IN THE SUPREME COURT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	CASE NO. SC01-2205
Appellant,	)	
	)	
v.	)	
	)	
E. LEON JACOBS, JR., et al.,	)	
	)	
Appellees.	)	
	)	

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, Florida Public Service Commission is referred to as the Commission. Appellee, Office of the Public Counsel is referred to as OPC. Appellant, BellSouth telecommunications, Inc. is referred to as BellSouth.

References to the Record on Appeal are designated (R. ___).

STATEMENT OF THE CASE AND FACTS

Appellee, Florida Public Service Commission (Commission) rejects appellant, BellSouth Telecommunications, Inc.'s (BellSouth) Introduction and Statement of the Case and Facts appearing at p. 1-7 of the Initial Brief as argumentative. The Commission hereby files its own Statement of the Case and Facts pursuant to Florida Rule of Appellate Procedure 9.210(c).

In this appeal, BellSouth challenges the Commission's Order rejecting a restructuring of BellSouth's late payment charge increasing revenues therefrom by more than 50%.[1] (R. 450) The Order held that the restructured charge violated Section 364.051(5)(a), Florida Statutes, which caps yearly increases in BellSouth's rates for non-basic services, such as the late payment charge, at 6% (or 20% where there is another provider of local telecommunications services in an exchange area).[2] (R. 440)

Pursuant to the informal hearing provided by Section 120.57(2), Florida Statutes, BellSouth and intervenor, Office of Public Counsel (OPC), stipulated to, inter alia, the following facts:

> In 1986, BellSouth instituted a late payment charge as a variable amount of 1.50% on all unpaid balances in excess of $1.00 of a customer's bill. In 1996, BellSouth represented to staff that its Late Payment Charge belongs

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[1] Order No. PSC-01-1769-FOF-TL. (R. 438)

[2] Further references in this brief to the 6% cap will assume the 20% alternative provision without restating it.

> in the miscellaneous basket of the non-basic services category.
>
> Although the filing was later withdrawn, in 1997, BellSouth filed a proposed tariff revision to increase its Late Payment Charge from 1.50% to 1.63%. BellSouth represented this proposed filing as revisions to its miscellaneous basket of the non-basic services category.
>
> In 1999, BellSouth filed a tariff revision to restructure its Late Payment Charge into a fixed rate of $1.50 and $9.00 for residential and business customers, respectively, and a variable rate of 1.50% on all unpaid balances in excess of $6.00. [e.s.] (R. 445-6)

In its 1999 tariff revision, BellSouth used the symbol "C", indicating that the previously existing late payment charge had been changed, rather than the symbol "N", which would have indicated a new, non-previously existing charge. (R. 460, 462)

As noted by OPC below, BellSouth had always categorized its 1.50% late payment charge as a non-basic service in its responses to staff inquiries during the entire period in which the new regulatory paradigm of price caps was implemented. (R. 99-101)

As noted in Docket No. 870456-TL, the Late Payment Charge instituted by BellSouth in 1986 was intended to address "expenses specifically incurred by treating delinquent accounts". (R. 168) As to whether the cost of the use of money was definitely included or excluded by that language, staff stated:

> ...staff cannot confirm what the original 1.50% LPC...was designed to recover or include. (R. 24)

Staff concluded instead that the nature of the cost was not germane and that the key point was that,

the old and new charges are for late payment of subscribers' telecommunications services. (R. 24)

STANDARD OF REVIEW

Public Service Commission orders come to the Supreme Court clothed with a presumption of validity. An agency's interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by the Supreme Court if it is not clearly erroneous. The party challenging the Commission's order bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law.

Florida Interexchange Carriers Association v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996).

SUMMARY OF THE ARGUMENT

BellSouth stipulated that, in 1996 and throughout the transition to price regulation which BellSouth elected, BellSouth always reported to the Commission that its late payment charge was "non-basic telecommunications service" for price regulation purposes. Section 364.02(8), Florida Statutes, defines non-basic service as "any telecommunications service provided by a local exchange telecommunications company...[other than a basic telecommunications service, defined at Section 364.02(2), Florida Statutes, or two other services not here relevant]". [e.s.]

Section 364.051(5)(a) caps annual price increases for non-basic services, like the total late payment charge at issue in this case, at 6%. The increase to customers of the total charge for late payment as a result of BellSouth's "restructured" charge would exceed 50%, which the Commission properly found to have obviously violated the price regulation statute applicable to non-basic services.

BellSouth's purported "restructuring" of the late payment charge is based on the unilateral assertion of two newly identified components thereof. One component is a fixed late payment charge which BellSouth has increased nearly 6%. The other is an "interest carrying charge" of 1.50%, which would increase the total charge for late payment by more than 50%. The "unrestructured" late payment charge had been a 1.50% charge for 13 years.

BellSouth's claim that the newly named "interest carrying charge" is either not telecommunications service at all or new non-basic service (uncapped in either event) must be rejected. It is the total charge for late payment that was capped and the cap cannot be evaded by any supposed link to BellSouth's costs of newly "discovered" components of that total charge. Therefore, BellSouth's repeated assertions that its cost of the use of money caused by late payment was never previously recovered by the late payment charge is not only unconfirmed by the Commission, but entirely irrelevant. It was the total charge for late payment that was capped for price regulation purposes, with BellSouth's full participation in the process, as stipulated.

There is no exception in the statute from the cap on increases of that total charge based on any theory of BellSouth's costs, let alone unconfirmed theories. Price regulation is based on BellSouth's total charge for a service to customers, not BellSouth's component costs of providing the service. There is no "restructuring" exception in the statute allowing for the cap to be evaded. BellSouth cannot substitute its costs for its charges in order to evade the cap.

Since Section 364.02(11), Florida Statutes, requires that "service" be construed in its broadest and most inclusive sense, the Commission did not err in considering BellSouth's provision of telecommunications despite late bill payment to be non-basic

telecommunications service for which increases in the total charge are capped. BellSouth cannot evade the cap by purporting to restructure the service so as to avoid the cap. Moreover, a component of the total charge is not a new, uncapped service if it is merely a component of the total charge for the same service previously rendered, as in this case--providing telecommunications despite late bill payment.

BellSouth's claim that it is being discriminated against, contrary to Section 364.051(5)(b), because other companies can supposedly charge more for late payment, and that BellSouth should be allowed to evade the cap to insure "fairness", is at odds with legislative intent. BellSouth itself acknowledges that price regulation was implemented to promote market competition. The regulatory premise is that would-be market competitors of BellSouth will be kept from charging more by competitive market forces and, indeed, will charge less in order to attract customers.

The whole point of the caps is to keep incumbents like BellSouth from exploiting the fact that their current overwhelming market share may far outweigh any constraint on them from market forces during the transition. Clearly, 'helping BellSouth charge more' for its provision of service despite late bill payment to insure "fairness" is destructive of the legislative intent.

To credit any of Bellsouth's ploys to avoid the cap in this case would destroy the effectiveness of price cap regulation to

afford protection to the public from massive rate hikes, such as this one exceeding 50%.

ARGUMENT

I. BELLSOUTH CANNOT UNILATERALLY EXEMPT ITS 1.50% LATE PAYMENT CHARGE FROM PRICE CAP REGULATION BY RESTRUCTURING OR RENAMING IT.

As will be demonstrated below, BellSouth's arguments are a ploy to evade the cap on price increases for a service it provides to consumers by irrelevant discussions about a supposed cost to BellSouth of providing that service. It is the total charge to customers for the former, not the latter, that is the concern of the price regulation statute. The total charge to customers for a service cannot be increased beyond the annual capped rate regardless of BellSouth's theories about its cost of providing the service.

A. BELLSOUTH'S ATTEMPTED RESTRUCTURING TO EVADE THE PRICE CAP IS INCONSISTENT WITH THE REGULATORY PARADIGM.

Section 364.051(5)(a), Florida Statutes, states, in pertinent part,

> Each company subject to this section...may set or change...the rate for each of its non-basic services, except that a price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period... [e.s.]

In this case, BellSouth stipulated that in the entire transition period during which BellSouth became subject to price cap regulation subsequent to its election thereof pursuant to Section 364.051(1)(a), Florida Statutes, it always categorized its 1.50% Late Payment Charge as a non-basic telecommunications

service. Those representations constitute BellSouth's legally binding commitment not to exceed the price increase limitations for late payment imposed by the regulatory system. The very nature of price cap regulation estops BellSouth to depart from that characterization now, where the result of doing so would enhance BellSouth's charges to its customers by more than $25 million. Plainly, nothing in the statutory language of Section 364.051(5)(a), Florida Statutes, gives the slightest hint that price regulated companies could evade caps on rates for their services by "restructuring" those rates, including unilaterally recharacterizing or renaming newly "discovered" subcomponents of the services, disclaiming that existing services for which rates are capped are telecommunications services, or, alternatively, claiming them to be new telecommunications services. It can readily be seen that if the Court credits any of these ploys to evade the cap in this case, the effectiveness of price cap regulation to afford protection to the public from massive rate hikes, such as this one exceeding 50%, would be eviscerated. The same techniques could as readily be applied to other non-basic telecommunications services by BellSouth, as well as other price regulated companies.

The unilateral assertion of distinctions which are wholly absent from the statutory language in an attempt to evade the clear limits of the regulatory scheme is found in a number of past

BellSouth cases. In BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594 (Fla. 1998), for example, it was claimed that, notwithstanding price capped rates, BellSouth could engage in the rate increasing practice of "rate regrouping", which was an ordinary feature of the former 'rate of return' regulatory system. This Court affirmed the Commission's conclusion that, despite the elaborate arguments BellSouth made in support of its "rate regrouping", the practice was a rate increase which was prohibited by the plain language of Section 364.051(2)(a).

Similarly, in Southern Bell Telephone & Telegraph Company v. Deason, 632 So. 2d 1377, 1388-1389 (1994), it was claimed that the Commission's access to documents of Southern Bell's affiliated companies for the purpose of auditing was limited by discovery principles to documents in Southern Bell's 'possession, custody or control'. This Court rejected that limitation, where the plain language of Section 364.183(1) afforded the Commission access to the documents and contained no discovery-related limitations. See also, Southern Bell Telephone and Telegraph Company v. Beard, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Records Act supported Public Service Commission's decision not to grant confidential classification to telephone company's documents despite company's argument that documents were 'critical self-analysis'; there was no exemption to Public Records Act for 'critical self-analysis' documents).

The reasoning in those cases supports affirmance of the Commission's Order here as well. There is no "restructuring" exemption in the statute from the yearly limit on price increases for the late payment charge which BellSouth itself defined as non-basic service for price regulation purposes. It is that service and that charge that are subject to the constraint. BellSouth cannot "restructure" the service so as to evade the constraint on the charge. Nothing in the statute allows for exceeding the cap due to "restructuring".

If a certain amount paid BellSouth covered the total amount due as charges for late payment in year 1, that amount plus 6% is the highest amount that could be charged for late payment in year 2, regardless of BellSouth's theories about its own cost of the use of money to provide that service.

B. THE COMMISSION DID NOT ERR IN FINDING BELLSOUTH'S TOTAL LATE PAYMENT CHARGE TO BE NON-BASIC TELECOMMUNICATIONS SERVICE SUBJECT TO THE PRICE REGULATION STATUTE.

The charge the customer pays is for BellSouth's provision of telecommunications service despite late payment of a bill. As noted previously, BellSouth reported this service to be "non-basic service" for price regulation purposes.[3] Though BellSouth now

[3] Non-basic service is defined in Section 364.02(8), Florida Statutes, to mean "any telecommunications service provided by a local exchange telecommunications company other than a basic telecommunications service [defined at Section 364.02(2)], a local interconnection arrangement described in Section 364.16, or a network access service described in Section 364.163". [e.s.]

would rename part of the charge an "interest carrying charge", that more accurately describes a component of operating costs that BellSouth pays to provide the service. As such, it is no more relevant to the customer's total late payment charge than rental or construction costs BellSouth pays for buildings in which its employees process late payments, taxes BellSouth pays on land those buildings occupy, or other myriad components of BellSouth's operating costs. The focus of the customer and the price regulation statute are both concerned with the total charge for a given service, not the component costs to BellSouth of providing it.

As BellSouth itself notes at p. 17 of the Initial Brief, "BellSouth is not in the business of providing credit". Therefore, why would BellSouth, except as a ploy, purport to bill customers for "interest carrying charges" as if it were in the business of providing credit? Absent this ploy, BellSouth bills for price regulated telecommunications services, including the non-basic telecommunications service of providing telecommunications despite late bill payment. It must do so, however, without exceeding the cap for price increases for that service. Indeed, BellSouth is not foreclosed from considering its interest carrying costs on servicing late paid customers bills, as well as all the other costs to BellSouth of providing that service, as it contemplates price increases within the cap.

1. The Commission's Order Does Not Violate Any Statutory Interpretation Principles.

BellSouth's attempt to bill customers for services banks provide to BellSouth, i.e., interest carrying charges for BellSouth's use of the banks' money, is an artificial construct designed to evade the regulatory scheme. BellSouth can certainly use customers' payment of charges, such as the charge for maintaining telecommunications service despite late bill payment, to pay its own operating costs, such as the cost to BellSouth of the use of money. However, BellSouth is conceptually wide of the mark in arguing as if it can bill its customers, not for its own service, but for the use of money provided by banks to BellSouth, as a ploy to hide price increases for its own service that ludicrously exceed the cap.

The question here is not whether the newly named "interest carrying charge" links up with the dictionary definition of "telecommunications". The question is whether that charge is part of the total charge to customers for a BellSouth service which effortlessly links up with that dictionary definition, i.e., maintaining telecommunications despite late bill payment. In this instance, it is part of the total charge for that BellSouth service. Indeed, Section 364.02(11), Florida Statutes, requires that "service" is to be construed in its broadest and most inclusive sense. Therefore, the total charge for that BellSouth service of maintaining telecommunications despite late bill payment

is subject to the cap on price increases. It is wholly immaterial what names BellSouth now gives the flat and variable rate components of that total charge. It is also immaterial how BellSouth links those components to its own costs.

Moreover, contrary to the Initial Brief at p. 16-17, no one is arguing that customers can pay only part of the charge for untimely bill payment. But that precisely proves the Commission's point. Both the customer and the Commission are indifferent as to how BellSouth "structures" its charge for maintaining telecommunications despite late payment of bills so long as the total charge to customers for such service is not subject to a price increase of more than 6% a year.

Though BellSouth claims that none of the examples of company-provided ancillary services in the miscellaneous category of non-basic telecommunications services are "remotely comparable" to an interest carrying charge on delinquent accounts, it is BellSouth that maintains that "BellSouth is not in the business of providing credit". Therefore, it is irrelevant that a charge component purportedly linked to BellSouth's own costs for bank services is or is not comparable to other listed telecommunications services. What is relevant is that the service BellSouth provides to its customers, i.e., continued telecommunications despite late payment, is indisputably telecommunications and also telecommunications related, as are the other listed examples. The total charge for

such service is subject to the cap on yearly increases, and, as the Commission correctly found, cannot be "restructured" to exceed the cap. The Commission did not err in concluding that a functional analysis of the interest charge, based on its nature and use, showed it to be derivative telecommunication service. (R. 447)

Cases BellSouth cites, such as ACTA[4] and AGI,[5] are easily distinguishable. Software is not telecommunications, nor is billing for yellow pages advertising. In the case of ACTA, the telephone service is "provided by the LEC and the ISP (in some cases, also an IXC). The software manufacturers provide no facilities for transmission, nor do they resell transmission over the facilities of other carriers". R. 252. Therefore, the software was not subject to the Commission's jurisdiction. Similarly, as to AGI, billing for yellow pages advertising is not telecommunications and, therefore, billing and collection for yellow pages advertising is not a derivative telecommunications service. However, providing telecommunications despite late payment is plainly a telecommunications service and one that is

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[4] Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecommunications services using the Internet by America's Carriers Telecommunications Association, 96 F.P.S.C. 12:385, 391 (1996). (R. 250)

[5] In re: Complaint of AGI Publishing, Inc. d/b/a Valley Yellow Pages Against GTE Florida, Incorporated for violation of Sections 364.08 and 364.10, Florida Statutes, and request for relief, 99 F.P.S.C. 4:572, 576 (1999). (R. 260)

derivative of the furnishing of telecommunications service. Unlike BellSouth's examples of Ford Motor Company and American Express, both of which are in the business of providing credit, BellSouth provides regulated utility service and the total charge for each such regulated service is capped, regardless of how BellSouth restructures, renames or re-conceptualizes sub-components of that charge.[6]

Though BellSouth also argues that "close questions" should be construed against the Commission's exercise of its jurisdiction, this is not a close question. For many years, BellSouth's service of furnishing telecommunications despite late bill payment has been self-categorized and treated for regulatory purposes as non-basic service. Since "BellSouth is not in the business of providing credit", according to its own argument, it would not purport to restructure its charges to customers to include charges for providing credit or BellSouth's costs of providing credit except as a ploy. In any event, the total charges for late payment cannot increase each year by more than 6%. The statute is plain and there is no close question as to that result.

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[6] BellSouth's references at p. 20-21 of the Initial Brief to definitions only applicable for tax purposes are irrelevant. What is relevant is that in 1996, when charges for telecommunication services were capped, BellSouth itself reported to the Commission that the total Late Payment Charge was non-basic telecommunications service for price regulation purposes. P. 2, supra.

C. BELLSOUTH'S TARIFF FILING SUPPORTS A FINDING THAT THE LATE PAYMENT CHARGE IS FOR NON-BASIC SERVICE REGARDLESS OF BELLSOUTH'S THEORIES ABOUT ITS OWN COST OF PROVIDING THE SERVICE.

As previously noted, BellSouth used the tariff revision symbol "C", designating a change in existing service, rather than the symbol "N", which would have designated a new service. See, Bella Boutique Corp. v. Venezolana International de Aviacion, 459 So. 2d 440, 443 (Fla. 3rd DCA 1984) (ambiguity in a tariff should be construed against the carrier).

Moreover, the Commission rejects BellSouth's claim at p. 27 of the Initial Brief that "the cost at issue here is the cost of the use of money, not the cost associated with the collection of late payments, which was the sole basis of BellSouth's existing 1986 late payment charge".

First, as previously noted, BellSouth's charges, not its costs, are what is relevant. Moreover, the cost of the use of money is a cost to BellSouth of service to BellSouth by banks, not a cost to customers of BellSouth for its provision of telecommunications service. Therefore, that cost is not properly asserted as an excuse to violate the cap on an increased charge by BellSouth to its customers. BellSouth confirms this by its statement at p. 17 of the Initial Brief that "BellSouth is not in the business of providing credit".

Second, as will be discussed in Part II, infra, the Commission rejects the assertion that the 1986 1.50% late payment charge is

clearly for a purpose different from BellSouth's "new" 1.50% charge. Even if established, that circumstance would not be relevant if the result to customers would be more than a 6% annual increase in their total payment to BellSouth for maintaining telecommunications despite late bill payment.

Contrary to BellSouth, the Commission's analysis does not violate either fundamental statutory interpretation principles or its own precedent. That analysis does have the reasonable result of constraining the annual price increase to BellSouth's customers of maintaining their telecommunications despite late bill payment to 6%, a result consistent with the intent of the statute. As this Court stated in Deltona Corp. v. Florida Public Service Commission, 220 So. 2d 905, 907 (Fla. 1969), the cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.

BellSouth's analysis, in contrast, would increase the total charge more than 50%, thus eviscerating this particular price cap and endangering the entire regime of price regulation in Florida. The idea that customers can be charged for BellSouth's costs as a means to evade the caps on BellSouth's charges is not only an absurd and unreasonable ploy, but plainly in contradiction to the legislative intent that the regulatory scheme be effective, not rendered nugatory. Deltona Corp. v. FPSC, supra. The Commission's

interpretation is consistent with effectuating legislative intent, not erroneous, and due great deference by the Court. Florida Interexchange Carriers Association v. Clark, supra.

II. NO NEW SERVICE IS AT ISSUE IN THIS CASE, WHICH ONLY INVOLVES THE SAME SERVICE WITH NEW SUB-DESIGNATIONS GIVEN BY BELLSOUTH IN AN ATTEMPT TO EVADE THE PRICE CAP.

Since the Commission's interpretation of the statute requires the total charge paid by customers to BellSouth for maintaining telecommunications despite late payment to be capped at a 6% annual increase, it is irrelevant whether BellSouth can "prove" its theories about its newly discovered designations for components of that charge which are asserted to evade the cap. Because the total charge is capped and the entire exercise is futile, the Commission's responses to BellSouth's arguments in this section should not be viewed as conceding any relevance to those arguments. Instead, the Commission seeks to demonstrate that BellSouth's arguments are inaccurate and unconvincing as well as fundamentally irrelevant.

First, BellSouth alleges at p. 29 of the Initial Brief that

> The Commission recognized that the late payment charge BellSouth instituted in 1986 was designed to recoup the "costs of collection" on delinquent accounts. [citation omitted] By contrast, the interest charge, which was implemented in 1999, allows BellSouth to recover losses incurred because of untimely payments alone, such as the cost of borrowing money to meet cash flow or loss of interest that BellSouth could have earned [i.e., opportunity cost] on the money if paid on time. [e.s.]

The Commission denies that it "recognized" the distinction BellSouth asserts. Moreover, the argument is entirely irrelevant to price regulation, which regulates charges to consumers for service without regard to BellSouth's costs. Thus, the argument, even were it correct, is no more relevant to this price regulation case than BellSouth's "rate regrouping" arguments were in BellSouth v. Johnson, supra.[7] The argument is wrong in any case. The record describes "expenses resulting from the late payment of customer's bills", which could have easily encompassed the "new" costs BellSouth describes. (R. 168) The fact that the 1986 charge was formulated as 1.50% suggests that it might well have been aimed at, inter alia, such cost of the use of money, though whether or not it was remains irrelevant for the purposes of this case. Even assuming none of that cost was recovered in 1986, Section 364.051(5)(a) allows BellSouth to raise the total late payment charge by 6% a year to pursue that recovery, and no more.

BellSouth then argues at p. 29-30 of the Initial Brief that the fact that late payment "triggers two charges is not sufficient to make those charges elements of a single telecommunication service". However, the example offered by BellSouth proves the Commission's analysis in this case to be correct. A customer can make phone calls that only trigger roaming charges, or phone calls

[7] Rate regrouping was, like BellSouth's cost-based arguments here, relevant to the former "rate of return" regulatory scheme, not price regulation.

that only trigger excess time charges, or phone calls that trigger both roaming charges and excess time charges. Thus, the two services are different. In contrast, every customer with a non-trivial account balance that pays late will trigger both of BellSouth's "restructured" charges because the restructuring is only a ploy to evade the cap on price increases for a single, already existing service--maintaining telecommunications despite late bill payment. Annual increases of the total price for that single service are capped and BellSouth cannot "restructure" its charges to evade that cap.

BellSouth then asserts, at p. 30-31 of the Initial Brief, that

> BellSouth's use of the words "plus" or "will add on" when referring to the restructured late payment charge and new interest carrying charge, did not constitute a representation that they were one and the same.

While that may be so as to BellSouth's thinking, the Commission believes the focus of the regulatory scheme is aimed at whether the total charge to customers for paying late is increased annually by more than 6% as a result of BellSouth's tariff. Since the result of BellSouth's tariff is to exceed the capped percentage increase by more than 8 times the limit, the tariff was properly found to violate the statute regardless of whether BellSouth believes there are one, two, or any number of BellSouth's costs addressed by that charge. Again, whether or not BellSouth has identified a new cost is fundamentally irrelevant to whether BellSouth can exceed the cap on increasing its charges to customers, which it cannot.

BellSouth's concluding argument at p. 31-32 of the Initial Brief is that, if BellSouth had not implemented a late payment charge in 1986, it could implement that charge as a new service now at a higher rate, supposedly as can other companies, and that BellSouth is therefore being discriminated against contrary to Section 364.051(5)(b). That section provides the Commission with "continuing regulatory oversight of non-basic services for purposes of ... ensuring that all providers are treated fairly in the telecommunications market". However, this BellSouth argument is merely another inapposite mixed regulatory metaphor.

As noted by BellSouth itself at p. 12 of the Initial Brief,

> The Legislature's implementation of price regulation, as contrasted to the former regulation through rate of return, reflects a philosophy of less governmental control and the promotion of market competition for telecommunications services. [e.s.][8]

Though BellSouth quotes the language, its argument entirely misses the point. The regulatory premise is that would-be market competitors of BellSouth will be kept from charging more for overall service (though charges for individual services might exceed the incumbents' charges) by competitive market forces, which will drive customers away from high cost providers. Indeed, those competitors can be expected to charge less overall in order to attract those customers. The point of the caps is to keep

[8] See, GTC, Inc. v. Garcia, 791 So. 2d 452, 457-58 (Fla. 2000).

incumbents like BellSouth from exploiting the fact that their current overwhelming market share may far outweigh any constraint on them from market forces during the transition.

Clearly, the idea that proper implementation of this mode of regulation would include 'helping BellSouth charge more' for its provision of service despite late bill payment to insure "fairness" is absurdly at odds with the legislative intent.

Finally, the Commission strongly disputes the supposedly "undisputed" claim at p. 33 of the Initial Brief that "prior to the implementation of the interest carrying charge BellSouth had no mechanism by which to recover the cost of the loss of use of money".

In fact, it would be extraordinarily naive to assume that BellSouth was unable to recover any of its costs during the period of 'rate of return' regulation. As previously noted, this cost may have been addressed as part of "expenses resulting from the late payment of customers' bills". (R. 168) Moreover, BellSouth was a sophisticated and experienced participant in the process of rate of return cost recovery.

Still, the deeper problem with BellSouth's arguments centered on its costs is that they are entirely irrelevant under price regulation and, therefore, entirely irrelevant to any issue before the Court in this case. As noted by the staff,

staff cannot confirm what the original 1.50% LPC in Order No. 17915, issued on July 27, 1987, in Docket No. 870456-TL, was designed to recover or include.

...

In the final analysis, however, staff does not believe the nature of the cost is germane. The key point from staff's perspective is that per BST's tariff, the old and new charges are for late payment of subscribers' telecommunications services. [e.s.] (R. 24)

CONCLUSION

The Commission properly found that BellSouth's Late Payment Charge, however restructured or renamed, related to a single service for which the two newly identified rate elements resulted in a total price increase far exceeding the annual statutory cap of 6%. The Commission's interpretation of the statute effectuates the legislative purpose, is not erroneous and is due great deference by the Court. Therefore, the Commission's Order requiring that the amount in excess of that limitation be refunded to BellSouth's customers should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 28th day of January 2002 to the following:

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CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the Courier New 12-point font, which is proportionately spaced.

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