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-97-0385-FOF-TL

CROSS-REPLY BRIEF OF CROSS-APPELLANT BELLSOUTH TELECOMMUNICATIONS

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Appellee and cross-appellant, BellSouth Telecommunications, Inc., pursuant to Rule 9.210(e) of the Florida Rules of Appellate Procedure, hereby files its consolidated reply to the arguments of Harris Corporation ("Harris") and the Florida Public Service Commission (the "Commission"). BellSouth has also opposed Harris' request for judicial notice under separate cover.

BellSouth's position, as set forth in its prior brief, is simple and straightforward:

(i) This appeal involves cable buried underground between 1969 and 1984;

(ii) The buried cable was appropriately booked to account 242 according to FCC regulations;

(iii) The FCC ordered that certain assets booked in account 232 should be amortized and thereafter provided without charge;

(iv) Absolutely no order of the FCC ever directed BellSouth to amortize assets booked to account 242 and to thereafter cease charging for customers' use of the assets;

(v) Absolutely no order of the FCC ever directed BellSouth to reclassify assets from account 242 to account 232, thereby subjecting those assets to the amortization requirement for 232 assets; therefore

(vi) It was error to hold that BellSouth could have reclassified the buried cable at issue from account 242 to account 232, and thereafter amortized the cable in accordance with the FCC's requirement for assets so booked.

The responsive arguments of the Commission and Harris essentially dispute points (ii) and (v).

Harris contends simply that the cable at issue should never have been booked to account 242, but rather should have been booked to account 232 in the first instance. Because the FCC required telephone companies to amortize and eventually cease charging for assets booked to account 232, Harris argues, BellSouth should have ceased charging for the use of its cable when the amortization should have been completed.

The Commission, on the other hand, agrees that under the plain meaning of the FCC's regulations, the buried cable **at** issue was appropriately booked to account 242 and thus **was** not initially required to be amortized. However, the Commission contends that thereafter, the FCC required BellSouth to reclassify its buried cable from account 242 to account 232 in connection with its expansion of the concept of "intrasystem wire", and to amortize its cost in accordance with the FCC's requirement for "232" assets. Accordingly, the Commission claims that BellSouth should not now be allowed to continue to charge for the use of its cable.

As shown below, these positions are meritless. Absolutely nothing in the responsive argument of either Harris or the Commission negates the **clear** and compelling logic of BellSouth's position.

A. The Buried Cable At Issue Was Appropriately Booked To Account 242

Harris contends that BellSouth's buried cable should have been booked to account 232 in the first instance. However, this ignores the plain terms of the FCC's accounting regulations, to which the parties were required to adhere. When the cable at issue was installed, account 232 was comprised of "Station Connections -

Inside Wiring". 47 CFR § 31.232 (emphasis added). Assets to be booked to this account were comprised of the wiring and small cables inside a building which were used as "station connections", connecting stations inside a building with each other or with facilities outside the building. Thus the FCC's "items list" for this account included such things as:

> The wires (or small cables) from the station apparatus to the point of connection with the outside plant cable or wire facilities;
>
> The wires (or small cables) used to connect station apparatus in the same building, such as main stations with extension systems, and stations of intercommunicating systems;
>
> The wires (or small cables) used to connect private branch exchange switchboards or their distributing frames with terminal stations located in the same building . . .

47 CFR § 31.232 (emphasis added).[1] No amount of definitional manipulation can fit the cable at issue, which was buried outside Harris' buildings, within this account description.

Furthermore, the buried cable at issue is used to connect Harris' private branch exchange (or "PBX") in one building with terminal stations located in its other buildings. Note B to Account 232 specifically provides that such cable should not be booked to account 232 but rather should be booked to the appropriate cable account:

[1]The FCC also made clear that the "small cables" referenced parenthetically in its items list were small cables inside a building which were used instead of inside wires "such as those that run from wall outlets or floor terminals to the station apparatus . . ." 47 CFR § 31.232, Note A.

> 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). Harris counters by claiming that Note B is limited to outside "plant", and that outside plant does not include the cable at issue but rather only cable that constitutes part of the telephone company's "network". As shown below, however, Harris argument is both logically and factually flawed.

Harris proffers a definition of a "network" as something which connects a telephone company's "wire center" to a customer's facilities (as opposed to cable directly connecting two buildings owned by the customer with one another, without routing to the telephone company's "wire center"). Thereafter, Harris claims that the term "outside plant" includes "network" infrastructure, Finally, Harris contends that because the cable at issue goes directly from one building to another on Harris' property, rather than taking a detour to BellSouth's "wire center" and back, it cannot be "outside plant" because it does not fall within Harris' definition of "network" facilities. [Reply Brief of Appellant/Cross Appellee Harris Corporation at 15-16] This is argument is flawed in three respects.

First, Harris cites no authority for the proposition that BellSouth's buried cable cannot constitute part of its network, and BellSouth is unaware of any such authority.

Second, it is illogical to state on the one hand that the term "outside plant" includes network facilities and then argue that the

cable at issue cannot be "outside plant" because the cable (allegedly) does not constitute network facilities. The term "include" is inclusive, not exclusive; it necessarily implies that something in addition to network facilities can constitute "outside plant".

Finally, Harris' argument is factually flawed, as Note B itself makes clear. The cable at issue is located entirely on Harris' private property. Note B explicitly applies to cable "whether or not on private property". 47 CFR § 31.232, Note B. The cable at issue connects a private branch exchange owned by Harris with its terminal stations. Note B specifically applies to cable "used to connect a private branch exchange with its terminal stations". Id. Note B by its very terms specifically deals with the precise kind of cable at issue here -- buried cable located on private property used to connect a customer's PBX with its terminal stations -- and directs that such cable should not be booked to account 232 but rather "to the appropriate . . , cable account". Id. All that is left, then, is to determine what that account is.

That is the simple part. In contrast to Harris, which attempts to force "buried cable" into an account entitled "Station Connections -- Inside Wire", BellSouth and the Commission give credence to the plain meaning of the FCC's terminology. The cable at issue is buried cable. The FCC had an account specifically entitled "Buried Cable", to which the costs associated with such cable were to have been booked. See 47 CFR § 31.242:3. Since outside cable connecting a customer's PBX with terminal stations are to be booked to the appropriate "pole, wire and cable

accounts", since the cable at issue is buried **cable,** and since the FCC had an account specifically applicable to buried cable, where else could it have been booked? BellSouth's cable was appropriately booked to account 242.

B. Harris Errs In Asserting That The FCC Had Always Required "Intrasystem Wire" To Be Booked To Account 232

As shown, the cable at issue was appropriately booked to account 242, and no order of the FCC ever required that assets booked to account 242 be amortized. Harris attempts to avoid this clear and compelling logic by taking the FCC's expanded definition of "intrasystem" wire (which detariffed the installation of this kind of cable prospectively beginning in 1984) and applying it retroactively to the cable at issue, to somehow bring the cable as of its date of installation (and classification to an appropriate account) within the definition of "inside wire" **as** that term was used in account 232. This is revisionist history in its most blatant form. It is an illogical construct.

In brief, the FCC gradually transitioned from an environment in which the cost of "station connections" were capitalized (i.e. booked to account 232 and born by all rate payers under rate of return regulation) to one in which only the rate payer causing the cost to be incurred would bear the burden. During this transition, the FCC decreed that future "inside wire" -- which would otherwise have been owned by the telephone company and recorded to account 232 -- would be expensed rather than capitalized. Existing inside wire, already owned by the telephone company and booked to account 232, would be amortized and taken off the company's books, at which

point the company should no longer charge for it.[2] See In the matter of amendment of Part 31, Uniform System of Accounts, 85 F.C.C. 2d 818 at ¶¶33-35 (1981) (hereinafter "In re Amendment to Part 31 - First Report and Order").

There is no question but that the FCC's requirement in In re Amendment to Part 31 - First Report and Order that costs be amortized was limited to station connection costs booked to account 232. Furthermore, as set forth above, there is no question but that the buried cable at issue in this appeal was appropriately booked to account 242 rather than 232. Harris' confusion results from the FCC's decision in a different proceeding altogether, which was concerned with "detariffing" station connections in the future. That proceeding not only detariffed what had to that point been generally referred to as "inside wire" but it also expanded that term by "establish[ing] the intrasystem concept for PBXs and key systems and [providing] for the detariffing of intrasystem wiring". In re Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring, 48 Fed. Reg. 50534 at ¶2 (November 2, 1983) (hereinafter "Detariffing Final Rule").[3] The buried cable at issue

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[2]Under "rate of return" regulation, the amortization of the cost of assets in account 232 would increase the telephone company's expenses, thereby increasing the amount consumers would be required to pay in order for the company to make the appropriate rate of return.

[3]Whereas In re Amendment to Part 31 - First Report and Order dealt with where the cost of station connections would be borne, the "detariffing" proceeding concerned what would be paid for intrasystem wire prospectively -- would it be pursuant to tariff or on an unregulated basis. Thus on a prospective basis, "intrasystem wire" -- including buried cable connecting PBXs with terminal stations -- would be provided on a detariffed basis. This has nothing to do with where prior costs of such facilities, provided on a tariffed basis, would be recorded.

falls within the FCC's definition of "intrasystem wire" (a/k/a/ "complex inside wiring") which was detariffed by the FCC on a prospective basis, Detariffing Final Rule, 48 Fed. Reg. 50534 at ¶5 and note 4, and Harris mistakenly attempts to utilize the definition of "intrasystem wire" from this proceeding to somehow argue that the cable also falls (and fell years before, when it was first installed and booked) within account 232's definition of "Station Connections -- Inside Wire", to be amortized in accordance with In re Amendment to Part 31 - First Report and Order.[4]

This argument is flawed. The intrasystem concept was not employed in connection with outside cable connecting PBX systems with their terminal stations until the Detariffing Final Rule did it effective 1984, and then only in the context of prospective detariffing of such systems -- & retroactive amortization of cable previously recorded to account 242.[5] There is absolutely no FCC authority, nor does Harris cite any authority, stating that the

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[4]See e.g. page 23 of the Reply Brief of Appellant/Cross-Appellee Harris Corporation, which cites the "Detariffing Notice para. 25" for the claim that intrasystem wire was "required to be recorded to account 232". The "Detariffing Notice" to which Harris cites is the precursor to the Detariffing Final Rule, in which the FCC **proposed** issuing a new rule. Indeed, paragraph 23 of the "Detariffing Notice" explicitly states that the concept of intrasystem wiring "would **be"** defined (if the concept is established or adopted) to include cable between buildings such as the cable at issue in this appeal. See In re Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies - Notice of Proposed Rulemaking, 47 Fed. Reg. 44770, at ¶23 ((October 12, 1982) . How can Harris take this **proposed** definition -- which was not even adopted until the Detariffing Final Rule adopted it prospectively in 1984, and use it to argue that the cable at issue should have been recorded to account 232 years before? It simply makes no sense.

[5]See Detariffing Final Rule, 48 Fed. Reg. 50534, at ¶70 (Detariffing Final Rule is effective May 2, 1984).

intrasystem concept (specifically the inclusion of buried cable connecting PBX systems with terminal stations) governed where buried cable **was** booked prior to 1984. Harris is simply taking the definition of "intrasystem wire" first adopted and employed in the Detariffing Final Rule and is using it retroactively and out of context to argue that "inside wire", as the FCC previously used that term to describe assets in account 232, included the cable at issue. It is a logically bankrupt argument."

C. The Commission Is Simply Wrong In Claiming That BellSouth Should Have Reclassified Its Buried Cable To Account 232 And Then Amortized It.

The Commission claims that while the buried cable at issue was appropriately booked to account 242 initially, it should have been reclassified to account 232 after the FCC issued its Detariffing Final Rule, which detariffed intrasystem wiring on a prospective basis, and amortized pursuant to In re Amendment to Part 31 - First Report and Order. This argument fails for three reasons.

First, nowhere does the FCC state that it was adopting the "intrasystem concept" retroactively, to be applied to already

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[6]The Commission also utilizes the definition of "intrasystem wire" contained in In re Modifications to the Uniform System of Accounts for Class A and Class B Telephone Companies, 47 Fed. Reg. 44770, at ¶23 ((October 12, 1982) without noting that at the time it was only a proposal and that the ultimate adoption of that definition in the Detariffing Final Rule was prospective only. Unlike Harris, however, the Commission does not attempt to apply the definition retroactively to argue that during the fifteen years prior to its adoption BellSouth's cable should have been recorded as "inside wire" in account 232. Rather, the Commission argues that the cable should have been reclassified to account 232 at some point after it **was** initially recorded to account 242. That argument is addressed below.

-installed systems. Indeed, the FCC stated specifically to the contrary:

> [W]e reiterate that we are detariffing new intrasystem wiring installed with new [customer premises equipment] systems.

Detariffins Final Rule, 48 Fed. Reg. 50534 at ¶59.

Second, the Detariffing Final Rule did not even involve amortization of "inside wire" costs booked to account 232; it involved the detariffing of PBX systems purchased in the future, including cable associated with such systems. The FCC's establishment of the intrasystem concept was thus not only explicitly prospective but was also outside the context to which the Commission now attempts to apply it. It is an attempt to retroactively confuse apples with oranges -- amortization of costs previously incurred versus regulation (or the lack thereof) of systems to be installed in the future.

Finally, the Commission's argument depends on its claim that BellSouth should have reclassified the cable at issue from account 242 to account 232, and from there should have amortized these costs. However, the Commission does not cite an FCC order requiring or even allowing BellSouth to reclassify its cable from account 242 to account 232. Rather, the Commission conjures such authority by implication, relying upon a post-Detariffing Final Rule definition of intrasystem or "complex inside" wiring and claiming that since the cable at issue would fall within this definition, it should be reclassified and amortized:

> This definition and the accompanying orders [which did not address reclassification] are clearly sufficient authority to require the reclassification of the wire as complex inside wire and to require the transfer of the associated costs of the facilities to Account 232 from Account 242.

Answer Brief of Cross-Appellee Florida PSC, at 11. This is nonsense.

First, as noted above, this is an apples and oranges comparison. The FCC adopted the intrasystem concept in this context for purposes of detariffing newly-installed PBX systems and their related facilities; one step in the process of opening up sales and service of such systems to the market, with price to be governed by market forces. This definition is not implied authority for its application in a different context: the retroactive reclassification of previously-installed cable from account 242 to account 232, so that it can be amortized under authority of In re Amendment to Part 31 - First Report and Order.

Second, and most importantly, when the FCC wants telephone companies to reclassify assets from one account to another, it does not direct reclassification by implication -- it specifically and directly orders them to do so. See e.g. In re Common Carrier Services; Amendment of Part 32 Uniform System of Accounts for Telecommunications Companies - Proposed Rule, 55 Fed. Reg. 14438 (April 18, 1990); In re Amendment of the Commission's Rules to Change the Basis of Depreciation and Retirement Procedures for the "Station connections - other" Subclass of Account 232, and to Reclassify Network Channel Terminating Equipment, 48 Fed. Reg. 49843 (October 28, 1983). Indeed, in Notice of Proposed

Rulemaking, on which both Harris and the Commission rely for their claim that the underground cable should have been booked to account 232 (in Harris' argument) or reclassified to account 232 (in the Commission's argument), the FCC specifically and directly proposes that other kinds of **assets** be reclassified from accounts 231 and 234 to other accounts not pertinent here. See In re Modifications to the Uniform System of Accounts for **Class** A and Class B Telephone Companies - Notice of Proposed Rulemaking, 47 Fed. Reg. 44770, at ¶ 18 ((October 12, 1982). The lack of a similar mandate requiring BellSouth to reclassify embedded underground cable from account 242 to account 232 clearly refutes any claim that the FCC nevertheless intended for BellSouth to do so.

When the FCC wants reclassification, it directs reclassification. It did not do so here. Therefore, given the Commission's agreement that the cable was appropriately booked to account 242 in the first instance, it was never required to be amortized and BellSouth has no obligation to allow Harris to use it free of charge.

D. Conclusion

For the reasons stated, BellSouth requests that this Court affirm the Commission's ruling that its cable was appropriately booked to account 242 and BellSouth therefore violated nothing in charging for its use. BellSouth further requests that the Court reverse the Commission's ruling that BellSouth **was** required by the FCC to reclassify its cable to account 232 and thereafter amortized its cost, and therefore must now provide the cable for Harris' use free of charge on a prospective basis.

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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 2 day of September, 1997.

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