

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HARRIS CORPORATION,)
)
Appellant/Cross-Appellee,)
)
and) CASE NO. 90,366
)
BELLSOUTH TELECOMMUNICATIONS,)
INC.,)
)
Appellee/Cross-Appellant,)
)
vs.)
)
JULIA L. JOHNSON, etc.,)
)
Appellees/Cross-Appellees.)

ON APPEAL OF AN ORDER
OF THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT HARRIS CORPORATION

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INTRODUCTION

This case concerns **BellSouth Telecommunications, Inc.'s** (**BellSouth's**) charges to Harris Corporation for complex inside telephone wiring on Harris Corporation's (Harris) Semiconductor Complex in Palm Bay, Florida. For regulatory purposes, the wiring is similar to the telephone wiring which is contained inside houses and which connects the homeowners' telephones to the telephone company's network. Pursuant to orders of the Florida Public Service Commission (FPSC) and Federal Communications Commission (FCC), **BellSouth** should have recorded residential inside wiring in Account 232 of the FCC's Uniform Systems of Accounts, expensed and/or amortized that wiring by December 31, 1988, and ceased charging for it by January 1, 1989. Accordingly, **BellSouth** should have recorded the wiring on Harris' property in Account 232, expensed and/or amortized that wiring by December 31, 1988, and ceased charging for it by January 1, 1989. In sum, just as **BellSouth** no longer charges homeowners for their inside wiring, **BellSouth** was required to eliminate its charges for the inside wiring on Harris' property by January 1, 1989.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On September 7, 1995, Harris filed a Petition and Complaint against BellSouth Telecommunications, Inc. at the FPSC. (Vol. 1, R. 1.) Harris stated that BellSouth has been unlawfully charging for the inside wiring on the Harris Semiconductor Complex at the rate of approximately \$2,100 per month, (Vol. 1, R. 7.) Harris stated that the inside wiring is legally characterized as "complex inside wiring" (aka "intrasystem wiring"). (Vol. 1, R. 3.) Harris stated the BellSouth's charges for the wiring were in violation of FPSC and FCC orders and rules which required BellSouth to amortize inside wiring, and eliminate its lease charges for that wiring. (Vol. 1, R. 5-7.) Harris requested the FPSC to order BellSouth to terminate its charges to Harris for the wiring, and to refund those charges unlawfully made, plus interest. (Vol. 1, R. 8.)

On September 28, 1995, BellSouth filed its Answer. (Vol. 1, R. 19.) BellSouth denied that it provided wiring on the Harris Semiconductor Complex. (Answer at 1 (Vol. 1, R. 19).) BellSouth also stated that it **was** without knowledge of Harris' statements concerning the physical location of the wiring and the installation dates of the wiring. (Id. at 2 (Vol. 1, R. 20).)

Stipulated Facts

On August 1, 1996, Harris and BellSouth filed a Joint Motion to Accept Stipulation of Facts and for Informal Hearing Pursuant to Section 120.57(2), Florida Statutes. (Vol. 1, R. 146.) With

the approval of the Chairman, the Prehearing Officer granted the Motion by Order No. PSC-96-0984-PCO-TL, issued on August 1, 1996. (Vol. 1, R. 150.) As stipulated by Harris and BellSouth, the material facts in this case are:

1. The "Harris Semiconductor Complex" is a campus consisting of approximately 13 buildings, located at 2401 Palm Bay Road, Palm Bay, Florida.
2. The facilities at issue are located on the Harris Semiconductor Complex, and were originally installed by BellSouth.
3. The demarcation point is in Building 53. All of the wiring at issue is on Harris' side of the demarcation point.¹ At least some of the network terminating devices on the facilities at issue were installed in Building 53 during or after 1988.
4. The facilities at issue connect the PBX in Building 53 to telephone closets in Buildings 51, 54, 58, 58A, 59, 60, 61, 62 and 63. All facilities run directly from Building 53 to telephone closets in those other buildings, except that the wiring for Building 61 runs from Building 53 into Building 60 and then back out of Building 60 to Building 61. Harris-owned, Harris-installed inside wiring connects the telephone closets to customer premises equipment (CPE) in the corresponding buildings.
5. None of the facilities at issue crosses a public road. All of the facilities at issue run between the buildings identified above in Stipulation No. 4, and all are underground (except at the point of connection to the above-referenced buildings).
6. The facilities were installed at the time that the respective building in which each terminates was

¹ "[A] customer who purchases a PBX system connects to the [local exchange carrier] network at a single demarcation point, and the interbuilding cable is treated as complex inside wire. . . . and deregulated." Investigation into BellSouth Telecommunications, Inc.'s and ALLTEL Florida, Inc.'s Practices for Pricing Campus Wiring Associated with Provision of ESSX/CENTREX Services 96 FPSC 8:166, 167-68 (1996). "The customer is then solely responsible for the wiring on the customer's side of the demarcation point, including the wiring between buildings." *Id.* at 168.

constructed. The first building was built and occupied in 1969. The last building was occupied in 1984,

7. BellSouth has recorded and continues to record the facilities at issue in Account 242.

8. 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.

9. BellSouth states that these charges include private line service,

10. BellSouth has charged, and Harris has paid, \$172,080.14 (not including taxes) for the facilities from January 1, 1989 to January 1996.

11. Harris has continued to pay for the facilities at issue at the rate of approximately \$2,000 per month since then; these payments are not included in the \$172,080.14 total given above.

(Final Order at 2-3 (Vol. 2, R. 271-72) (footnote added).)

Harris' Briefs

After agreeing to the material facts of the case, Harris and BellSouth filed their briefs. Harris filed its Initial Brief on August 30, 1996 and its Reply Brief on September 9, 1996. (Vol. 1, R. 160; Vol. 2, R. 211.) Harris again demonstrated that the wiring at issue is properly legally characterized as "inside wire" and more specifically, "complex inside wiring" (aka "intrasystem wiring"), in accordance with FPSC and FCC orders. (Harris Br. at 2-4 (Vol. 1, R. 162-64).) In particular, Harris noted that in the recent Investigation into BellSouth Telecommunications, Inc.'s and ALLTEL Florida, Inc.'s Practices for Pricing Campus Wiring Associated with Provision of ESSX/CENTREX Services, 96 FPSC 8:166, 167-68 (1996), the FPSC

stated that for PBX systems, there is a single demarcation point and "the interbuildins cable is treated as complex inside wire.'" (Harris Br. at 3-4 (Vol. 2, R. 163-64) (citation omitted) (emphasis added); see Harris Reply Br. at 2 (Vol. 2, R. 213).)

Harris also demonstrated that complex inside wiring should be recorded in Account 232. Account 232 contains "the original cost of installing or connecting items of station apparatus and the original cost of inside wiring and cabling and of drop and block wires." 47 C.F.R. § 31.232(a) (1983) (emphasis added).² Harris noted that in its Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982), the FCC stated: "Currently, it is required that intrasystem wiring be recorded in account 232" (Harris Reply Br. at 5 (Vol. 2, R. 216).) In the Report and Order, 48 Fed. Reg. 50,534 para. 61 (referenced by the FPSC as the "Final Order"), referenced by Harris (Harris Br. at 5 (Vol 1, R. 165)), the FCC stated:

[T]he items list for account 232 clearly requires that wires used to connect private branch exchanges, switchboards or their distributing frames with terminal stations should be recorded in account 232. This clearly applies to all PBXs and the wires we have defined as intrasystem wiring.

(Emphasis added.)

Harris next discussed the deregulation of inside wiring as it applied to inside wiring that was recorded in Account 232.

² Although the FCC's Uniform System of Accounts and accounting rules currently are contained in 47 C.F.R. Part 32, they were contained in Part 31 in 1982.

(Harris Br. at 6-11 (Vol. 1, R. 166-71).) This deregulation began in the early 1980s through a series of orders released by the FPSC and FCC. In the FCC's First Report and Order, 85 FCC 2d 818, 829 (1981), the FCC required telephone companies to amortize (i.e., phase out) their embedded investment in inside wiring recorded in Account 232 over a 10-year period. All of the wiring installed by October 1, 1981 (which had previously been capitalized) should have been amortized. Some of the wiring installed between October 1, 1981 and September 30, 1984 should have been capitalized (and then amortized). The remainder of the wiring installed between October 1, 1981 and September 30, 1984 should have been expensed, as should all wiring installed after September 30, 1984. Id. at 828. Depending on the installation date of the inside wiring that should have been amortized, such wiring should have been fully amortized by October 1, 1991, or September 30, 1994, respectively. Id. at 828-29; (Harris Br. at 6-7 (Vol. 1, R. 166-67)).

In the case at hand, the wiring was installed at the time that the respective building in which it terminates was constructed. The first building on Harris' campus was built and occupied in 1969. The last building was occupied in 1984. (See Stipulation of Facts, No. 6 (Vol. 1, R. 155); Harris Br. at 7 (Vol. 1, R. 167).)

Although the FCC established a September 30, 1994 deadline for amortization, the FPSC ordered **BellSouth** to follow a shorter amortization schedule. The FPSC required **BellSouth** to fully

amortize the amounts in Account 232 by December 31, 1988.

Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311, 328 (1988). Once inside wiring was expensed or fully amortized, telephone companies could no longer impose a charge for the use of that wiring. Memorandum Opinion and Order (Detariffing the Installation and Maintenance of Inside Wiring), 1 FCC Rcd. 1190, 1195 (1986). Indeed, the FPSC required BellSouth to eliminate its lease charges for all (pre-1984 and post-1984) complex inside wiring as of January 1, 1989.

Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311, 328 (1988). Based on these orders, Harris concluded that BellSouth should have recorded the wiring in Account 232 and expensed or amortized all of the wiring at issue by December 31, 1988. (Harris Br. at 7-8 (Vol. 1, R. 167-68).)

Despite the FPSC's mandate that BellSouth eliminate the lease charges for complex inside wiring, BellSouth continued to charge Harris for the complex inside wiring on Harris' Semiconductor Complex. Harris requested the FPSC to order BellSouth to refund to Harris its payments for the wiring since that date. Harris estimated that the refund would be \$172,080.14 plus \$2,000 per month for each month after January 1996, plus interest and taxes.. (Harris Br. at 11 (Vol. 1, R. 171).)

BellSouth's Briefs

BellSouth filed its Initial Brief on August 30, 1996 and its Reply Brief on September 9, 1996. (Vol. 1, R. 176; Vol. 2, R. 198.) BellSouth asserted that the wiring at issue is "network intrasystem cabling," a term for which BellSouth gave no reference in any FPSC or FCC order. (BellSouth Br. at 4 (Vol. 1, R. 181).) BellSouth asserted that all of its facilities installed before 1984 (including inside wire) were "network facilities." (BellSouth Br. at 18 (Vol. 1, R. 195); BellSouth Reply Br. at 4 (Vol. 2, R. 203).) As for the accounting treatment of the wiring at issue, BellSouth stated that its predecessor company had recorded the wiring in Account 242. (BellSouth Br. at 7 (Vol. 1, R. 184).) Specifically, BellSouth stated that the wiring was recorded as "buried cable" in Account 242.3,³ but BellSouth did not explain why the wiring at issue should fit the definition of buried cable. Id. Account 242.3 includes: "the original cost of buried cable and other material used in the construction of such cable." 47 C.F.R. § 31.242:3 (1983). Unlike Account 232, Account 242.3 makes no mention of inside wiring. And although Account 242.3 contains an "Items" list, BellSouth did not point to any item on the list that would coincide with the wiring at issue.

³ Account 242, at times, has been split into separate accounts of the form 242.x and 242x. The term "Account 242" is used generally to refer to any of these accounts.

FPSC Staff Recommendation

The FPSC Staff filed its Recommendation on March 10, 1997. (Vol. 2, R. 246.) The Staff concurred with Harris that the wiring at issue is properly characterized as "complex inside wiring." (Recommendation at 8 (Vol. 2, R. 253).) The Staff noted that in the FCC's Report and Order released in 1983, the FCC specifically stated that intrasystem wiring must be recorded in Account 232. (Id. at 20 (Vol. 2, R. 265)); Resort and Order, 48 Fed. Reg. 50,534 para. 61 (1983). But BellSouth had argued that the FCC's Report and Order applied only to new intrasystem wiring. In response, the Staff stated that "it makes little sense that new intrasystem wiring would be treated as inside wire [(i.e., recorded in Account 232)] while embedded intrasystem wiring would continue to be maintained as network cables [(i.e., recorded in Account 242)]." (Recommendation at 20 (Vol. 2, R. 265).) The Staff explicitly disagreed that the wiring at issue is network cable. (Id. at 21 (Vol. 2, R. 266).)

FPSC Final Order

On April 7, 1997, the FPSC issued its Final Order Resolving Petition and Complaint. (Vol. 2, R. 270.) The FPSC's Final Order followed the FPSC Staff Recommendation. In the Final Order, the FPSC agreed that: (a) the wiring at issue is properly legally characterized as complex inside wiring (Final Order at 15 (Vol. 2, R. 284)); (b) complex inside wiring should have been recorded in Account 232 and amortized and/or expensed (id. at 19

(Vol. 2, R. 288)); (c) since January 1, 1989, BellSouth should not have charged for complex inside wiring (id. at 20 (Vol. 2, R. 289)); and (d) in the future, BellSouth should not charge for wiring on Harris' Semiconductor Complex (id.). However, the FPSC did not order BellSouth to refund its past (post-January 1, 1989) charges for the wiring on Harris' campus. The FPSC required BellSouth to cease charging for the wiring only on a going-forward basis. (Id.)

It is the FPSC's Final Order -- and in particular, its decision not to require BellSouth to refund its charges to Harris -- that is the subject of this appeal.

S - Y OF ARGUMENT

The main issue on appeal is whether BellSouth unlawfully charged Harris for the complex inside wiring (aka "intrasystem wiring") on Harris' Semiconductor Complex from at least January 1, 1989 to the present, and therefore whether the Florida Public Service Commission (FPSC) should have ordered BellSouth to refund to Harris its payments for that wiring.

The FPSC agreed with Harris that the wiring at issue meets the FPSC's and Federal Communications Commission's (FCC's) definition of "complex inside wiring." (Final Order at 15 (Vol. 2, R. 284).)

Such wiring should have been recorded in Account 232. However, BellSouth recorded the wiring in Account 242, which is used for regulated network cables, not deregulated inside wire.

(See Harris Reply Br. at 15-17 & n.4 (Vol. 2, R. 226-28).) The FPSC excused BellSouth's accounting treatment of the wiring at issue.

In doing so, the FPSC misinterpreted the FCC's accounting rules and orders which the FPSC applies to Florida telephone companies. See Fla. Admin. Code. R. 25-4.017. The FPSC acknowledged that in its 1982 Notice of Proposed Rulemaking, the FCC stated that intrasystem wiring must be recorded in Account 232. (Final Order at 18-19 (Vol. 2, R. 287-89).) The FPSC also recognized that in the corresponding Report and Order, the FCC stated that Account 232 applies to intrasystem wiring. (Id. at 18 (Vol. 2, R. 287)); Report and Order, 48 Fed. Reg. 50,534 para. 61 (1983). In response to BellSouth's argument that the FCC's Report and Order applied only to new intrasystem wiring, the FPSC stated that it would be incongruous for new intrasystem wiring to be treated as inside wire and recorded in Account 232, while retaining existing intrasystem wiring "as part of the network" in Account 242.3. (Final Order at 19-20 (Vol. 2, R. 288-89).) The FPSC also agreed that wiring recorded in Account 232 should have been expensed and/or amortized by December 31, 1988, and that BellSouth was required to cease charging for such wiring at that time. (Id. at 22-23 (Vol. 2, R. 291-92).) Yet the FPSC refused to apply these rules and orders to the wiring at issue. Despite the FPSC's own mandate that charges for Account 232 complex inside wiring be eliminated effective January 1, 1989, the FPSC failed to order BellSouth to pay refunds to Harris.

The justification proffered by the FPSC is its misinterpretation of Note B to Account 232. But Note B has nothing to do with the complex inside wiring at issue; it applies only to outside plant. By ignoring Harris' arguments concerning Note B and the FPSC's own conclusions about the regulatory rules applicable to complex inside wiring, the FPSC held that BellSouth had not violated any FPSC orders, and that it was unclear whether BellSouth had violated any FCC orders. (Final Order at 19 (Vol. 2, R. 288).) The FPSC is wrong. By not determining that BellSouth should have recorded the complex inside wiring in Account 232, the FPSC clearly misinterpreted: (a) the FCC's Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982) ; (b) the FCC's Report and Order, 48 Fed. Reg. 50,534 para. 61 (referenced by the FPSC as the "Final Order"); and (c) the FCC's Account 232, as contained in 47 C.F.R. § 32.232 (1983). These FCC rules and orders require complex inside wiring to be recorded in Account 232. Instead of giving deference to the FCC's interpretations of its own rules, the FPSC plainly ignored them.

Additionally, in stating that BellSouth had not violated any FPSC rules or orders, the FPSC misinterpreted its own rule requiring telephone companies to comply with the FCC's Uniform System of Accounts, Fla. Admin. Code. R. 25-4.017. If BellSouth had violated any FCC accounting rules or orders, BellSouth also would have violated the FPSC's requirement to comply with FCC accounting rules. Because the FPSC found that the wiring was

complex inside wiring (i.e., wiring that is recorded in Account 232), the FPSC erred by deferring to BellSouth's plainly erroneous accounting for the wiring.

For these reasons, Harris respectfully requests the Court to hold the Final Order to be unlawful. Harris also requests the Court to remand to the FPSC with directions to: (a) hold that the wiring at issue should have been recorded in Account 232 and expensed and/or amortized by December 31, 1988, and BellSouth should have ceased charging Harris for the wiring as of January 1, 1989; and (b) order BellSouth to refund to Harris the amounts it has paid for that wiring since at least January 1, 1989, plus interest and taxes.

ARGUMENT

The FPSC agreed with Harris on almost every issue -- that the wiring at issue is complex inside wiring, that complex inside wiring should be recorded in Account 232, that wiring recorded in Account 232 should have been expensed and/or amortized by December 31, 1988, and that BellSouth should have ceased charging for such wiring as of January 1, 1989. However, the FPSC failed to take the next logical step and conclude that the complex inside wiring at issue should have been recorded in Account 232. If the FPSC had reached that conclusion, FPSC and FCC orders mandate that BellSouth should not have charged Harris for the wiring since at least January 1, 1989; the FPSC therefore should

have required BellSouth to refund its unlawful charges for that wiring.

Standard of Review

Under the Florida Statutes, the Court must remand this case to the FPSC for further proceedings consistent with the Court's decision or set aside the FPSC's action when it finds that "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action."

§ 120.68(7) (d), Fla. Stat. (Supp. 1996). Harris demonstrates herein that the FPSC misinterpreted FPSC and FCC rules and orders, and that a correct interpretation of those rules and orders would require the FPSC to order BellSouth to refund Harris' payments for the wiring at issue.

I. THE FPSC AGREED THAT THE WIRING AT ISSUE IS COMPLEX INSIDE WIRING

The first step toward determining whether BellSouth should have been charging Harris for the wiring at issue is to determine the proper legal characterization of the wiring. The FPSC agreed with Harris that the wiring at issue meets the FCC's and FPSC's definition of "complex inside wire." (Final Order at 15 (Vol. 2, R. 284).)

The FPSC and FCC define complex inside wiring as follows:

Inside wire services can be classified into two product groups: complex inside wire services and simple inside wire services. The FCC's definition of inside wiring is:

"Complex wiring, also called intrasystem wiring, includes all cable and wire and its associated components such as connecting blocks, terminal boxes and conduit located on the customer's side of the demarcation point, when this wiring is inside a building (or between a customer's buildings) located on the same or contiguous property not separated by a public thoroughfare, which connect station components to each other or to the common equipment of a PBX or key system. However, wire meeting the other criteria for complex inside wire and crossing a public thoroughfare may be considered intrasystem wiring if approved by an appropriate state or local authority. Simple inside wiring is any inside wiring other than complex wiring."

Generic Investigation into the Proper Regulatory Treatment of Inside Wire, 95 FPSC 1:119, 121 (1995) (citing Second Resort and Order, 59 R.R.2d 1143, 1143 & n.2 (1986); Report and Order (Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring), 48 Fed. Reg. 50,534 para. 5 n.4 (1983)); see generally Proposed Revisions to Rule 25-4.345, 84 FPSC 12:17 (1984) (defining "inside wire" as "all wire or cable located on the customers [sic] side of the demarcation point, including interbuilding conduit on the same customer's premises when it is intrasystem wiring for a complex system"); Notice of Proposed Rulemaking (Telecommunications Services Inside Wiring), 11 FCC Rcd. 2747, 2762 (1996) (definition of intrasystem wiring).

(Harris Br. at 2-3 (Vol. 1, R. 162-63) (citation omitted) (emphasis added) .)

The FPSC correctly concluded that the wiring at issue complies with its definition of complex inside wiring. The FPSC noted that Stipulation of Facts No. 3 states that there is one demarcation point for the wiring at issue, and all of the wiring at issue is on Harris' side of the demarcation point. (Final Order at 15 (Vol. 2, R. 284).) Also, the wiring runs between Harris' buildings, but does not cross a public road. See .

Indeed, BellSouth was charging for the wiring as Series 2000 Channels which BellSouth defines as "'a channel between different buildings on the same continuous property.'" *Id.* (citation omitted). Furthermore, the wiring connects the PBX in Building 53 to telephone closets in other buildings. (*Id.* at 2 (Vol. 2, R. 271).) Thus, in accordance with the FPSC's and FCC's definitions of complex inside wiring, the FPSC concluded that "the only rational conclusion is that the facilities at issue constitute complex inside wire," (*Id.* at 15 (Vol. 2, R. 284).) (The terms "intrasystem wiring" and "complex intrasystem wiring" are used synonymously with "complex inside wiring" throughout the Final Order.)

II. THE COMPLEX INSIDE WIRING SHOULD HAVE BEEN RECORDED IN ACCOUNT 232

Once the legal characterization of the wiring at issue was determined to be complex inside wiring, the second step in determining whether BellSouth should have been charging Harris for the complex inside wiring is determining the proper accounting treatment for that wiring. In its Brief, Harris demonstrated that the FPSC requires BellSouth to follow the FCC's Uniform System of Accounts, Fla. Admin. Code. R. 25-4.017, and that the wiring at issue should have been recorded in the complex inside wiring account -- Account 232 of the FCC's Uniform System of Accounts. (Harris Br. at 5-6 (Vol. 1, R. 165-66).) However, BellSouth stated that it recorded the wiring in Account 242.3, for regulated buried network cable. (BellSouth Br. at 7 (Vol. 1,

R. 184).) As demonstrated below, by misinterpreting Account 232 (including Note B to Account 232) and by failing to give deference to the FCC's interpretation of its own accounting rules, the FPSC erroneously excused BellSouth for recording the wiring in Account 242.

The FPSC acknowledged the two FCC orders stating that Account 232 includes intrasystem wiring: (a) the FCC's Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982); and (b) the FCC's Report and Order, 48 Fed. Reg. 50,534 para. 61 (explaining that Account 232 includes intrasystem wiring) (referenced by the FPSC as the "Final Order"). (Final Order at 18 (Vol. 2, R. 287).) The FPSC, however, failed to reach the conclusion that BellSouth should have recorded the complex inside wiring in Account 232, even though it had just determined that the wire was complex inside wiring which is recorded in Account 232. Instead, the FPSC adopted a split-the-baby approach and determined that "it would have been appropriate for BellSouth to reclassify the associated investment to Account 232." (Final Order at 20 (Vol. 2, R. 289) (emphasis added).) The FPSC thereby excused BellSouth's recording of the wiring in the wrong account (Account 242), which is used for regulated network cable rather than inside wire. (Harris Br. at 6 (Vol. 1, R. 166); Harris Reply Br. 15-17 & n.4 (Vol. 2, R. 226-28).) The FPSC's sanction of BellSouth's use of Account 242 is inconsistent with its own statements that the wiring at issue is not network cable. (Final Order at 15, 19 (Vol. 2, R. 284, 288).)

The FPSC hung its hat on its misinterpretation of Note B to Account 232 (which the FPSC repeatedly and erroneously referred to as Note B to Account 242 (Final Order at 17, 19-20 (Vol. 2, R. 286, 288-89))). Note B states:

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 C.F.R. § 32.232 (1983). The critical point is that Note B was never intended to convey the position that inside wire "behind a PBX" should not be recorded in Account 232. Instead, the Note has clarified that the outside facilities, such as poles, wires and cables, that bring the telephone company's system to the PBX are network facilities which should not be recorded in Account 232. (See Harris Reply Br. at 17 (Vol. 2, R. 228).)

Note B to Account 232 apparently has its origins in Note B to Account 234 (which applies to small **PBXs**). In Account 234, Note B clarified that inside wiring associated with the **PBXs** recorded in Account 234 should be recorded in Account 234, whereas outside plant must be recorded in the outside plant accounts. (Harris Reply Br. at 17 (Vol. 2, R. 228).) In 1956, when the FCC transferred inside wiring that was recorded in Account 234 to Account 232, it apparently copied Note B from Account 234 to Account 232. (Harris Reply Br. at 16 (Vol. 2, R. 227)); Notice of Proposed Rulemaking (Uniform System of Accounts, Class A and Class B Telephone Companies), 21 Fed. Reg. 5296, 5296 (1956) (explaining that inside wires formerly recorded in Account

234 would be transferred to Account 232); Order (Uniform System of Accounts, Class A and Class B Telephone Companies), 21 Fed. Reg. 7446, 7450 (1956) (adding Note B to Account 232). Note B to Account 232 therefore retained the meaning that it had in Account 234 -- that outside plant should be recorded in the outside plant accounts. Thus, Note B to Account 234 and Note B to Account 232 have never affected the recording of inside wiring.

The FPSC did not address Harris' arguments on this issue, and without explanation, the FPSC stated that Note B "could be interpreted to include the facilities at issue" prior to 1984. (Final Order at 19 (Vol. 2, R. 288).) The FPSC stated, however, with respect to Note B, that "the issue is not so much with the accounting treatment of the facilities prior to 1984, but with the accounting treatment since 1984." (Id, at 17 (Vol. 2, R. 286) (emphasis added).) Thus, any applicability of Note B to the wiring at issue prior to 1984 should not have had any impact on the FPSC's decision in this case.

But it did. The FPSC summed up its position in the following two sentences:

1. BellSouth believes these facilities have always been network cables and therefore has continued to record this investment as buried cable in Account 242.
2. Note B continued to be reflected in Account 242 and the FCC never issued an Order requiring the reclassification of such facilities to Account 232.

(Final Order at 19 (Vol. 2, R. 288).)

There are several flaws with the FPSC's reliance on these two statements. First, the FPSC essentially is stating that even though the FPSC requires BellSouth to comply with the FCC's accounting rules, and the FCC required intrasystem wiring to be recorded in Account 232, it was permissible for BellSouth to ignore the FCC's accounting requirements. The FPSC freely admits that it would have been appropriate for BellSouth to record the facilities in Account 232. Only the FPSC's misinterpretation of the applicability of Note B to Account 232 prevented the FPSC from concluding that BellSouth was required to record the facilities in Account 232. The FCC never needed to issue an order requiring the reclassification of the facilities at issue to Account 232. The facilities at issue are Account 232 facilities, whereas Note B facilities are outside plant (i.e., telephone company network facilities) as, hopefully, this Court will recognize. The FPSC states:

We note BellSouth could have recovered the investment in these facilities by January 1, 1989 through amortization; it chose not to avail itself of that opportunity.

(Final Order at 20 (Vol. 2, R. 289).) The 1988 FPSC order referenced by the FPSC said nothing about choices or opportunities -- it was a mandate. The FPSC ordered:

Station lines are the lines extending from the common equipment of PBX or key systems to the individual telephones. . . . [E]ffective December 31, 1988, the unamortized balance of \$9,282,000 in Account 232 will be fully recovered. . . . On January 1, 1989, Southern Bell shall eliminate the lease charges on complex station lines.

88 FPSC 10:311 at 327-28.

Second, the FPSC's statements appear to imply that the wiring at issue should have been recorded in Account 242 because Note B "continued to be reflected in Account 242." (Final Order at 19 (Vol. 2, R. 288) (emphasis added).) But as noted above, Note B **was** contained in Account 232, not Account 242- Thus, at a minimum, the FPSC's apparent reliance on the placement of Note B reflects a misreading of Accounts 232 and 242. Moreover, the FPSC's statement could be construed to support its antithesis -- that because Note B was in Account 232, the inside wiring should have been recorded in Account 232.

Finally, even if, for the sake of argument, the Court were to agree with the FPSC that BellSouth was not specifically required to transfer the wiring from Account 242 to Account 232, the question would-remain whether the wiring **was** properly recorded in Account 242 in the first instance. The fact that "BellSouth believes these facilities have always been network cables" has no relevance to the issues of whether they are network cables, and whether they should have been recorded in Account 232. Instead, it is the FCC's orders and rules, and the FPSC's requirement that telephone companies follow the FCC's accounting rules, which are dispositive of whether the wiring should have been recorded in Account 232.

In its Brief, Harris reviewed the relevant FCC orders and rules requiring complex inside wiring to be recorded in Account 232. (Harris Br. at 5-6 (Vol. 1, R. 165-66); Harris Reply Br. at 14-18 (Vol. 2, R. 225-29).) In particular, as noted by the FPSC,

in September 1982, the FCC stated: "Currently, it is required that intrasystem wiring be recorded in account 232." (Final Order at 18 (Vol. 2, R. 287)); Notice of Prososed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982). Because that statement was made in the context of a notice of proposed rulemaking, the requirement to record intrasystem wiring in Account 232 predated the release date of the notice of proposed rulemaking -- September 1982. The FPSC did not and cannot point to any FCC order issued between 1969 (the year that the wiring at issue began to be installed) and September 1982 that changed the accounting rules for intrasystem wiring. Thus, the requirement to record intrasystem wiring in Account 232 must date back at least to 1969, and therefore must apply to all of the wiring installed by BellSouth.

The FPSC erred by declining to defer to the FCC's interpretation of Account 232. Under Florida law, when confronted with what the FPSC believed to be an ambiguity in the wording of Accounts 232 and 242, the FPSC should have deferred to the FCC's interpretation of those rules. This Court has made it clear that the FPSC, like other agencies, is entitled to great deference when construing a rule it is charged to interpret and enforce. The Court will not depart from the FPSC's construction of an FPSC rule unless the FPSC's interpretation is clearly erroneous. See Pan Am World Airways, Inc. v. Florida Pub. Serv. Comm'n, 427 So. 2d 716, 719-20 (Fla. 1983); Falk v. Beard, 614 So. 2d 1086, 1089 (Fla. 1993). The FCC's interpretation of

Account 232 is entitled to the same level of deference by this Court. The FPSC's misinterpretation of Note B under Account 232 hardly renders the FCC's interpretation of Account 232 to be clearly erroneous.

Thus, the FPSC should have deferred to the FCC's Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982), and the corresponding FCC Report and Order, 48 Fed. Reg. 50,534 para. 61 (referenced by the FPSC as the "Final Order"). In both orders, the FCC interpreted its accounting rules and stated that intrasystem wiring should be recorded in Account 232. Thus, in accordance with this Court's decision in Pan Am v. Florida Pub. Serv. Comm'n, the FPSC should have given deference to the FCC's interpretation of its rules, and held that the wiring at issue should have been recorded in Account 232.

In sum, the FPSC's sanction of BellSouth's use of Account 242 for the complex inside wiring at issue resulted from the FPSC's erroneous interpretation of: (a) the FCC's Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982); (b) the FCC's Report and Order, 48 Fed. Reg. 50,534 para. 61 (referenced by the FPSC as the "Final Order"); and (c) the FCC's Account 232, as contained in 47 C.F.R. § 32.232 (1983). These FCC orders and rules each stated that complex inside wiring should be recorded in Account 232, but the FPSC did not interpret them to apply to the wiring at issue;

111. BECAUSE BELLSOUTH SHOULD HAVE RECORDED THE WIRING IN ACCOUNT 232. IT SHOULD HAVE CEASED CHARGING HARRIS FOR TEAT WIRING BY AT LEAST JANUARY 1, 1989

Because the wiring should have been recorded in Account 232, it was subject to the FPSC's and FCC's orders concerning the expensing and amortization of embedded complex inside wiring, as demonstrated below. The FPSC agrees that if the wiring had been recorded in Account 232, BellSouth "should not have been charging for the wiring at issue since January 1, 1989 when the amortization of Account 232 - Inside Wire was complete." (Final Order at 19 (Vol. 2, R. 288).)

As noted in the Statement of Facts, the FCC had required that all wiring installed after September 30, 1984 be expensed, and that previously capitalized wiring be fully amortized by September 30, 1994. First Resort and Order, 85 FCC 2d at 828-29. In the case at hand, all of the wiring at issue was installed by 1984, the year that the last building on Harris' campus was occupied. (See Stipulation of Facts, No. 6 (Vol. 1, R. 155).) Thus, in accordance with the FCC's First Resort and Order, all of the wiring at issue should have been expensed or should have been fully amortized by September 30, 1994. See also Rewort and Order (Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services), 95 FCC 2d 1276, 1371-72 & n.141 (1983) (stating that in the First Resort and Order, the FCC required carriers to amortize intrasystem wiring costs).

However, the FPSC ordered BellSouth to fully amortize the amounts in Account 232 by December 31, 1988, and to eliminate its lease charges for complex inside wiring as of January 1, 1989. Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311, 328 (1988). Thus, BellSouth should not have been charging for complex inside wiring since at least January 1, 1989. This conclusion is consistent with the FCC's order precluding telephone companies from imposing a charge for the use of inside wiring after it is expensed or fully amortized. Memorandum Opinion and Order (Detariffing the Installation and Maintenance of Inside Wiring), 1 FCC Rcd. 1190, 1195 (1986); (Harris Br. at.8 (Vol. 1, R. 168); see also Final Order at 19-20 (Vol. 2, R. 288-89).)

In sum, the FPSC agreed that the wiring at issue is complex inside wiring, that complex inside wiring should be recorded in Account 232, that wiring in Account 232 should have been expensed and/or amortized by December 31, 1988, and that BellSouth should not have been charging for such wiring since January 1, 1989. By not interpreting these regulatory requirements to apply to the wiring at issue, the FPSC unlawfully failed to order BellSouth to pay refunds to Harris.

IV. THE FINAL ORDER MISINTERPRETS AND IS INCONSISTENT WITH FPSC AND FCC RULES AND ORDERS

As demonstrated above, the FPSC erroneously interpreted FPSC and FCC orders concerning the recording of complex inside wiring

in Account 232. A correct interpretation of those orders is that the complex inside wiring at issue should have been recorded in Account 232. If the FPSC had made that correct interpretation, it was required to conclude under its 1988 order that BellSouth should not have charged Harris for the wiring at issue since at least January 1, 1989, and the FPSC should have ordered BellSouth 'to refund Harris' payments for those charges unlawfully made (plus interest and taxes).

The FPSC also erroneously interpreted its own rules concerning the application of FCC accounting rules to Florida telephone companies. As noted by Harris, the FPSC requires telephone companies, such as BellSouth, to follow the FCC's accounting rules. (Harris Br. at 5 (Vol. 1, R. 165)); Fla. Admin. Code. R. 25-4.017. However, the FPSC stated: "[I]t does not appear that BellSouth has violated any Florida rules, regulations or statutes. Further, . . . it is unclear whether any FCC rules or regulations have been violated." (Final Order at 19 (Vol. 2, R. 288).) But if BellSouth violated FCC rules concerning the accounting treatment of complex inside wiring, BellSouth also violated the FPSC's accounting rules. The FPSC therefore erred in definitively stating that BellSouth did not violate any Florida rules.

CONCLUSION AND RELIEF SOUGHT

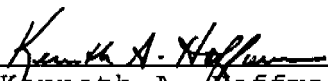
Harris has demonstrated that the FPSC's Final Order erroneously interpreted and applied the FPSC and FCC rules and

orders concerning the accounting treatment for the complex inside wiring at issue. In accordance with Section 120.68(7)(d), Florida Statutes, Harris respectfully requests this Court to: (a) hold the Final Order to be unlawful; and (b) remand to the FPSC with directions to hold that the complex inside wiring should have been recorded in Account 232, and to order BellSouth to refund to Harris the amounts it has paid for that wiring since at least January 1, 1989, plus interest and taxes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused to be served by U.S. mail on this 16th day of June, 1997, a copy of the foregoing Initial Brief to the following:

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