

IN THE
SUPREME COURT OF FLORIDA

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HARRIS CORPORATION,)
Appellant/Cross-Appellee,)
and)
BELLSOUTH TELECOMMUNICATIONS,)
INC.,)
Appellee/Cross-Appellant,)
vs.)
JULIA L. JOHNSON, etc.,)
Appellees/Cross-Appellees.)

CASE NO. 90,366

ON NOTICE OF APPEAL OF AN ORDER
OF THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE HARRIS CORPORATION

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INTRODUCTION

Appellees BellSouth Telecommunications, Inc. (BellSouth) and Julia L. Johnson, etc. (the FPSC) do not dispute a trio of Federal Communications Commission (FCC) orders that are dispositive of this case. First, in 1982, the FCC stated:

Currently, it is required that intrasystem wiring¹ be recorded in account 232.

(Final Order at 18 (Vol. 2, R. 287)); Notice of Proposed Rulemaking, 47 Fed. Reg. 44,770 para. 25 (1982) [hereinafter Detariffing Notice].² Second, in 1983, 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.

Report and Order, 48 Fed. Reg. 50,534 para. 61 (1983)

[hereinafter Detariffing Order] (referenced by the FPSC as the "Final Rule" and by BellSouth as the "Detariffing Rule")

(emphasis added); (see also Harris Br. at 5 (Vol. 1, R. 165)).

Third, that same year, the FCC acknowledged that embedded (i.e.,

¹As noted in Harris Corporation's (Harris') Initial Brief, at 2, 15, the term "intrasystem wiring" is used interchangeably with "complex inside wiring."

²The Appendix to this Reply Brief and the Appendix to Harris' Initial Brief collectively contain excerpts from FPSC orders, the Florida Administrative Code, Federal Communications Commission (FCC) orders and rules (except for the FCC's rules contained in 47 C.F.R. §§ 2321, 2422, 2423, which are referenced in a footnote infra), the FPSC's Final Order, the U.S. Code and the Florida Rules of Appellate Procedure which are cited in this Reply Brief and in the Initial Brief. Pleadings filed by AT&T in FCC Docket No. 81-893 are attached to Harris' Request for Judicial Notice.

expensing requirements of the First Report and Order, 85 FCC 2d 818 (1981). The FCC stated:

We already have taken action to establish a schedule for the amortization of . . . unrecovered costs [for embedded intrasystem wiring] under regulation.

Report and Order (Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services), 95 FCC 2d 1276, 1371-72 & n.141 (1983) [hereinafter CPE Report and Order] (citing First Report and Order, 85 FCC 2d at 829-30); (see Harris Init. Br. at 6).

Everyone agrees that the definition of intrasystem wiring fits the wiring at issue. (E.g., BellSouth Br. at 13; FPSC Br. at 10; Harris Init. Br. at 14-16.) Therefore, there can be no question that the FCC required BellSouth to record the wiring at issue in Account 232. There also can be no question that this wiring should have been amortized and/or expensed, And, **as** everyone agrees, once such wiring has been amortized or expensed, BellSouth should not have continued to charge for the wiring. (BellSouth Br. at 3; FPSC Br. at 13; see Final Order at 20 (Vol. 2, R. 289).)

BellSouth and the FPSC ignore the import of this trio of FCC orders, and base their defenses on strained and erroneous interpretations of these and other FCC orders. BellSouth proffers three main arguments: (a) that the wiring at issue is not intrasystem wiring because it existed when the term "intrasystem wiring" was adopted, (BellSouth Br. at 27); (b) that BellSouth did not have to record the wiring in Account 232, (id.

at 18-20); and (c) that the FCC's requirement to amortize and/or expense intrasystem wiring did not apply to the wiring at issue, (id. at 23). As demonstrated below, these arguments are inconsistent with the trio of FCC orders discussed above and are riddled with inconsistencies and other flaws that belie their veracity. The arguments also **are** inconsistent with BellSouth's statements to the FCC in rulemaking proceedings related to intrasystem wiring. Additionally, BellSouth's "Statement of Facts" contains numerous unsupported and incorrect assertions that must be rejected by the Court.³ Furthermore, BellSouth's cross-appeal, which requests future payments for the wiring at issue, is based on the same faulty logic on which the remainder of its Brief is based, and therefore should be denied.

The FPSC fares no better. The FPSC concedes that BellSouth **was** not in compliance with FPSC and FCC rules and orders. (FPSC Br. at 16.) The FPSC argues that BellSouth did not need to comply with those rules in the past, but it must do so in the future. (Id. at 13, 16.) Surely a decision to deny a refund to Harris cannot stand on such arbitrary reasoning.

The FPSC requests the Court to defer to the FPSC's interpretation of the FPSC's rules. (FPSC Br. at 9.) However, the main issue here is the FPSC's incorrect interpretation of the

³ BellSouth's "Statement of Facts" contains alleged facts that are not true, as well as many legal assertions that are unsupported and argumentative. Rather than moving to strike BellSouth's Answer Brief, Harris treats BellSouth's "Statement of Facts" as argument, and refutes many of BellSouth's incorrect and unsupported "Facts" in this Reply Brief.

FCC's rules and orders. No deference is due the FPSC in that situation. Instead, the Court should give deference to the FCC's interpretation of its rules. And, as shown by the trio of FCC orders discussed above, the FCC has provided clear interpretations of its rules.

In sum, neither the FPSC nor BellSouth has provided any justification for BellSouth's noncompliance with the FPSC's and FCC's accounting rules, nor have they provided any justification for the FPSC's decision not to require BellSouth to refund Harris' payments. For these reasons, the Court should deny BellSouth's cross-appeal, and order the FPSC to award a refund to Harris for its past (post-January 1, 1989) payments.

I. BELLSOUTH AND THE FPSC DO NOT DISPUTE HARRIS' STATEMENT OF THE CASE AND STATEMENT OF FACTS

As a threshold matter, Harris notes that the FPSC did not dispute anything in Harris' Statement of the Case and Statement of Facts. In the FPSC's **Statement of the Case and of the Facts**, it did not even cite to any part of Harris' Brief. As required by Rule 9.210(c), Fla. R. App. P. 9.210(c), the FPSC should have clearly specified any areas of disagreement, but it did not. Thus, it appears that the FPSC agrees with Harris' Statement.

Harris notes that BellSouth begins its Statement of the Case and Facts with the assertion that Harris' Statement of the Case and Statement of Facts is "unduly argumentative." (BellSouth Br. at 4.) BellSouth never explains to what it was referring, and does not cite Harris' Brief anywhere in its Statement of the Case

and Facts. By beginning its Statement of the Case and Facts with this allegation that it never even attempts to support, BellSouth casts doubt on the veracity of the remainder of its Brief. Additionally, because BellSouth did not dispute any facts that Harris presented, BellSouth must agree with Harris' facts.

In sum, neither BellSouth nor the FPSC has disputed anything in Harris' Statement of the Case and Statement of Facts.

II. CONTRARY TO BELLSOUTH'S CONTENTIONS, THE WIRING WAS INTRASYSTEM WIRING

BellSouth does dispute the FPSC's determination that the wiring at issue is intrasystem wiring, (BellSouth Br. at 27; Final Order at 15, 19 (stating that "the only rational conclusion is that the facilities at issue constitute complex inside wire") (Vol. 2, R. 284, 288).) BellSouth contends that the wiring cannot be intrasystem wiring because it already existed when the FCC first defined "intrasystem wiring." (BellSouth Br. at 27.) BellSouth is legally and factually wrong.

A. THE TERM "INTRASYSTEM WIRING" APPLIES TO NEW WIRING AND TO EMBEDDED WIRING

BellSouth states that the wiring used to connect a PBX to terminal stations in other buildings is intrasystem wiring because it is on the customer's side of the demarcation point. (Id.) That part of BellSouth's statement is correct. But BellSouth goes on to assert that the wiring cannot be intrasystem wiring if it was "already embedded" when the "intrasystem wiring"

definition was established. (Id.) BellSouth does not give any citation to support this assertion, because there is none. Later in its Brief, BellSouth states that "intrasystem wiring" includes "outside, buried cable connecting multibuilding systems," and asserts that the term "intrasystem wiring" does not apply to the wiring at issue because it already was "embedded." (Id. at 30.) Again, BellSouth provides no citation for this assertion.

Indeed, BellSouth's Brief is strikingly inconsistent. BellSouth references "embedded intrasystem wiring" several times throughout its Brief, (E.g., BellSouth Br. at 27, 28, 29.) If "intrasystem wiring" cannot be embedded, then why is BellSouth referring to embedded intrasystem wiring? This inconsistency further highlights the fact that BellSouth's argument regarding embedded wiring is manufactured from thin air.

BellSouth also ignores the fact that the FCC has referenced "embedded intrasystem wiring" in a variety of contexts. For example, in the CPE Report and Order, 95 FCC 2d at 1371 & n.141, the FCC considered how AT&T's investment in "embedded intrasystem wiring" should be recovered. The FCC also referenced "embedded complex wiring" when it defined the demarcation point. Memorandum Opinion and Order (Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network), 50 Fed. Reg. 29,384 para. 12 (1985). If intrasystem wiring could not be "embedded," there would have been no reason for the FCC to concern itself with "embedded intrasystem wiring." Even the FPSC Staff referenced "embedded intrasystem wiring" when they stated

that it would make little sense for embedded intrasystem wiring to be recorded in Account 242. (Recommendation at 20 (Vol. 2, R. 265) .) Ultimately, the FPSC adopted the Staff Recommendation on this point. (Final Order at 18 (Vol. 2, R. 287).) Thus, the FPSC, the FPSC Staff, the FCC and Harris all agree that the definition of "intrasystem wiring" applies to wiring that already was in place in the early 1980s. As earlier noted, BellSouth waffles on this issue.

The only support BellSouth proffers for its contention that embedding wiring cannot be intrasystem wiring is found in its "Statement of Facts." There, BellSouth asserts that the FCC "explicitly declined to apply [the intrasystem wiring] concept to embedded facilities." (BellSouth Br. at 14.) BellSouth references the Detariffing Order, but provides no reference to any page or paragraph to support its assertion. Nor could it. The Detariffing Order does not support BellSouth's contentions, and clearly does not "explicitly" state them, as BellSouth asserts. In the Detariffing Order, the FCC detariffed new intrasystem wiring; the issue of embedded intrasystem wiring was to be addressed in another docket. Detariffing Order para. 59.⁴ Again, if the term "intrasystem wiring" did not apply to existing facilities, there would have been no need for the FCC to address

*In the Detariffing Order para. 59, the FCC noted that it would address embedded intrasystem wiring in FCC CC Docket No. 81-893. And it did. In the CPE Report and Order in that docket, the FCC decided that BellSouth would retain the embedded intrasystem wiring, and noted that the wiring was subject to the amortization and expensing requirements of the First Report and Order. 95 FCC 2d at 1370-73 & n.141.

embedded intrasystem wiring in a different proceeding, and there would be no need to reference "new" intrasystem wiring.

BellSouth's failure to recognize its inconsistent positions on embedded intrasystem wiring is underscored by the "definition" it proffers for "embedded cable" in its "Statement of Facts." BellSouth states that "embedded cable is cable that was already installed and booked to account 242 when the FCC adopted the 'intrasystem wire' concept." (BellSouth Br. at 8.) The first half of that sentence references embedded cable that is recorded in Account 242, whereas the second half references intrasystem wire which is recorded in Account 232. BellSouth does not explain why cable that is booked to Account 242 would be called "embedded" based on the date that the FCC adopted a new term (i.e., intrasystem wiring) to refer to some of the wiring booked to Account 232. BellSouth's "definition" of embedded cable therefore must be rejected.

In sum, BellSouth has acknowledged -- and the FPSC, the FPSC Staff, the FCC and Harris all agree -- that the term "intrasystem wiring" applied to embedded wiring. BellSouth's arguments to the contrary should be rejected.

**B. IN THE FCC RULEMAKING AND NOW BEFORE THE FPSC,
BELLSOUTH ACKNOWLEDGED THAT ITS EMBEDDED WIRING IS
INTRASYSTEM WIRING**

BellSouth's position on this issue is further belied by pleadings it filed with the FCC in the rulemaking proceeding

corresponding to the CPE Report and Order.' In October 1983, BellSouth acknowledged that it had been recording intrasystem wiring in Account 232, and that prior to 1981, it had been accounting for retired intrasystem wiring through reductions in the depreciation reserve for Account 232. AT&T Response to Request for Information, FCC CC Docket No. 81-893, filed Oct. 7, 1983, at 41-43 & 43 n.*. Additionally, in a later pleading before the FCC, BellSouth discussed how embedded intrasystem wire investment reflects past capitalized labor pursuant to a "deliberate regulatory policy," and BellSouth wanted to be sure that it could recoup its investment. Opposition to Petitions for Reconsideration, FCC CC Docket No. 81-893, filed Mar. 1, 1984, at 20-21 (filed by AT&T and AT&T Information Systems Inc.).

BellSouth recently admitted to the FPSC that its Final Order applied to "intrasystem facilities." BellSouth's Motion for Stay of Order Pending Judicial Review, Docket No, 951069-TL, filed May 2, 1997, at 2 (Vol. 2, R. 317). "Intrasystem facilities" include PBXs, telephones and intrasystem wiring. Detariffing Order paras. 9, 56. The only part of "intrasystem facilities" that are at issue in this case is intrasystem wiring. BellSouth therefore must now be calling the wiring at issue "intrasystem wiring."

In sum, BellSouth knew what intrasystem wiring was before the FCC adopted that term in November 1983, it knew how to account for intrasystem wiring even before 1981, it defended its

⁵ As BellSouth did not generally distinguish between BellSouth and its predecessor, AT&T, (BellSouth Br. at 10 n.5), this Brief also will not do so.

right to recoup its investment in embedded intrasystem wiring, and now refers to the wiring as "intrasystem wiring." BellSouth's contentions that the term "intrasystem wiring" did not apply to existing wiring are insincere.

C. SOME OF THE WIRING MAY HAVE BEEN INSTALLED AFTER THE FCC ADOPTED THE INTRASYSTEM WIRING CONCEPT

BellSouth next argues that the wiring at issue cannot be intrasystem wiring because it already was installed when the Detariffing Order in which the FCC first defined "intrasystem wiring" became effective on May 2, 1984. BellSouth makes that assertion in its "Statement of Facts," where it contends that the wiring was installed prior to the adoption of the "intrasystem wire" concept. (BellSouth Br. at 8.) It repeats its assertion in the Argument section of its Brief. (Id. at 25.) BellSouth fails to consider that the wiring at issue was installed between 1969 and 1984 -- "intrasystem wiring" was adopted in 1983, Detariffins Order paras. 29, 56-61.

BellSouth repeatedly references May 2, 1984 as a key date for determining the regulatory treatment of the wiring at issue. (E.g., BellSouth Br. at 14, 25.) That date is the effective date of the "Part 31" accounting rule changes adopted in the Detariffins Order para. 70. (See also BellSouth Br. at 25-26.) But the term "intrasystem wiring" was not a "rule" that **was** part of the Part 31 rule changes effective May 2, 1984, and it was not even mentioned in those rule changes. Detariffins Order. Thus, May 2, 1984 is irrelevant.

Moreover, BellSouth's concept of an "effective date" for the term "intrasystem wiring" is misguided. (BellSouth Br. at 25.) "Intrasystem wiring" **was** a new term the FCC decided to use to describe some of the wiring in Account 232. If there were an "effective date" and if that date were other than the date the Detariffing Order was adopted (i.e., November 3, 1983), it would be 30 days after the date of public notice of the order in the Federal Register, or December 3, 1983. See 47 C.F.R. § 1.427 (1983) (rules effective 30 days after Federal Register publication). Because the wiring was installed between 1969 and 1984, some of the wiring therefore may have been installed after the term "intrasystem wiring" **was** adopted by the FCC. BellSouth cannot state that all of the wiring was "embedded" when the term intrasystem wiring **was** adopted. There is no basis in the record for such an assertion. And as demonstrated above, wiring that later was considered "intrasystem wiring" was regulated as inside wiring before the "intrasystem wiring" term was adopted by the FCC. The FPSC agrees that the date on which the FCC defined intrasystem wiring is "irrelevant." (Final Order at 15 (Vol. 2, R. 284).)

As an aside, Harris notes that the FPSC incorrectly defined complex inside wiring both in its Statement of the Case and Facts and in its Final Order. (FPSC Br. at 6; Final Order at 6 (Vol. 2., R. 275).) The definition of complex inside wiring is given in Harris' Brief at 14-15. It states:

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.

The FPSC twice omitted the phrase "or between a customer's buildings." (FPSC Br. at 6; Final Order at 6 (Vol. 2, R. 275) .) That phrase is important to this case, because the wiring at issue runs between Harris' buildings.

In sum, BellSouth's arguments that the wiring at issue was not intrasystem wiring because it existed when the term "intrasystem wiring" was adopted are factually and legally wrong, and are inconsistent with BellSouth's acknowledgment of embedded intrasystem wiring in its Brief before this Court, in pleadings before the FCC, and in its recent Motion before the FPSC.

III. BELLSOUTH SHOULD HAVE RECORDED THE WIRING IN ACCOUNT 232

Although the FCC required intrasystem wiring to be recorded in Account 232, BellSouth next argues that it somehow is not subject to that requirement, (BellSouth Br. at 18-20). The FPSC admits that BellSouth was not in compliance with FPSC and FCC rules and orders, but continues to excuse BellSouth's past behavior as long as BellSouth does not continue it in the future. (FPSC Br. at 16.) Neither position has merit.

A. THE FACT THAT BELLSOUTH RECORDED THE WIRING IN ACCOUNT 242 IS IRRELEVANT

BellSouth asserts that because the FCC has never specifically addressed the issue of BellSouth's retention of the

wiring at issue in Account 242, BellSouth could retain the wiring in that account. (BellSouth Br. at 3, 21, 30.1 The FPSC offers only the meek "justification" that BellSouth "believed" that the wiring should be recorded in Account 242. (FPSC Br. at 11; Final Order at 19 (Vol 2., R. 288).) Neither of these arguments, nor the FPSC's erroneous construction of Account 232, excuses BellSouth's violation of FCC and FPSC orders, as discussed below.

1. The FCC Did Not Need to Tell BellSouth to Transfer the Wiring to Account 232

The FPSC and BellSouth argue that because BellSouth recorded the wiring in Account 242 in the late 1970s, and the FCC didn't tell BellSouth to transfer it to Account 232, BellSouth's actions are lawful. (FPSC Br. at 12; BellSouth Br. at 21.)

a. BellSouth Had Notice that the Wirings Should Be Recorded in Account 232

The FCC required intrasystem wiring to be recorded in Account 232. Detariffing Notice para. 25; Detariffing Order para. 61. BellSouth had notice of this requirement. The Detariffing Notice and Detariffing Order were duly published in the Federal Register. See 47 C.F.R. § 1.4(b) (1) (1983). BellSouth should have complied with these FCC requirements. See, e.g., 5 U.S.C. § 553 (requiring Federal Register publication before rules are enforceable).

BellSouth even participated in the rulemaking proceeding by filing comments and reply comments. See Detariffing Order para.

12. If BellSouth had a question about the statement in the Detariffing Notice concerning the accounting treatment of intrasystem wiring, BellSouth could have asked the FCC in the comments it filed in that proceeding.

Alternatively, if BellSouth had any doubt as to its accounting treatment of the wire, it could have requested clarification of the FCC's accounting rules through procedures provided in Section 31.01-9 of the FCC's Rules. 47 C.F.R. § 31.01-9 (1981) (currently 47 C.F.R. § 32.17 (1996)).

In sum, BellSouth was on notice of the FCC's requirements to record intrasystem wiring in Account 232, and BellSouth knew how to obtain clarification from the FCC, if needed. But BellSouth apparently chose to continue its improper use of Account 242.

b. Note B to Account 232 Has Never Applied to the Wiring at Issue

The FPSC asserts that "[p]rior to 1984 these facilities were recorded in the appropriate account," (FPSC Br. at 8), but the FPSC provides no citation for this conclusion. Indeed, the FPSC acknowledges that the FCC required intrasystem wiring to be recorded in Account 232, (id. at 4), but states that BellSouth "believed" the wiring belonged in Account 242, (id. at 11). BellSouth's alleged belief has no basis in the record and, in any event, provides no justification for its failure to comply with an FCC rule (Account 232) that the FPSC acknowledges to be applicable and mandatory.

The FPSC specifically references the text of Account 232 and

Note B. (FPSC Br. at 11.) While the text of subsection (a) to Account 232 is pertinent to this case, Note B is not. Harris explained the plain meaning and legislative history of Note B in its Initial Brief before this Court and in its Brief in the proceeding below. (Harris Init. Br. at 18-19; Harris Reply Br. at 16-17 (vol 2, R. 227-28).) Note B states only that "outside plant" should be recorded in outside plant accounts.

The wiring at issue is not "outside plant." "Outside plant" has a special meaning. "Outside plant" includes "every part of [a telephone company's] network infrastructure connecting the wire center to customer locations." Further Notice of Proposed Rulemaking (Universal Service), FCC 97-256, FCC CC Docket No. 96-45, released July 18, 1997, para. 55 (emphasis added); see also Notice of Proposed Rulemaking (Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities), 104 FCC 2d 59, 108 n.110 (1986) (stating that network plant includes outside plant). With the definition of "outside plant" in mind, one can visualize the cable to which Note B refers. Note B concerns outside plant, such as poles, wires and cables, used to connect a PBX to its terminal stations. 47 C.F.R. § 31.232 Note B (1982). In order for "outside plant" to connect the telephone company's wire center to the customer's location (as required by the definition of "outside plant") and in order for outside plant also to connect a PBX to its terminal stations (as required by Note B), a cable would need to be run from the PBX (i.e., the customer's location) out to the telephone company's wire center

(i.e., the central office) and back to the terminal stations (e.g., telephone closets) at the customer's location. But the wiring at issue does not connect BellSouth's central office to Harris' campus. It only connects the PBX on Harris' campus to telephone closets in other buildings on Harris' campus.

(Stipulation of Facts, No. 4 (Vol. 1, R. 155).) Thus, the wiring at issue cannot be "outside plant" and, as the FPSC has agreed (Final Order at 19 (Vol. 2, R. 288)), it is not network facilities. In sum, Note B, and its references to outside plant, have nothing to do with the wiring at issue.

BellSouth uses an erroneous, simplistic deduction to assert that the wiring should be recorded in Account 242. It states:

The wiring at issue is "outside." (BellSouth Br. at 20.)

and

Note B references facilities that are "outside.1 (Id. at 19.)

Therefore,

Note B applies to the wiring at issue; "the cable was appropriately booked to Account 242." (Id. at 20.)

The error in BellSouth's logic is that Note B references the term "outside plant," not just the word "outside." As demonstrated above, the wiring at issue is not outside plant. BellSouth's argument that the wiring belongs in Account 242 is wrong.

BellSouth compounds its confusing terminology by stating in its "Statement of Facts" that Note B "emphasiz[es] 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."

(BellSouth Br. at 7.) If by "outside cable," BellSouth means "buried cable" as that term refers to network cable that is recorded in Account 242 (as discussed further below), then BellSouth is correct. However, if BellSouth is using the term "outside cable" to refer generically to wiring that is simply "outside," then BellSouth is wrong. Wiring that is "outside" can be recorded in Account 232, as discussed below.

Subsection (a) to Account 232, rather than Note B, is significant to this case. (FPSC Br. at 11); 47 C.F.R. § 31.232(a) (1982).⁶ It states that Account 232 includes "inside wiring." 47 C.F.R. § 232(a) (1982). The FCC and FPSC have made clear, and BellSouth has acknowledged to the FCC, that intrasystem wiring: (a) is a type of "inside wiring"; and (b) includes wiring that runs between buildings. Generic Investisation into the Proper Regulatory Treatment of Inside Wire, 95 FPSC 1:119, 122 (1995) (citing Second Report and Order, 59 R.R.2d 1143, 1143 n.2 (1986)). Thus, "inside wiring" includes wiring that runs "outside" and between buildings.

In sum, Account 232 defines its contents as including inside wiring, and Note B merely cautions that other facilities (such as outside plant) should be recorded in other accounts. The wiring at issue is not outside plant, so Note B has no impact on the wiring at issue.

In any event, if there were any question as to the meaning

⁶Although 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.

of Note B, one needs to look only at the trio of FCC orders referenced at the beginning of this Brief. There, at a time when Note B had been part of Account 232 for over 26 years, the FCC clearly stated that it required embedded intrasystem wiring to be recorded in Account 232. See 47 C.F.R. § 31.232 Note B (1982); Order (Uniform System of Accounts, Class A and Class B Telephone Companies), 21 Fed. Reg. 7446, 7450 (1956) (adding Note B to Account 232).

c. **The Wiring at Issue Is Inside Wiring, Not Buried Cable**

Instead of addressing FCC precedent and Harris' arguments on this issue, the FPSC falls into a semantical trap concerning "buried cable." (E.g., BellSouth Br. at 10, 13, 18, 30.) It is true that the wiring was underground and could be described as "buried"; and sometimes the words "cable" and "wiring" are used interchangeably. However, "buried cable" has a special connotation in the FCC's accounting rules, and the facilities at issue are not buried cable.

"Buried cable" is a term for network facilities (aka outside plant) that are recorded in Account 242. 47 C.F.R. § 31.242:3 (1983). The FCC has described buried cable as follows:

Buried Cable - This cable account consists of cables that are buried directly below the ground and not placed in conduit structure. The cables in this environment can have conductors that are metallic copper or non-metallic optical fibers. Include both local loop and interoffice facilities where applicable.

Order Inviting Comments (Revision of ARMIS USOA Report), 7 FCC

Rcd. 6669 (1992) (Table S-1 in 1992 FCC LEXIS 5851, at **140).

The wiring at issue is neither local loop nor interoffice facilities. The FCC explains "local loop" as connecting a customer premises to a telephone company central office. Notice of Proposed Rulemaking (Local Competition), 11 FCC Rcd. 14,171, 14,199 n.110 (1996). Certainly, the wiring at issue does not connect Harris' campus to BellSouth's central office. The wiring at issue connects only the PBX in Building 53 to other buildings on Harris' campus. (Stipulation of Facts, No. 4 (Vol. 1, R. 155).) Thus, the wiring at issue is not local loop. Similarly, the wiring at issue is not interoffice facilities. Interoffice facilities are just what their words imply: facilities that run between telephone company central offices. Harris' wiring is on Harris' campus and runs between buildings on Harris' campus, not between telephone company central offices. Because the wiring at issue is not local loop or interoffice facilities, the wiring at issue does not fit the FCC's definitions of "buried cable."⁷

'At one point, BellSouth refers to the wiring at issue not as buried cable, but as "underground cable." (BellSouth Br. at 10 n.5.) The term "underground cable" has a meaning that is distinct from "buried cable," see Order Inviting Comments (Table S-1 in 1992 FCC LEXIS 5851, at **139) (defining "underground cable"), and it is recorded in a separate account. Currently, underground cable is recorded in 47 C.F.R. § 32.2422 (1996), whereas buried cable is recorded in 47 C.F.R. § 32.2423 (1996). BellSouth's inconsistency in calling the wiring at issue "underground cable" at one time, and "buried cable" at another, is further shown by its statement in footnote 13 of its Answer Brief. There, BellSouth notes that Part 31 of the FCC's Rules has been replaced with Part 32. It then asserts that the "current counterparts of the rules in question" are 47 C.F.R. § 32.2321 for inside wiring, and 47 C.F.R. § 32.2422 for undersround cable. It is correct that Sections 32.2321, 32.2422 and 32.2423 of the FCC's Rules are the sections that currently

Additionally, buried cable is a type of outside plant. See, e.g., Order Inviting Comments (Table S-1 in 1992 FCC LEXIS 5851, at **137-40). As demonstrated above, the wiring at issue is not outside plant, so it cannot be buried cable.

The FPSC underlines the word "cable" in its quotation of Note B, and proceeds with flawed deductive logic, similar to that used by BellSouth. (FPSC Br. at 11.) The FPSC states:

Note B refers to "cable." (Id.)

and

BellSouth calls the facilities "buried cable." (Id.)

Therefore,

Note B applies to the wiring at issue, and it was appropriate for BellSouth to record the wiring in Account 242. (Id. at 12.)

The FPSC's deduction assumes that the facilities are correctly referred to as "buried cable" just because that's what BellSouth "believed" they were. But as demonstrated above, the facilities are not buried cable. Thus, the FPSC's conclusion that the wiring could have been recorded in Account 242 is wrong.

The FPSC's insistence that the wiring at issue is buried cable also is at odds with its conclusion in the Final Order that the wiring is not network facilities. As noted above, buried cable is a type of outside plant which is part of the network. Either the wiring at issue is buried cable (i.e., network facilities) or it is not. The FPSC cannot have it both ways.

correspond to the former Sections 31.232 for inside wiring and Section 242 for network cable. But Section 32.2422 (for underground cable) is not at issue in this proceeding.

The proper conclusion is that the wiring is intrasystem wiring (a type of inside wiring), not "buried cable" (a type of network facilities). As intrasystem wiring, it should have been recorded in Account 232. For this reason and because the Stipulation of Facts refers to the facilities as "wiring," (Stipulation of Facts, No. 3 (Vol. I, R. 155)), Harris has referred to the facilities at issue as "wiring." BellSouth's mantra-like incantations of "buried cable" are intended to confuse, and have no relevance to the legal characterization of the wiring at issue.

d. The Wiring at Issue Should Have Been Recorded in Account 232 Beginning in 1969

Although BellSouth may agree that intrasystem wiring should be recorded in Account 232, BellSouth makes the unsupported assertion that the key to the case is how the wiring should have been recorded when it **was** installed. (BellSouth Br. at 3.) BellSouth also does not explain why its intrasystem wiring should not have been recorded in Account 232 by at least 1982 (i.e., the date of the FCC's Detariffing Notice) regardless of how BellSouth accounted for the wiring before that time.

BellSouth should have recorded the wiring in Account 232 from the beginning of its installation in 1969 for three reasons. First, in 1982, the FCC **stated** that it currently required intrasystem wiring to **be** recorded in Account 232. Detariffing Notice para. 25. Second, the only difference between the version of Account 232 interpreted by the FCC in the Detariffing Notice

and the version that existed back to at least 1969 is that in 1981, the FCC adopted the amortization and expensing requirements of the First Report and Order. See 47 C.F.R. § 31.232 (1982) (showing that the only changes since 1963 occurred in 1981; the change at 46 Fed. Reg. 19,491 corresponded to the adoption of the First Report and Order with textual corrections published at 46 Fed. Reg. 28,657); see also 47 C.F.R. § 31.232 (1964) (version of Account 232 in effect until 1981). These changes to Account 232 concerned only amortization and expensing requirements and did not affect Account 232's applicability to inside wiring, including intrasystem wiring. See First Report and Order, 85 FCC 2d at 841-43.⁸ Finally, because the applicability of Account 232 to intrasystem wiring did not change between 1963 and 1982, and Account 232 applied to intrasystem wiring in 1982, the wiring should have been recorded in Account 232 when it was installed beginning in 1969. (Harris Init. Br. at 22.)

BellSouth's attempt to refute this fact is **based on** double-talk concerning the fact that the "intrasystem concept" (which includes PBXs and intrasystem wiring) and the term "intrasystem wiring" were developed in the Detariffins Order paras. 9, 56,

⁸ In Harris' Initial Brief at 22, Harris stated that "[t]he 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." Harris clarifies that it meant to state that there **was** no order "changing the account applicable to intrasystem wiring." In any event, neither BellSouth nor the FPSC disputed the fact that there were no changes to the text of Account 232 that were adopted between 1969 and 1982 that affected the applicability of Account 232 to intrasystem wiring.

adopted in 1983. (BellSouth Br. at 25 n.16.) However, in 1982, the FCC clearly stated that wiring that fits the definition the FCC proposed for "intrasystem wiring" was required to be recorded in Account 232. Detariffing Notice para. 25. The FCC had plenty of other words to describe that wiring. The FCC called it "multi-wiring or complex wiring." Id. paras. 22-23. The FCC also described the wiring as connecting PBXs to their station equipment (e.g., telephones), and the FCC noted that the wiring could run between buildings on the same customer's premises. Id. The FCC clearly knew the type of wiring to which it was referring without using the term "intrasystem wiring." The FCC simply used the term "intrasystem wiring" as a handy way to describe the wiring that belonged in Account 232. Id. para. 25.

In sum, no FCC order changed the account that **was** applicable to intrasystem wiring between at least 1969 and 1982. The FCC's requirement that wiring that fit the definition of what it later termed "intrasystem wiring" be recorded in Account 232 must date back to at least 1969. Neither BellSouth nor the FPSC have provided any authority to the contrary.

e. No Rule Change in the Early 1980s Affected the Wiring at Issue

BellSouth references "accounting changes" in the early 1980s that accompanied the detariffing of the installation of new intrasystem wiring, as if the accounting changes affected whether Account 232 or Account 242 should be used for existing intrasystem wiring. (BellSouth Br. at 26 & n.17.) But the

accounting changes referenced by BellSouth applied only to new intrasystem wiring. As BellSouth notes, the FCC added to Account 232 a "Note F" concerning the accounting for new detariffed intrasystem wiring. (Id. at 26.) Embedded intrasystem wiring still was subject to the terms of Account 232 (including the corresponding amortization and expensing requirements of Account 232, as discussed further below). Also, **as** BellSouth notes, when the FCC adopted the accounting changes in the Detariffing Order, the FCC did not eliminate Note B. (BellSouth Br. at 26.) However, as discussed above, Note B has no application to the facilities at issue because Note B deals with network plant. Simply put, Note B is irrelevant. None of the "accounting changes" in the Detariffing Order changed BellSouth's obligation to record the embedded wiring in Account 232.

2. In the FCC Rulemaking, BellSouth Told the FCC that It Recorded Intrasystem Wiring in Account 232

As discussed above, in October 1983, BellSouth acknowledged that it had been recording intrasystem wiring in Account 232. AT&T Response to Request for Information at 41-43. In fact, AT&T had approximately \$3 billion of embedded intrasystem wiring investment in Account 232. Id. at 42 n.*. BellSouth **also** stated that prior to 1981, it had been accounting for retired intrasystem wiring through reductions in the depreciation reserve for Account 232. Id. at 43 n.*.

In sum, BellSouth's contention that there was no requirement to record "intrasystem wiring" in Account 232 before the early

1980s is inconsistent with its admission to the FCC that it recorded intrasystem wiring in Account 232 before 1981, and with the FCC's requirement to record intrasystem wiring in Account 232 beginning at least by 1969.

B. INTRASYSTEM WIRING INCLUDES WIRING THAT IS OUTSIDE

In another futile attempt to justify its use of Account 242, BellSouth focuses on the fact that the wiring at issue runs between buildings and is not "inside" a building. (E.g., BellSouth Br. at 19.) In its "Statement of Facts," BellSouth asserts that Account 232 included only wiring inside a building. (Id. at 6.) However, Account 232 includes intrasystem wiring. Detariffins Notice para. 25. Intrasystem wiring includes wiring between buildings. Generic Investigation into the Proper Regulatory Treatment of Inside Wire, 95 FPSC 1:119, 122 (citing Second Report and Order, 59 R.R.2d at 1143 & n.2)) (defining intrasystem wiring). BellSouth's attempt to distinguish between inside wiring and wiring that is outside therefore is wrong and is inconsistent with the FPSC's decision on this issue.

To compound its error, BellSouth asserts that the "inside cables" in Account 232 "should not be confused with outside, underground cables chargeable to account 242, such as those at issue in this appeal." (BellSouth Br. at 6 n.1.) If BellSouth meant only to say that Account 232 should not be confused with Account 242, BellSouth is correct. However, BellSouth implies that the wiring at issue in this proceeding is chargeable to

Account 242. That is a legal conclusion for which it gives no support* (Id.) Even if BellSouth were attempting to argue that the 1982 version of Account 232 (see id. at 6 n.2) did not include wiring outside buildings, BellSouth is wrong again. In 1982, the FCC explicitly stated that intrasystem wiring (which included wiring between buildings) should be recorded in Account 232. Detariffing Notice paras. 22, 25.

BellSouth repeated these incorrect assertions in the Argument section of its Brief. (BellSouth Br. at 19.) This time, BellSouth added a citation to footnote 4 of the ~~First Report and Order~~, 85 FCC 2d at 823 n.4. But that footnote says nothing about whether inside wiring is "inside" or "outside."

In its "Statement of Facts," BellSouth asserts that "inside" was an adjective that only engineers understood, and that "inside" meant that the corresponding wiring was "inside" a building. (BellSouth Br. at 12 n.6, 13.) This assertion is incorrect and was not introduced in the proceeding below. (See Stipulation of Facts (Vol. 1, R. 155).) On this basis alone, the Court should reject BellSouth's assertion about what its engineers thought. Indeed, BellSouth's assertion is inconsistent with the FCC's and FPSC's orders which define intrasystem wiring to include wiring outside of buildings and as being a type of "inside wiring." Second Report and Order, 59 R.R.2d at 1143 & n.2; Generic Investigation into the Proper Regulatory Treatment of Inside Wire, 95 FPSC 1:119, 122.

In sum, the wiring at issue is intrasystem wiring even

though it runs between buildings. The Court should reject BellSouth's arguments concerning the thought processes of BellSouth's engineers and related arguments concerning the meaning of the term "inside."

IV. THE WIRING SHOULD HAVE BEEN AMORTIZED AND/OR EXPENSED

BellSouth agrees that embedded inside wiring should have been amortized and thereafter provided for use free of charge. (BellSouth Br. at 22.) In its attempt to show that the wiring at issue was not subject to those requirements for embedded inside wiring, BellSouth introduces the concepts of customer premises equipment (CPE), the demarcation point and detariffing, and some related FCC orders. None of those orders excuse BellSouth from recording the wiring at issue in Account 232.

A. THE FCC STATED THAT EMBEDDED INTRASYSTEM WIRING SHOULD BE AMORTIZED AND EXPENSED IN ACCORDANCE WITH THE FIRST REPORT AND ORDER

First, BellSouth references the CPE Report and Order, 95 FCC 2d at 1370-71, and the corresponding Opinion and Order on Reconsideration, 50 Fed. Reg. 9016 paras. 85-89 (1985).

(BellSouth Br. at 29.) Those orders concern the breakup of AT&T, and the FCC's determination of whether embedded intrasystem wiring would be retained by the Bell Operating Companies, such as BellSouth, or be transferred to an unregulated entity, ATTIS. The FCC chose the former, and BellSouth retained the wiring at issue. CPE Report and Order, 95 FCC 2d at 1370-71.

These two orders actually support Harris' position -- not BellSouth's. In the CPE Report and Order, the FCC stated:

[U]namortized labor costs . . . , form the predominant portion of embedded intrasystem wiring investment We already have taken action to establish a schedule for the amortization of these unrecovered costs under regulation.

95 FCC 2d at 1371-72 (emphasis added), In a footnote to that last sentence, the FCC cited the First Report and Order and its provisions requiring the amortization and expensing of inside wiring. Id. at 1372 n.141. Thus, it is clear that embedded intrasystem wiring, which was retained by BellSouth, should have been amortized and/or expensed.

The FPSC and BellSouth both cite to that portion of the CPE Report and Order, but both of them fail to recognize its import to the **case** at hand. (FPSC Br. at 5; BellSouth Br. at 29.) The FPSC and BellSouth focus on the fact that the FCC decided that at that point in time the embedded intrasystem wiring would remain subject to regulation and tariffing (rather than being deregulated and transferred to ATTIS). (FPSC Br. at 5; BellSouth Br. at 29.) But that regulation of embedded intrasystem wiring would not last forever. Under that regulation, BellSouth was required to amortize and/or expense the embedded intrasystem wiring. CPE Report and Order, 95 FCC 2d at 1371-72 & n.141. Thus, the wiring could have been provided under tariff in 1983. But once the wiring was fully amortized, no charges could be imposed. Memorandum Opinion and Order (Detariffing the Installation and Maintenance of Inside Wiring), 1 FCC Rcd. 1190,

1195 (1986). BellSouth agrees. (BellSouth Br. at 22.)

B. THE TIMING OF THE FCC'S ADOPTION OF THE DEFINITION OF DEMARCATION POINT HAS NO EFFECT ON THIS CASE

In its discussion of the CPE Report and Order, BellSouth erroneously argues that the timing of the FCC's adoption of the term "demarcation point" is determinative of whether the wiring at issue should have been amortized and expensed, **and** eventually deregulated. (BellSouth Br. at 12.) In its "Statement of Facts," BellSouth asserts that the "FCC specifically decreed that the [demarcation point] concept would be applied prospectively only." (BellSouth Br. at 12; see id. at 13.) BellSouth gives no support for this contention. As discussed below, not only was BellSouth aware of the existence of demarcation points before their definition was formally adopted by the FCC and the FPSC, but the original definition of intrasystem wiring did not depend on the location of a demarcation point, and consequently, neither did the requirement to amortize or expense the wiring.

1. The Demarcation Point Applied to Embedded Intrasystem Wiring

When the FCC considered the definition of "demarcation point," the FCC stated that "[e]xisting wiring . . . inherently incorporates a demarcation point on the customer side of the protector." Second Notice of Proposed Rulemaking and Order (Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and

Protective Apparatus to the Telephone Network), 92 FCC 2d 1, 9 (1982) (emphasis added). In the proceeding below, BellSouth acknowledged an earlier FCC statement that within the industry, "'there is a common term called the "demarcation point," which can be physically identified by those familiar with actual service provision,'" and that "'several different telephone plant engineers . . . would all identify the same point.'" (BellSouth Br. at 10 (no citation was given) (Vol. 1, R. 187)); see First Report and Order, 85 FCC 2d at 826 (the apparent source of BellSouth's quotation). In the First Report and Order, the FCC also stated that the identification of the demarcation point "must for the moment remain with the company." 85 FCC 2d at 826. Thus, not only did the FCC state that telephone plant engineers could identify the demarcation point, but the FCC left its location up to BellSouth. BellSouth did not need the FCC to define the demarcation point; BellSouth knew what it was and where to find it. Indeed, it later agreed with Harris as to its location. (Stipulation of Facts, No. 3 (Vol. 1, R. 155).)

Even if, for the sake of argument, BellSouth's engineers did not know where the demarcation point was, BellSouth cannot state that the demarcation point definition was adopted after all of the wiring was installed. (BellSouth Br. at 13.) BellSouth admits that the demarcation point definition existed by 1981. (Id. at 24 (stating that the First Report and Order, which was adopted in 1981, used the term "demarcation point") .) As early as 1982, the FPSC adopted a definition of demarcation point in

Rule 25-4.345, Florida Administrative Code. In Re Adoption of Rule 25-4.345, Provision of CPE and Inside Wire Maintenance, 82 FPSC 11:185 (1982). Rule 25-4.345(1)(c) defined the demarcation point as the "point of physical interconnection . . . between the telephone network and the customers [sic] premises wiring." Id. at 189. As Stipulation of Facts No. 6 states, the wiring at issue **was** installed between 1969 and 1984. (Vol. 1, R. 155.) Thus, the term "demarcation point" was adopted by the FPSC and the FCC before BellSouth completed the installation of all of the wiring at issue. The above definition of "demarcation point" **remains** in place today. Fla. Admin. Code R. 25-4.0345(3).

In any event, the demarcation point did apply to embedded intrasystem wiring. The FCC explained: "For embedded complex . . . wiring, . . . the demarcation point serves as a dividing line between the telephone plant on one side that is to be capitalized [(i.e., network facilities)] and telephone company plant on the other side that is to be expensed [(e.g., complex inside wiring)]" (emphasis added), Memorandum Opinion and Order, 50 Fed. Reg. 29,384 para. 12.

In sum, BellSouth was aware of demarcation points prior to the FPSC's and FCC's adoption of rules defining this term. These definitions apply to embedded and new intrasystem wiring.

2. The Original Intrasystem Wiring Definition Did Not Refer to the Demarcation Point

Notwithstanding BellSouth's arguments regarding when the definition of the term "demarcation point" was adopted by the FCC

or FPSC, the wiring at issue is still intrasystem wiring, When the FCC first defined "intrasystem wiring," it did not reference the demarcation point. In its Detariffins Notice para. 23, the FCC stated that the term "intrasystem wiring" would refer to wiring connecting a PBX to station equipment such as telephones, and include "all cable or wiring and associated components located inside a building or between a customer's different buildings located on the same or contiguous property not separated by a public thoroughfare." This definition was adopted in the corresponding Detariffins Order paras. 5 n.4, 9. Thus, BellSouth's assertion that the "intrasystem wiring" definition "resulted" from the FCC's development of the "demarcation point" definition should be rejected. (BellSouth Br. at 13.)

BellSouth therefore is wrong when it asserts, in its "Statement of Facts," that on May 2, 1984, the "FCC expand[ed] [the] deregulation of inside wire by adopting [the] 'intrasystem wire' concept, i.e.,] deregulating all facilities on the customer-side of the demarcation point." (Id. at 14.) BellSouth cites to the Detariffins Order. As noted above, the date May 2, 1984 corresponds to the effective date of the "Part 31" rule changes adopted in the Detariffins Order para. 70, But, as demonstrated above, the definition of "intrasystem wiring" that was adopted in that order did not refer to the demarcation point. Thus, BellSouth's argument that either the "intrasystem wiring concept" or the deregulation of inside wire had only prospective application (BellSouth's Brief is unclear on this point) relies

on manufactured precedent. Additionally, BellSouth's contention that **all** cable on the customer-side of the demarcation point was deregulated, (BellSouth Br. at 15), implies that BellSouth has been unlawfully charging Harris for the wiring pursuant to tariff since that time. Furthermore, if BellSouth actually meant that newly installed intrasystem wiring would be detariffed, BellSouth's reference to the demarcation point as determining what would be detariffed is wrong once again. As demonstrated above, the Detariffing Order establishing the May 2, 1984 deadline did not reference the demarcation point. BellSouth's confusion about deregulation, demarcation points and whether the rules applied to existing wiring **as** compared to newly installed wiring, again undermine its credibility on this issue.

It was several years after the FCC's adoption of the Detariffing Order that the FCC included the terms "located on the customer's side of the demarcation point" in its definition of intrasystem wiring. See, e.g., Second Report and Order, 59 R.R.2d at 1143 & n.2; (Harris Init. Br. at 15). The wiring at issue fits this later-adopted definition of intrasystem wiring as well. (Harris Init. Br. at 15-16.) Indeed, the FPSC agrees. (Final Order at 15, 19 (Vol. 2, R. 284, 288).)

In sum, the wiring at issue satisfies the definition of intrasystem wiring regardless of whether one uses the FCC's initial definition that does not reference a demarcation point or the FCC's later definition that does reference a demarcation point. Even if BellSouth were correct that the term demarcation

point was to be applied prospectively only (and Harris believes that BellSouth is not correct), it would have no effect on this case. The wiring would still be intrasystem wiring because it fits the intrasystem wiring definitions that existed before and after the demarcation point definition was adopted. Indeed, BellSouth recently defined the wiring at issue as being intrasystem wiring and BellSouth did not use the term "demarcation point" in its definition. (BellSouth's Motion for Stay of Order Pending Judicial Review at 2 (Vol. 2, R. 317).) Because the wiring is intrasystem wiring, it is subject to the amortization and expensing requirements of the First Report and Order, as demonstrated above, regardless of when the FCC and FPSC adopted definitions of the "demarcation point."

C. BELLSOUTH ADMITTED TO THE FCC THAT THE AMORTIZATION REQUIREMENTS APPLIED TO EMBEDDED INTRASYSTEM WIRING

BellSouth's contention that the amortization requirements did not apply to embedded intrasystem wiring are belied by pleadings it filed with the FCC in the rulemaking proceeding corresponding to the CPE Report and Order. In 1984, BellSouth acknowledged that the amortization requirements of the First Report and Order applied to embedded intrasystem wiring. Opposition to Petitions for Reconsideration at 20-21. In 1983, BellSouth also noted that the First Report and Order precluded it from the practice of retirement accounting with respect to its investment in embedded intrasystem wiring. AT&T Response to Request for Information at 42. That portion of the First Report

and Order states:

[W]e amend our Rules and Regulations so as to recognize retirements of station connections--inside wiring, embedded investment only in those cases where physical removal, sale, destruction or abandonment takes place.

85 FCC 2d at 830 (emphasis added). Thus, by acknowledging that the First Report and Order modified retirement accounting for embedding intrasystem wiring, BellSouth acknowledged that "station connections-inside wiring" (aka "inside wiring") includes intrasystem wiring. Thus, the FCC's and FPSC's amortization requirements (applicable to inside wiring) squarely applied to embedded intrasystem wiring.⁹ BellSouth's argument to the contrary is yet another attempt to have it both ways.

In sum, although the FCC did not totally deregulate and detariff all existing intrasystem wiring in the early 1980s, it did provide a schedule for the amortization and/or expensing of intrasystem wiring,¹⁰ after which time BellSouth could no longer charge for the wiring. The date of the FCC's adoption of the term "demarcation point" is irrelevant. Moreover, in its

⁹The FPSC applies the FCC's accounting rules and orders to Florida telephone companies. See Fla. Admin. Code. R. 25-4.017.

¹⁰The schedule for the expensing and amortization of inside wiring is given in the First Report and Order and repeated by Harris in its Initial Brief, at 6. In its "Statement of Facts," BellSouth asserts that inside wiring was to be expensed prospectively. (BellSouth Br. at 14 & n.8.) BellSouth ignores the fact that some inside wiring installed after the adoption of the First Report and Order was to be capitalized. BellSouth makes the same error in the Argument section of its Brief. (Id. at 22 n.14.) BellSouth's lack of comprehension of the amortization and expensing requirements of the First Report and Order further undermines its arguments that those requirements did not apply to the wiring at issue.

pleadings before the FCC, BellSouth acknowledged the FCC's amortization requirements for embedded intrasystem wiring.

V. THE FPSC'S EXCUSES FOR NOT ORDERING A REFUND ARE WITHOUT MERIT

Harris has demonstrated above and in its Initial Brief that the wiring at issue should have been amortized and/or expensed, and BellSouth should have ceased charging for the wiring by at least January 1, 1989.¹¹ (E.g., Harris Init. Br. at 24-25.) The FPSC proffers two excuses for not ordering a refund: (a) that BellSouth did not violate any rule or order, although the FPSC admits that BellSouth did violate FPSC and FCC rules and orders, (FPSC Br. at 13); and (b) that the FPSC did not have sufficient facts to determine the amount of a refund, (id. at 15), even though the Stipulation of Facts provided the necessary information, (Stipulation of Facts, Nos. 10-11 (Vol. 1, R. 155)). Then, the FPSC makes the startling admission that BellSouth has recovered its costs for the wiring at issue. (FPSC Br. at 14.) Given the FPSC's admissions that BellSouth violated FPSC rules and orders and that BellSouth has recovered its costs for the

¹¹Harris notes that the FPSC disputes Harris' statement that "all of the wiring at issue should have been expensed or should have been fully amortized by September 30, 1994." (FPSC Br. at 15; Harris Init. Br. at 24.) The FPSC states that Harris' statement "was not established in the record." (FPSC Br. at 15.) The FPSC doesn't get it. Harris demonstrated that the wiring at issue is intrasystem wiring that was subject to the FCC's First Report and Order, which required the wiring to be expensed or amortized by September 30, 1994. (Harris Init. Br. at 14-25.) The wiring at issue should have been expensed or amortized by September 30, 1994. (Id. at 24.) And **as** the FPSC admits, it shortened this time frame to January 1, 1989. (FPSC Br. at 14.)

wiring, it was plainly erroneous for the FPSC to refuse to award a refund to Harris. These issues are discussed below.

A. THE FPSC'S ARGUMENT IS INCONSISTENT REGARDING BELLSOUTH'S COMPLIANCE WITH REGULATIONS

The FPSC initially asserts that BellSouth did not violate any rule or order. (FPSC Br. at 13.) Later in its Brief, however, the FPSC admits that BellSouth was not in compliance with FPSC and FCC rules. The FPSC states:

The Commission recognized the FCC's Final Rule was clear that the FCC intended that embedded intrasystem wiring be recorded in Account 232 and amortized in accordance with its Expensing Order. . . . The FCC and the Commission orders also prohibited charging for the use of the wire. In order to bring BellSouth in compliance with its rules and regulations, the Commission prohibited BellSouth from charging for the use of the facilities on a going-forward basis. The facts before the Commission dictate this result.

(Id. at 16 (emphasis added) (citation omitted) .)

This inconsistency in the FPSC's Brief clearly shows the underlying FPSC order to be the political compromise that it was. BellSouth was not in compliance with FCC and FPSC orders. Yet, the FPSC bizarrely refused to order a refund, while prohibiting BellSouth from charging for the wiring in the future. The FPSC's refusal to grant Harris the refund it deserves clearly was error.

B. THE FPSC CLAIMS THAT IT DID NOT KNOW HOW MUCH THE REFUND SHOULD BE

The FPSC's second reason for not ordering a refund is that it claims that it did not know enough to determine what the

amount should be. (FPSC Br. at 15.) But BellSouth and Harris anticipated the FPSC's need to determine the amount of a refund, and stipulated to the amount that Harris has paid BellSouth for the wiring at issue since January 1, 1989 as follows:

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.

(Stipulation of Facts, Nos. 10-11 (Vol. 1, R. 155).) The FPSC clearly had all of the information it needed to perform a refund calculation and that information was uncontroverted.

The FPSC's related assertion that part of the wiring was used to provide private line service -- thereby allegedly hampering a refund calculation -- is more of the same post hoc rationale. (FPSC Br. at 15.) This finding does not appear in the FPSC's Final Order and is not supported by the record. The FPSC's counsel cannot substitute its own argument for a finding not made by the agency.

And, in any event, the FPSC's Brief has its facts wrong. The Stipulated Facts state: "BellSouth states that these charges include private line service." (Stipulation of Facts, No. 9 (Vol. 1, R. 155) (emphasis added).) Harris placed the two words "BellSouth states" at the beginning of that sentence in order to indicate that Harris **was** not stipulating to BellSouth's contention. Thus, it is not a fact in this proceeding that BellSouth **was** providing private line service on the facilities at

issue. The Court should not base its decision on this alleged fact that was not before the FPSC in the proceeding below.

In sum, both BellSouth and Harris provided the FPSC with stipulated information concerning Harris' payments to BellSouth. The refund that the FPSC should award to Harris equals those payments plus interest and taxes. (See Harris Init. Br. at 27.) The FPSC's allegations that it lacked sufficient information to calculate the refund, and its argument concerning private line service, are made for the first time in the FPSC's Brief, and are improper. The record clearly identifies the disputed payments, and the FPSC should have ordered them refunded to Harris.

C. THE FPSC STATES THAT BELLSOUTH HAS RECOVERED ITS COSTS

Finally, the FPSC admits that BellSouth's costs for the wiring at issue were recovered under regulation, (FPSC Br. at 14), but probably were not completely recovered by January 1, 1989, (id. at 15). In its Final Order, the FPSC did not state that BellSouth's costs have been completely recovered. Again, this is post hoc rationalization by the FPSC's counsel which should be summarily rejected by the court.

VI. BELLSOUTH'S CROSS-APPEAL IS AS MERITLESS AS THE REMAINDER OF ITS BRIEF

BellSouth's cross-appeal is based on the same erroneous arguments on which the remainder of its Brief is based, and on two new arguments concerning cost recovery and the terms of its tariff. As shown below, none of these arguments has any merit.

A. BELLSOUTH REPEATS THE SAME ERRONEOUS ASSERTIONS MADE ELSEWHERE IN ITS BRIEF

First, BellSouth asserts that Harris should continue paying for the wiring at issue because it existed when the FCC adopted the term "intrasystem wiring." (BellSouth Br. at 31.) As set forth above, the FCC required embedded intrasystem wiring to be amortized and expensed in accordance with the First Report and Order. See CPE Report and Order, 95 FCC 2d at 1371-72 & n.141.

Second, BellSouth claims that the FCC "specifically declined to include embedded cable, such as the cable at issue here, in its newly-expanded definition of inside wire." (BellSouth Br. at 31.) BellSouth provides no citation to support this assertion. BellSouth may be referencing a citation to paragraph 9 of the Detariffing Order which BellSouth made in a preceding sentence. But neither paragraph 9, nor any other paragraph in the Detariffing Order, supports BellSouth's contentions and they do not "specifically" state them, as BellSouth asserts. In paragraph 9 of the Detariffing Order, the FCC summarized the proposals it made in its previous Detariffing Notice. The FCC stated that it was proposing an "intrasystem concept" for "new detariffed PBXs and key systems, which would consist of common equipment (a switchboard or switching equipment shared by all stations), station equipment (usually, telephones or key telephone systems), and intrasystem wiring." Detariffing Order para. 9 (emphasis added). What was "new" was the application of the term "intrasystem" to combinations of intrasystem wiring with "new detariffed PBXs." In paragraph 9, the FCC also stated:

We also proposed that account 232 be amended to preclude the recording of new intrasystem wiring.

Id. If "intrasystem wiring" were a term to be applied only on a prospective basis, there would be no need to discuss accounting rules for new intrasystem wiring, because there would have been no "old" intrasystem wiring. Additionally, the sentence that BellSouth cites in paragraph 9 summarized only the FCC's proposals. The key part of the Detariffing Order, for purposes of this case, is not the proposals discussed in paragraph 9, but the FCC's statement (in paragraph 61) that it requires intrasystem wiring to be recorded in Account 232. Furthermore, in pleadings before the FCC, BellSouth acknowledged that "intrasystem wiring" applied to existing wiring that it recorded in Account 232 and was required to amortize pursuant to the First Report and Order. AT&T Response to Request for Information at 41-43 & n.*; Opposition to Petitions for Reconsideration at 20-21. In sum, BellSouth's contention that embedded wiring was not considered to be "inside wiring" should be rejected.

Third, BellSouth argues that there is no authority requiring BellSouth to transfer its embedded intrasystem wiring from Account 242 to Account 232, and that if the FCC wanted BellSouth to do so, the FCC would have said so in the Detariffing Order. (BellSouth Br. at 32.) But the FCC did not need to say anything in that order. The FCC told BellSouth at least twice before that embedded inside wiring must be recorded in Account 232. Detariffing Notice para. 25; Detariffing Order para. 61.

Fourth, BellSouth contends that the amortization and

expensing requirements applied only to wiring in Account 232. (BellSouth Br. at 33.) But, BellSouth was required to record the wiring at issue in Account 232, and to amortize and expense that wiring. Detariffing Notice para. 25; CPE Report and Order, 95 FCC 2d at 1371-72 & n.141. The fact that BellSouth did not comply with these requirements is an admission -- not a defense.

Finally, BellSouth claims that the FCC had ample opportunity to tell it to amortize the wiring. (BellSouth Br. at 33.) As discussed above, the FCC did tell BellSouth to amortize the wiring, and it did so right in the middle of an order that was of particular importance to BellSouth during the breakup of AT&T. BellSouth participated in that proceeding. See, e.g., CPE Report and Order, 95 FCC 2d at 1370 n.137. Furthermore, BellSouth cited the order in its Brief, at 29. There can be no doubt that the FCC told BellSouth to amortize its embedded intrasystem wiring, and BellSouth was, and is, aware of that requirement.

B. BELLSOUTH ASSERTS THAT THE FPSC'S DECISION WILL PREVENT BELLSOUTH FROM RECOVERING ITS COSTS

BellSouth makes new allegations concerning free usage, free maintenance, its expectations of income from the wiring, and the recovery of its costs. None of these allegations have any merit.

First, BellSouth asserts that the FPSC's decision requires BellSouth to let Harris use the wiring "free of charge."

(BellSouth Br. at 35.) The phrase "free of charge" is a red herring. The FCC required BellSouth to recover its investment in the wiring through amortization and expensing. The FPSC

accordingly required BellSouth to complete its amortization by January 1, 1989, and to cease charging for the wiring at that time. Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311, 328 (1988). BellSouth has no right to complain that the FPSC is prohibiting it from charging for the wiring now. BellSouth should have stopped charging Harris by at least January 1, 1989, because it should have recovered its investment under rules especially designed for that purpose.

Second, BellSouth alleges that it has been responsible for maintaining the wiring "free of charge" since it was installed. (BellSouth Br. at 35.) Once again, BellSouth strays outside the record to create facts purporting to support its position. (See Stipulation of Facts (Vol. 1, R. 155).) The facts are that BellSouth requested the FCC to detariff the maintenance of complex inside wiring, see CPE Report and Order n.142, and in a subsequent proceeding, the FCC did so, see Second Report and Order, 59 R.R.2d at 1158. The FCC also preempted the states from regulating the maintenance of complex inside wiring. Id.¹² BellSouth eliminated its maintenance charge for complex wiring,

¹² Although other parts of the same order were reversed by the United States Court of Appeals for the District of Columbia Circuit, the decision to preempt state regulation of the maintenance of complex wiring was not part of that appeal. National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989). Thus, the FCC's decision concerning the maintenance of complex wiring has become final. See Second Further Notice of Proposed Rule Making (Detariffing the Installation and Maintenance of Inside Wiring), 5 FCC Rcd. 3407, 3411 n.2 (1990).

for intrastate purposes, at that time. Investigation into Earnings of Southern Bell Tel. & Tel. Co., 87 FPSC 1:4, 8 (1986). Thus, not only is the issue of whether BellSouth provided maintenance "free of charge" not a fact of record in this case, but if BellSouth did provide "free" maintenance, BellSouth made that decision on its own because maintenance has not been regulated for over 10 years. The Court should reject BellSouth's baseless assertions concerning "free" maintenance service.

Third, BellSouth claims that the FPSC's decision precludes BellSouth from receiving income from the wiring over its useful life. (BellSouth Br. at 35.) BellSouth states that it was entitled to this income "[a]bsent a contrary directive by the FCC." (Id.) BellSouth also asserts that the FPSC is "confiscating the remaining useful life" of the wiring. (Id.) The FCC and FPSC clearly directed BellSouth to amortize the wiring. To the extent that BellSouth ignored these directives, it has improperly earned a return on these unregulated assets, and improperly skewed competition in the unregulated inside wire service market. BellSouth should not profit further from its unlawful activity. There is certainly nothing confiscatory about requiring BellSouth to finally comply with this market structure years after the rest of the industry has come into compliance.

Fourth, BellSouth again raises the issue of "CPE." (BellSouth Br. at 34.) BellSouth points out that the FCC did not determine its treatment of embedded CPE within the context of the rulemaking proceeding adopted in the Detariffing Notice, and that

the FCC's regulatory disposition of new CPE may be different from that for embedded CPE. (Id.) But all of that has nothing to do with BellSouth's treatment of embedded intrasystem wiring. The CPE that was discussed in paragraph 6 of the Detariffing Notice (cited by BellSouth) did not include inside wiring. Detariffing Notice para. 6 n.5. BellSouth's assertion that "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" it, is nonsense. (BellSouth Br. at 35.) This is not a case about telephone sets (CPE); it is about inside wiring. The rules required BellSouth to amortize its inside wire and to cease charging for it. The FPSC's Final Order currently implements this policy on a going-forward basis.

BellSouth contributed to its own confusion by "defining" CPE in its "Statement of Facts." There, BellSouth asserted that CPE originally referred to equipment and not inside wiring, and that CPE later included inside wiring. (BellSouth Br. at 7 n.4.) BellSouth provides no support for this assertion, and does not say when the CPE definition changed and why the change matters. This ambiguity apparently led to the non sequitur above.

Finally, to complete its complaints, BellSouth asserts that it has never been allowed to recover its costs. (Id. at 35.) Again, BellSouth apparently is referring to its costs for embedded telephones, not wiring. Nevertheless, even if we were to assume that BellSouth meant to refer to cost recovery for the wiring at issue, that concern is not a fact of record in this

proceeding. What is a fact is that BellSouth charged Harris for the wiring from 1969 through 1997. BellSouth did not amortize the wiring, as it was required to do. Now, it seeks to avoid paying the refund that rightfully is due Harris.

In sum, BellSouth should not have been charging Harris for the wiring since at least January 1, 1989, not just since April 7, 1997, the date of the FPSC's Final Order. The FPSC's decision concerning Harris' future payments for the wiring is consistent with the trio of FCC orders on intrasystem wiring.

C. BELLSOUTH'S TARIFF IS NOT A SHIELD FOR ITS VIOLATION OF FPSC AND FCC ORDERS

BellSouth's other new argument concerns its tariff, which it attempts to use as a shield against any charges that its actions were unlawful. BellSouth asserts that Harris should continue paying for the wiring at issue because in the Final Order, the FPSC allegedly "detariffed" BellSouth's wiring in violation of the preemptory effect of the FCC's regulations. (BellSouth Br. at 31.) BellSouth has it backwards. BellSouth was required to record intrasystem wiring in Account 232, amortize and/or expense that wiring, and then cease charging for the wiring. The FCC preempted state regulation of intrasystem wiring thereafter. See Third Report and Order (Detariffing the Installation and Maintenance of Inside Wiring), 7 FCC Rcd. 1334, 1341 (1992). Thus, BellSouth should not have provided the wiring on a regulated, tariffed basis after it was completely amortized or expensed. The FPSC's decision to prohibit BellSouth from

continuing to charge for the wiring, whether pursuant to tariff or otherwise, is consistent with these FCC orders. The part of the FPSC's decision that conflicts with the FCC orders is the FPSC's condonation of BellSouth's past charges for the wiring.

BellSouth next claims that the terms of its tariff, which it states was approved by the FPSC, somehow justify its continued charges to Harris. (BellSouth Br. at 34.) But BellSouth's tariff stated only that newly installed intrasystem wiring would be provided on an unregulated basis, and embedded intrasystem wiring would continue to be provided under its tariff. Although the FPSC "approved" BellSouth's tariff in 1984, In Re: Southern Bell Telephone and Telegraph Company - Proposal to Discontinue Provision of New Complex Inside Wire, 84 FPSC 9:178 (1984), the FPSC did not tell BellSouth not to amortize its intrasystem wiring. The FPSC did not even address whether BellSouth should be charging for intrasystem wiring under the private line section of its tariff. Indeed, in the Final Order, the FPSC stated:

We agree that when the tariff was approved, the facilities would have been offered under regulation. We do not agree, however, with the result of BellSouth's argument: the facilities will continue to be offered under regulation even after BellSouth has recovered its investment. Nor did we adopt this position when we approved the tariff.

(Final Order at 11 (Vol. 2, R. 280).) Thus, the tariff language did not preclude BellSouth from ceasing to charge for intrasystem wiring once it was completely amortized or expensed. BellSouth could have filed a tariff revision to remove the corresponding terms from its tariff. No FPSC order precluded BellSouth from

doing so. To the contrary, the FCC and the FPSC required BellSouth to do so, E.g., Petitions of Southern Bell Telephone and Telegraph Company for Rate Stabilization and Implementation Orders and Other Relief, 88 FPSC 10:311, 328; Memorandum Opinion and Order, 1 FCC Rcd. at 1195 (stating that telephone companies may not charge for inside wiring once it is amortized).

CONCLUSION AND RELIEF SOUGHT

Harris has demonstrated that the FPSC and BellSouth erroneously interpreted and applied the FPSC and FCC rules and orders concerning the accounting treatment for the complex inside wiring at issue. The Court should defer only to the FCC's interpretations of its rules, not to the erroneous interpretations provided by the FPSC, or for that matter, BellSouth. As stated in the trio of FCC orders cited at the beginning of this Brief, the FCC clearly stated that intrasystem wiring, including embedded intrasystem wiring, should have been recorded in Account 232, and should have been expensed or amortized. BellSouth therefore should not have charged Harris for the wiring since at least January 1, 1989, the date when BellSouth was required to complete its amortization in accordance with the FPSC's order. BellSouth's cross-appeal does nothing to change these facts, and should be denied.


In accordance with Section 120.68(7)(d), Florida Statutes (Supp. 1996), Harris respectfully requests this Court to: (a) hold the Final Order to be unlawful; (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; (c) deny BellSouth's cross-appeal; and (d) affirm the FPSC's decision to prohibit BellSouth from charging Harris for the wiring on a going-forward basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant/Cross-Appellee Harris Corporation was furnished by U. S. Mail on this 8th day of August, 1997 to the following:

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