulated facts were found to meet the FCC's and the Commission's definition of complex inside wire. (R. 283, Or. 14.)

Complex inside wire, or intrasystem wiring, as defined by the FCC includes:

. . . all cable and wire and its associated components (e.g. connecting blocks, terminal boxes, connecting between buildings on the same customer's premises, etc.) which connect station components to one another or to the common equipment of a PBX or a key system. (Emphasis supplied.)

Final Rule, 47 FR 44770 (1982).

The stipulated facts before the Commission supported the finding that BellSouth's facilities meet this definition. Those

facts include the following: the facilities are located on Harris property; there is a single demarcation point in building 53; none of the facilities cross a public road; BellSouth has charged for the facilities at issue as Series 2000 Channels (with usoc 1LVDE), pursuant to Section A113 of its Florida General Subscriber Services Tariff; and all of the facilities are located on the Harris side of the demarcation point. (R. 271-272 ; Or. 2-3.)

The Commission relied on BellSouth's tariff, A113.5 Extension and Tie Line Services, and the USOC handbook to determine the appropriate classification. The tariff was for "a channel between different buildings on the same continuous property and for different premises within the same building." (Emphasis supplied.) This description conforms to the FCC's definition of complex inside wire. (R. 284, Or. 15.)

BellSouth correctly states that the FCC deregulated the provisioning of inside wire, and over the course of years, included complex inside wire in its deregulation. (BellSouth Br. 30.) BellSouth is incorrect, however, when it states that "the FCC specifically declined to include embedded [buried] cable in its newly expanded definition of inside wire." (Emphasis supplied.) (BellSouth Br. 31.)

The FCC Final Rule is clear that new intrasystem wiring was deregulated and that embedded intrasystem wiring should remain

under regulation until it was fully amortized. After that time, companies could charge for maintenance on an unregulated basis, but could not charge customers for the use of such wire. (See Memorandum Opinion and Order, 1 FCCR 1190 (1986).

BellSouth argues that the facilities at issue are network facilities because they were properly booked to Account 242 when installed and nothing has changed since they were installed. (BellSouth Br. 12.) The Commission disagreed since it would be incongruous to conclude that new intrasystem wiring would be treated as inside wire while embedded intrasystem wiring would continue to be maintained as network cables. (R. 284; Or. 15.) Moreover, the FCC stated that the embedded intrasystem wiring would remain under regulation until it was fully amortized. First Report and Order, 95 FCC 2d 1276 (1983). After the wire was fully amortized it would no longer be provided under regulation. Second Report and Order, 59 Rad. Reg. 2d (P & F) 1143 (1986).

The Commission's finding that the facilities at issue are complex inside wiring are supported by competent, substantial evidence and should not be overturned by the Court.

II. THE ORDER BELOW CORRECTLY CONCLUDED THAT IT DID NOT APPEAR THAT BELL SOUTH HAD VIOLATED ANY FLORIDA RULES OR STATUTES, AND THAT, GIVEN THE APPARENT INCONSISTENCY BETWEEN THE FCC'S FINAL RULE AND NOTE B TO ACCOUNT 232, IT WAS UNCLEAR WHETHER ANY FCC RULES OR REGULATIONS HAD BEEN VIOLATED.'

Upon finding that the facilities at issue were complex inside wire, the Commission addressed the next issue which was "Does/has BellSouth's treatment of these facilities violate(d) any FCC and/or FPSC rules or orders or any federal or Florida Statute." (R. 271, Or. 2.) The Commission found that "it does not appear BellSouth has violated any Florida rules, regulation or statutes" and "it is unclear whether any FCC rules or regulations have been violated." (R. 288, Or. 19.)

BellSouth begins its argument with the assumption that because the Commission found no violation of the accounting rules, that the wire at issue is buried cable. This assumption is incorrect in two respects. First, the wire at issue was correctly found to be complex inside wire. Second, the inconsistency between the FCC orders and its rules - particularly Note B to Account 232 and the fact that no FCC or Commission Order required transfer of the wire recorded in Account 242 to Account 232 - was such that the Commission did not find a clear violation of FCC regulations or orders and, therefore, could not

³This section addresses Issue A beginning on page 17 of BellSouth's Brief.

retroactively penalize BellSouth by requiring refunds. (R. 288, Or. 19.)

Contrary to BellSouth's arguments, there is authority requiring or allowing the facilities to be reclassified to Account 232 from Account 242. (BellSouth Br. 32.) Reading all the reports, orders, and opinions together, the Commission logically concluded that embedded complex inside wire was deregulated and was required to be recorded in Account 232.

The FCC required newly installed wire to be provided on a deregulated basis whereby the customer purchases the wire and pays for its installation and either maintains the wire himself or pays to have the wire maintained. Report and Order, 85 FCC 2d 818 (1981). Telephone companies with existing or embedded inside wire should have recorded that wire in Account 232 and then amortized the wire over a period not to exceed ten years. First Report and Order, 95 FCC 2d 1276 (1983). During the amortization period, the wire would be under regulation. After the wire was fully amortized, the wire would be deregulated and companies could no longer charge for the use of the wire. Memorandum Opinion and Order, 1 FCCR 1190 (1986).

The FCC provided a procedure of deregulation whereby embedded facilities could be phased into deregulated service. First Report and Order, 95 FCC 2d 1276 (1983) Paras. 164 and 165. The FCC contemplated this duality of systems (deregulation of

newly installed intrasystem wiring and regulation of embedded wire) until such time that the cost of embedded facilities were fully recovered through amortization. The embedded facilities were phased into deregulation to protect competition (i.e. maintain a level playing field) and to assure that the users of the wire⁴ and the shareholders' of the company were treated equitably. Companies were to adhere to the previously established schedule for amortizing the unrecovered costs set in 1981. Id. See also Report and Order, 85 FCC 2d 818 (1981).

What may once have been categorized as buried cable, such as the cable at issue here, was clearly redefined by the FCC as complex inside wiring: "wiring that is located on the customer's side of the demarcation point that connects station components to each other or to the common equipment of a PBX or key system." Second Report and Order, 59 Rad. Reg. 2d (P & F) 1143 (1986) Para. 1, FN2. This definition and the accompanying orders are clearly sufficient authority to require the reclassification of the wire as complex inside wire and to require transfer of the associated costs of the facilities to Account 232 from Account 242.

⁴ It would be unfair to require current users to contribute to the recovery of this investment because users in prior years have received the benefit of capitalization of the labor costs (for installation). Id.

⁵ Removal from regulated service would run the risk that invested amounts never would be recovered

The Commission's decision was based upon the stipulated facts before it and its interpretation of the FCC's orders, rules, and opinions. Deference should be given to the agency's interpretation of its rules and orders and the statutes it is authorized to enforce. Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237, 240 (Fla. 1st DCA 1985).

III. THE ORDER BELOW CORRECTLY PROHIBITED BELLSOUTH FROM CONTINUING TO CHARGE FOR THE USE OF THE COMPLEX INSIDE WIRE.⁶

The Commission correctly interpreted the FCC's intent that embedded complex inside wire should be amortized and that a telephone company could no longer charge for the use of the wire. BellSouth clings desperately to the notion that the facilities in question are network facilities, specifically buried cable. The FCC did not deregulate network facilities nor require them to be provided free of charge. The FCC did deregulate complex inside wire, required that its costs be recovered through amortization, and upon full amortization, prohibited telephone companies from charging for its use. The facilities at issue are complex inside wire. As such, are not the type of facility for which a telephone company may impose a charge.

⁶ This section addresses Issue B beginning on page 30 of BellSouth's Brief.

BellSouth argues that the Commission's Order prohibiting further payment is confiscatory. To the contrary, the Commission's requirement is an elimination of a charge that is no longer necessary. First, the Commission's Order prohibiting BellSouth from charging for use of the complex inside wire is consistent with the FCC's rules and the Commission's own orders. See First Report and Order, 95 FCC 2d 1276, paras. 164 and 165 (1983) ; Petition of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311 (1988). Because the facilities at issue are complex inside wire, the Commission is authorized to prohibit BellSouth from further charging for the use of the facilities. See Teleco Communications Company v. Susan F. Clark, No. 87,316 (Fla. May 22, 1997). (Teleco had a similar fact pattern involving complex inside wire.)

Second, the record contains no information as to how much of the approximately \$2,000 per month charge was for private line service or use or maintenance of the lines. Moreover, the record contains no information as to if, or how much of, the facilities at issue have been fully amortized. Any attempt by the Commission to allow for recover of that 'investment' would have been speculative.

Finally, BellSouth will continue to recover revenue through base rates. Since the facilities went into service during a time

period between 1969 and 1984, the costs have been nearly recovered through depreciation. (R. 289, Or. 20.) There is no evidence in the record to determine the actual amount of current recovery. BellSouth has been recovering these investments through its general subscriber tariff from all ratepayers as well as through specific charges to Harris. (Id.) Even though the specific charge to Harris will cease under the Commission's order, BellSouth will continue receiving revenue through base rates (the general body of ratepayers) until those rates are revised to exclude the Harris facilities.

The Commission properly interpreted the FCC's Orders and regulations when it determined that the facilities at issue were intrasystem wiring. Since the Commission found no violation because the FCC rules and orders were not clear and because the Commission had limited facts before it, the Commission correctly refrained from ordering refunds. Finally, while BellSouth cannot charge for the use of the wire, it may still recover its investment through its base rates.

Given the facts and information before it, the Commission would have been in error to allow BellSouth to continue to charge for the use of the complex inside wire.

CONCLUSION

The Commission was presented with three issues upon which to make findings. It was presented with a list of stipulated facts

and briefs addressing the legal issues. To the extent that the Commission was preempted by Federal law, the Commission relied upon the Federal Rules and orders to make its findings and conclusions of law. The Commission's findings on each of the issues was a reasonable interpretation of the law and should not be overturned. For the foregoing reasons, the Commission's final order should be affirmed. BellSouth has not met its burden of overcoming the presumption of correctness that attaches to Commission Orders. City of Tallahassee v. Mann, 411 So. 2d 162 (Fla. 1981). The Commission's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 4th day of August, 1997 to the following:

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