IN THE SUPREME COURT
OF THE STATE OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation,

appellant,

v

Julia L. Johnson, Susan F. Clark, J. Terry Deason, Joe Garcia and Diane K. Kiesling, in their official capacities as members of the FLORIDA PUBLIC SERVICE COMMISSION,

appellees.

Case No. 90,671

REPLY BRIEF OF APPELLANT BELLSOUTH TELECOMMUNICATIONS, INC.

On Appeal From Florida Public Service Commission Order No. PSC-97-0488-FOF-TL

William W. Deem, Esq.
MAHONEY ADAMS & CRISER, P.A.

Robert G. Beatty, Esq.
Nancy B. White, Esq.
J. Phillip Carver, Esq.
BELLSOUTH TELECOMMUNICATIONS

Appellant, BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 9.210(d), Fla. R. App. P., files this brief in reply to the Amended Answer Brief of Appellee, the Florida Public Service Commission (the "Commission").[1]

The "rate cap" of section 364.051(2)(a) does just that -- it caps BellSouth's various rates for local service at their July 1995 levels. However, this appeal does not involve an attempt by BellSouth to increase any of those rates beyond their cap levels; it is uncontroverted that each of BellSouth's rates for local service remains at July 1995 levels. This appeal involves the established, Commission-prescribed mechanism for choosing which rate shall apply as the level of local service being purchased is changed -- a mechanism that the statute does not even address, let alone vitiate. As shown below, the Answer Brief fails to demonstrate any basis for the Commission's sudden and inappropriate departure from this selection protocol.

A. The Commission's record citations and references to the "competent substantial evidence" standard of review are superfluous -- given the stipulated context, this appeal presents purely an issue of law.

The Answer Brief vacillates between discussing purported evidentiary matters under the "competent substantial evidence" standard and discussing statutory construction issues under the "clearly erroneous" standard with which courts review an agency's construction of the statute it administers. Compare Ans. Brf. at

---

[1] Citations to the Commission's Amended Answer Brief will be designated as "Ans. Brf. at [page]".

9 ("appellants cannot . . . demonstrate that the Commission's finding lacks any competent substantial evidence") and Ans. Brf. at 12 ("under the clearly erroneous standard of review, the burden of appellants is to demonstrate that no commission could reasonably have arrived at the conclusion in the challenged order"). This dual analysis, and the record citations purportedly underpinning it, are inappropriate. As shown below, this appeal presents purely a question of law.

For the most part, the Answer Brief cites not to evidence but to argument, either in briefing (Ans. Brf. at 9) or at oral argument below (Ans. Brf. at 16-17). The Answer Brief's basic premise is that there is support in the record -- primarily in the form of so-called "admissions" by the Appellant's counsel or in self-serving argument by the Commission's staff -- for the Commission's legal conclusion. However, this appeal requires no citation to argument by counsel or Commission staff. The parties stipulated to a basic set of contextual facts [Vol. 1, R. 128-140], leaving only a question of law -- does the established practice of "rate regrouping" constitute a violation of section 364.051(2)(a)'s rate cap? Neither (purported) admissions by counsel nor the argument below can aid in making this determination. Since there is no factual dispute as to what "rate regrouping" is, the issue on appeal is purely a question of statutory construction.

Accordingly, this appeal should be decided as a matter of law and reviewed under the established principle that an agency's construction of the statute it administers should be overturned if

clearly erroneous. See e.g. Morris v. Division of Retirement, 1997 WL 235124 (1st DCA 1997) (slip copy); Smith v. Crawford, 645 So.2d **513** (1st DCA 1994); Prospective Tenant Report v. Dept. of State, Div. of Licensing, 629 So.2d 894 (2d DCA 1993). Viewed in this context, the Answer Brief's citation to statements made in briefing and during the argument below is superfluous.

Furthermore, in its attempt to marshal support for the Commission's legal conclusion, the Answer Brief does not fairly characterize the proceedings and argument below. See for example pages 8-9 of the Answer Brief, where a statement by a BellSouth representative is characterized **as** an "admission against interest" that rate regrouping constitutes **a** prohibited rate increase.[2] However, the Answer Brief cites only a portion of the statement. The bold-faced portion of the quotation below is what the Answer Brief did not include:

> Q. **Can** regrouping result in a change in **a** subscriber's rate?
>
> A. Yes. If there is a sufficient increase in **access** lines in the local calling area to trigger **a** rate group change, subscribers in that exchange would be regrouped into the next highest rate group. As a result, the rate they are charged for local service would be increased. **Similarly, if there is a sufficient decline in access lines to trigger a**

[2]The parties have used the term "rate increase" loosely. In the event a "rate increase" operates to increase the amount of any particular rate above its July 1995 cap level, the rate increase would violate the statute. However, where the term is used to refer simply to the choice of a different rate to apply to a more expensive product or level of service, then the term "rate increase" is a misnomer. That so-called "rate increase" would not violate the rate cap because the amount of both rates (the prior rate and the new rate) remain at or below their cap levels.

rate group change, subscribers in that exchange would be regrouped into a lower rate group. Consequently, the rate charged to subscribers in that exchange would be reduced.

Q. **Is a reclassification of an exchange that results in a particular customer paying a higher rate, an increase that is prohibited under section 364.051, Florida Statutes?**

A. **No. . . . The price cap in section 364.051 applies to the price of service in the existing exchange rate groups, not to the service of individual customers who may move from one rate group to another. . . . All individual customers included in the same rate group category pay the same price for basic exchange service. In regrouping situations, the price for a given rate group does not chance; instead, the customer simwlv moves into a different rate group.**

[Vol. 1 R. 133-34, emphasis added1 A fair reading of this **passage** in its entirety is perfectly consistent with BellSouth's position in this appeal -- rate regrouping does not violate the rate cap by increasing BellSouth's rates beyond their July 1995 cap levels. Rather, regrouping is simply a process of selecting which rate shall apply to customers in any particular area according to criteria which were in existence when section 364.051 was enacted, and which that statute does not even address let alone impair.

Simply put, the Answer Brief's attempt to somehow glean "evidentiary" support for the Commission's flawed conclusion of law is superfluous, non-persuasive and should be discounted in its entirety.

B. Rates are product-specific rather than consumer-specific; rates are inappropriately increased only when the price paid for a particular product increases, not when a particular consumer purchases a different product at a higher price.

BellSouth contends that "rate regrouping" is but a change in the selection among currently-extant rates as the product being purchased changes, rather than an impermissible increase above cap levels in the rate applicable to any particular product. The Commission contends, on the other hand, that when the selection of a different rate operates to increase the expense paid by the customer involved -- even if a more valuable product is now being purchased and even if the new rate is no more than what would have been charged for that product as of July 1995 -- then rate regrouping violates the rate cap. The essential difference between the two positions is thus one of focus. BellSouth focuses on consistency in rates as they pertain to particular products, no matter which consumer is purchasing any particular product or (more to the point) whether they commenced purchasing their current product before or after the rate cap went into effect. The Commission, on the other hand, focuses on consistency in the expense paid by particular customers, no matter what product is then being purchased and without regard to the rate the customer would have been charged for that product as of July 1995.

There is no claim that the rates BellSouth seeks to apply to the West Palm Beach, Jensen Beach and Holley-Navarre exchanges exceed the rates that would have been applied as of July 1, 1995, had those exchanges reached their current calling scopes by that

date. Therefore, the only question is whether a post-July 1995 change in rate-selection, to conform to changes in the product being purchased, constitutes a violation of the rate cap.

The choice between BellSouth's product-specific construction and the Commission's consumer-specific construction of the rate cap should be dispositive of this issue. If the rate cap simply prevents BellSouth's rates -- as they apply on a product-specific basis -- from increasing beyond their July 1995 levels, then the statute does not prohibit regrouping because the rates for each level of service remain precisely the same; the only change is in the level of service that particular customers are receiving. If, on the other hand, the Legislature meant to guarantee that the amount any particular consumer paid for local service could not increase even if the product being purchased by that customer was upgraded, then the rate cap is actually a customer-specific expense cap, and the Commission should prevail. As shown below, BellSouth's product-specific position is by far the more compelling.

While the Commission focuses on the fact that when a local exchange area is regrouped into a higher rate group the cost to the customers in that exchange can increase,[3] it is clear that Florida's Commission-approved local exchange rates apply to the particular product being purchased -- in this case the ability to

[3]This, of course, ignores the fact that under the Rules if the number of lines in an exchange decreases, rate regrouping would have the effect of reducing the cost of local service to customers in that exchange.

make local, flat-rate calls to x number of other lines -- no matter who the customer is. Therefore, in determining whether regrouping constitutes an impermissible "rate increase" in violation of the rate cap, the appropriate inquiry is not whether any particular customer **pays** more that he or she did yesterday, because the product he or she is purchasing may be different. In determining whether a rate has been increased the focus must **be** on whether the price for a particular product -- the ability to make flat-rate **calls** to x number of lines -- has increased, because **that** is how Florida's rate system works, and the Legislature must be presumed to have known this in enacting section 364.051(2)(a).[4]

In other words, Florida's rate system is product-specific, and therefore Florida's new rate cap must be applied on a product-specific basis. The cap does not preclude charging any particular customer a different rate as the product that customer is purchasing is upgraded, so long as the rate charged for the new, upgraded product is the same rate that would have been charged as of July 1, 1995. Since BellSouth's rates **have** not increased beyond

---

[4]Using the analogy employed in BellSouth's initial brief, when a consumer changes from leasing an economy car to leasing a luxury sedan, the cost to that consumer -- the price he or she **pays** -- increases. However, car rental rates are product-specific, not consumer-specific. The same rate applies every time a particular type of vehicle is leased, no matter who the consumer is. Therefore, in this situation neither the economy **car** rate nor the luxury sedan rate has increased beyond their prior levels; the rates remain the same, and the increase in the consumer's cost is attributable to the upgrade in product. It is only if the rental company increases the amount charged for renting the same kind of car that **a** rate has been increased, and this would be so even if the customer trades down to a smaller car so that the price he actually pays remains constant.

their July 1, 1995, levels, since the three exchanges at issue have indisputably grown beyond the parameters of their current rates, and since BellSouth simply seeks to apply the standard rates which would have been applied to exchanges of this (new) size and scope as of July 1995, the Commission erred in disallowing the Rate Regroupings below.

The foregoing product-specific analysis is not just logically compelling, but it is also perfectly consistent with the manner in which the Commission treats other rate-change situations. There are two ways in which the amount a customer pays for local service can increase: the customer's local exchange can grow such that the number of lines exceeds the parameters of the rate currently being charged (i.e. a rate regrouping situation), or the customer can move to a larger locale, where she would have the ability to make flat-rate calls to more lines than before. If the rate cap is violated simply because the amount paid by a specific customer increases, then any time a customer moves to a larger city she should have the right to take her prior, less expensive rate with her rather than paying the standard rate applicable to the new, expanded local calling scope.[5] To the contrary, however, the Commission requires this customer to be charged the standard rate applicable to the calling scope at the new location, even though it

[5] In this event, the customer who moved would pay less than her new next-door neighbor for precisely the same service. It would create a privileged class of consumers. Anyone living in smaller exchanges on or after July 1995 would have the ability to move anywhere in the state and take their low rate with them.

is more costly than the rate previously charged to that customer, in order to give effect to the Legislative mandate that similarly-situated rate payers be treated alike. In so doing, the Commission tacitly validates BellSouth's product-specific analysis set forth above; the product being purchased at the new location has changed, and therefore the standard rate applicable to the new product (unchanged from its July 1995 level) is charged without violating the rate cap.

The only difference between a customer whose exchange grows beyond the parameters of its current rate group and a customer who moves to a more populated area is that of volition; the latter chooses to move to a more populated area, whereas the former sees his area grow up around him. Section 364.051 makes absolutely no distinction on this basis. Logically, then, the two should be treated consistently -- the rate cap is either product-specific, such that rates for particular service levels remain constant, or they are customer-specific, in which case customers take their rates with them wherever they go.[6] Since customers moving to larger exchanges are required to pay the standard rate applicable to the expanded calling scope there, the same should be required of customers whose current exchange grows beyond the parameters of its current rate.

[6]BellSouth would contend that even if it were applied consistently, the latter position would contravene the anti-discrimination measures in section 364.08-.10, Florida Statutes.

Accordingly, the Commission **clearly** erred in its construction of section 364.051. The rate cap does not guarantee any particular customer (Or group of customers) any particular rate, without regard to changes in the product being purchased. Whether **a** customer moves to a new location with a larger calling scope or the calling scope at the customer's current location grows, the rate cap only prohibits charging more for the new calling scope than would have been charged **as** of July 1995.

C. The Commission's analysis of whether it is required to follow a rule in the face of a conflicting statute simply begs the question of whether the rule is indeed inconsistent with the statute.

The Answer Brief argues that if a new statute conflicts with an established rule, the Commission is not authorized to continue to follow its rule but rather must apply the statute. The Answer Brief goes so far as to quote counsel for BellSouth for the proposition that in this situation the legislation should control. Ans. Brf. at 19-20.[7] However, that analysis does nothing to resolve the primary issue on appeal. It simply begs the question of whether rate regrouping, as authorized by Rules 25-4.053-.056, F.A.C., is in fact inconsistent with the rate cap imposed by section 364.051(2)(a).

---

[7] In the interest of accuracy, BellSouth notes that in the entire pertinent exchange with Chairperson Johnson, counsel for BellSouth first stated that if the new statute conflicted with an established rule, the rule would have to be modified or withdrawn as quickly as possible, but that the rule's operation should be suspended during the proceedings necessary to accomplish this. [Vol. 1 R. 1761 Here, of course, it has been two years and the rate regrouping rules are still in force.

As shown above, the answer to that question is no; rate regrouping is perfectly consistent with section 364.051 so long as the rates themselves remain at or below July 1995 levels. Therefore, the Commission has no discretion to depart from Rules 25-4.053-.056 unless and until it follows the statutory procedure for doing so. See, Cleveland Clinic v. Asencv for Health Care Administration, 679 So.2d 1237, 1242 (1st DCA 1996) .

Cleveland Clinic involved an agency's sudden change in its own interpretation of a statute, and its failure to follow a rule which had been established in reliance on its prior interpretation. The Court did not foreclose the agency from altering its statutory interpretation, but required the agency to follow the established mechanism for changing the rule to reflect the new interpretation. BellSouth would acknowledge in the case at bar that if a new statute explicitly contradicted an established rule (as opposed to a situation in which only the Commission's interpretation changed), the Commission need not continue to follow the rule during the time required to formally amend or repeal it. However, because the regrouping rules are not inconsistent with section 364.051, the Commission has no discretion to unilaterally abandon those rules simply because it may believe that the "complex fabric of regulation" must be "torn" in order to foster competition. Ans. Brf. at 19. Absent direct and explicit conflict with a new

statute, the Commission must continue to follow its rules until formal proceedings are concluded which change those rules.'

D. The Commission's erroneous construction of section 364.051 will foster undue discrimination among similarly-situated rate payers.

As demonstrated in BellSouth's initial brief, it is the policy of this State that similarly-situated consumers should pay the same rates for local telephone service. See §§ 364.08, 364.09 and 364.10, Fla. Stat. (1995). BellSouth's construction of section 364.051 is perfectly consistent with this policy. On the other hand, as the Commission acknowledges, by construing section 364.051 to prohibit rate regrouping the Commission has guaranteed that similarly-situated consumers receiving precisely the same level of service will pay different rates, based solely on historical happenstance.[9] Therefore, as between BellSouth's logically-sound construction, which meshes perfectly with public policy, and the Commission's strained construction, which does not, BellSouth's proffered construction is clearly the more compelling.

Furthermore, despite the Commission's suggestion to the contrary [Ans. Brf. at 1], this will not be a temporary aberration.

---

[8] It should be noted that though the new statute has been in effect for approximately two years now, the Commission has made no effort to modify or repeal its rules. Had the Commission followed those rules, of course, it would not have objected to the rate regroupings below.

[9] See BellSouth's Initial Brief at 17-21. See also In re Investigation into the Desirability of a Statewide Uniform Coin Telephone Charge, 84 FPSC 9:26 (1984) (different prices for basic local services among customers in geographic areas having substantially similar calling scopes is unreasonable discrimination).

Although the rate cap of section 364.051 remains in place with respect to BellSouth only until January 1, 2001, price increases thereafter are limited to once annually and may not exceed the change in inflation less one percent. See § 354.051(4), Fla. Stat. (1995). The effect of the Commission's disallowance of rate regrouping over the next four years will be perpetuated for years thereafter. Therefore, absent a strong showing of a contrary legislative intent, the appropriate construction of section 354.051 must be the one which gives effect to the mandate that similarly-situated consumers be treated alike.[10]

In response to this clear and compelling logic, the Commission contends simply that the statutes prohibit only "undue" discrimination among consumers. Therefore, it is argued, the discrimination guaranteed to occur as a result of the Commission's construction of section 364.051 does not militate against that construction and in favor of BellSouth's. Ans. Brf. at 15-19. However, the "undue" qualification is not license to abandon all notions of consistency among rates for local service, which (given the rapid demographic growth this State continues to experience) is

---

[10] See In re Proposed Tariff Filing by AT&T Communications of the Southern States, Inc., 89 FPSC 11:308, 311 (1989) (it is a fundamental precept derived from the common law and echoed in the Fourteenth Amendment that every member of the public has the right to the same treatment from those who hold themselves out as providers or products or services to the public). See also Re Telephone Resulatorv Methods, 157 PUR 4th 465 at 506 (Va. S.C.C 1994) (despite moratorium on rate increases, rate regrouping due to increased number of lines available for local calling will continue in order to avoid discrimination among consumers in similarly-sized exchanges).

precisely what the Commission's construction of section 364.051 will do. Consistency among similarly-situated consumers remains paramount to the extent there is not a good and compelling reason to depart therefrom, and no such reason has been shown here.

The only basis advanced for the Commission's claim that the threatened discrimination would not be "undue" is that BellSouth has elected price regulation under section 364.051. The Commission reasons essentially that under its construction of the statute, discrimination among similarly-situated consumers is an unavoidable corollary of BellSouth's election, and therefore that discrimination must not be "undue". The flaw in this reasoning, however, is that it abandons all notions of consistency among consumers simply because price regulation has been elected. While the standards of what is or is not "undue" discrimination may be different under price regulation than they were under rate of return regulation, there are still standards to be applied. The policy of treating similarly-situated consumers alike unless there is a compelling reason not to do so clearly survives a telecommunications company's election of price regulation.

Indeed, while section 364.051 exempts price-regulated companies from many statutory provisions pertaining to rate of return regulation, the prohibitions against discrimination contained in sections 364.08-.10 are not among them. See § 364.051(1)(c), Fla. Stat. (1995). Therefore, the mere fact that price regulation has been elected cannot be sufficient -- standing alone -- to authorize the wide-spread discrimination that the

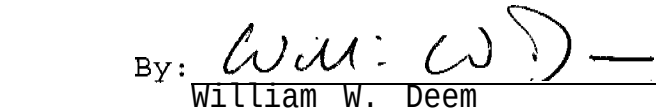
Commission's construction of the statute will engender. Accordingly, the "undue" qualification does not remedy the logical inconsistency between Florida's statutorily-announced policy against discrimination and the Commission's flawed construction of section 364.051.

BellSouth submits that (i) given the clear policy of this State, as embodied in sections 364.08-.10, that similarly situated consumers should be treated alike, (ii) given the fact that BellSouth's logical and compelling construction of section 364.051 is completely consistent with this policy, and (iii) given the fact the Commission's strained, logically-inconsistent construction of section 364.051 is guaranteed to contravene this policy, no deference should be afforded the Commission's construction. The Commission clearly erred in its construing section 364.051(2)(a)'s rate cap **as** prohibiting rate regrouping.

Conclusion

For the reasons stated, BellSouth requests that the Order Below be reversed and remanded with directions to sustain BellSouth's January 31, 1996, Petition on Proposed Agency Action.

MAHONEY ADAMS & CRISER, P.A.

By: 

William W. Deem
Florida Bar No. 512834
3300 Barnett Center
Post Office Box 4099
Jacksonville, FL 32201-4099
(904) **354-1100**
(fax) 798-2697

COUNSEL FOR APPELLANT BELLSOUTH TELECOMMUNICATIONS, INC.

BELLSOUTH TELECOMMUNICATIONS, INC.
Robert G. Beatty
Florida Bar No. 272906
J. Phillip Carver
Florida Bar No. 386715
150 S. Monroe St., Ste. 400
Tallahassee, FL 32301
(850) 222-1206
(fax) 222-8640

COUNSEL FOR APPELLANT BELLSOUTH TELECOMMUNICATIONS, INC.

Of Counsel:
Nancy White, Esq.
BELLSOUTH TELECOMMUNICATIONS, INC.

Certificate of Service

I certify that a copy of the foregoing was furnished by U. S. Mail to the following on this 14th day of October, 1997:

Richard C. Bellak, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gerald L. Gunter Building
Tallahassee, FL 32399-0850

John P. Fons, Esq.
Ausley & McMullen
227 S. Calhoun Street
P. 0. Box 391
Tallahassee, FL 32302

Charles L. Rehwinkle, Esq.
Sprint-Florida, Inc.
1313 Blairstone Road
Tallahassee, FL 32316

Attorney