
IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2205

On appeal from a Final Order of
The Florida Public Service Commission

BELLSOUTH TELECOMMUNICATIONS, INC.,

Appellant,

v.

E. Leon Jacobs, Jr., et al.,

Appellees.

**ANSWER BRIEF OF
CITIZENS OF THE STATE OF FLORIDA**

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SYMBOLS AND DESIGNATION OF THE PARTIES

Appellant, BellSouth Communications, Inc., will be referred to as "Appellant" or "BellSouth."

Appellee, the Florida Public Service Commission, will be referred to as the "Commission."

Appellee, the Citizens of the State of Florida, will be referred to as the "Citizens."

The Commission's Order appealed from here, Order No. PSC-01-1769-FOF-TL, issued August 30, 2001, will be referred to as the "Order."

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

All references to the Florida Statutes are to Florida Statutes (1999) unless otherwise noted. Such references are consistent with Appellant's Initial Brief, see Footnote 2, page 3, Appellant's Initial Brief.

STATEMENT OF THE CASE AND FACTS

Citizens submit that additional facts are needed to develop an understanding of the factual basis of this case. Therefore, Citizens submit the following additional Statement of the Case and Facts.

More than fourteen years ago the Florida Public Service Commission gave final approval to BellSouth's first late payment charge. (R-221). The Commission's order explained that the revenues generated by this charge would cover general costs in the company's next rate case in lieu of rate increases. (R-222).

Under rate of return regulation, which existed until January 1, 1996, the Commission approved tariffs that permitted telecommunications companies to recover all of the costs and expenses associated with operations. Revenues generated by tariffs such as the late payment charge were used to offset what would otherwise be rate increases in the basic local rates charged to customers. A process known as residual ratemaking under rate of return regulation used revenues from tariffs such as the late payment charge, speed calling, ancillary services, custom calling services, and other tariffs to keep basic rates low. In concept, revenues from these tariffs were set at high profit levels so that only the "residual" revenue requirement, after all these profits were taken into account, would be used to set basic local rates. Revenues

from the late payment tariff had exactly the same effect as the revenues from tariffs such as speed calling: these revenues were used to keep basic rates lower.

In 1995 the Florida legislature adopted a new regulatory paradigm to take effect on January 1, 1996. Under the new system, price restraints for different types of services are set by guidelines found in Chapter 364, Florida Statutes. The old system of setting rates based on rate of return regulation was abandoned.

The new system contains different procedures governing the rates for basic local telecommunications services, local interconnection arrangements, network access services, and nonbasic services. Section 364.02(2), Florida Statutes, defines basic local telecommunications services; Section 364.163, Florida Statutes, defines network access services; and Section 364.16, Florida Statutes, describes interconnection arrangements. Nonbasic services encompass the remainder of all services not otherwise defined. Section 364.02(8), Florida Statutes, defines the term "nonbasic service" to mean "any telecommunications service provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in s. 364.16, or a network access service described in s. 364.163."

The primary change made by the legislature involved the substitution of price

regulation for rate of return regulation for the largest telecommunications companies, including BellSouth. As part of price regulation, the legislature limited the total price

increases allowed each year for each nonbasic service "category." §364.051(5)(a),

Florida Statutes

Shortly after passage of the new law, the staff of the Florida Public Service Commission initiated a series of meeting and workshops to determine the various categories of nonbasic services. The record in this proceeding includes numerous documents showing that BellSouth affirmatively asserted that its late payment charge -- a 1.5% charge on unpaid balances in excess of \$1.00 -- was a nonbasic service.

For example, staff asked BellSouth to identify and describe in detail the specific services that fell within each basket of services, one of which was nonbasic services. In its response dated August 25, 1995 (R-293), BellSouth listed late payment charges as tariffs in its "Non Basic Services - Business Ancillary" (R-295) and "Non Basic Services - Residential Ancillary" (R-300) baskets that would be included as nonbasic services under the new statute.

On October 27, 1995, BellSouth responded to a PSC request to provide a list of BellSouth's nonbasic services according to nonbasic service category. (R-308).

BellSouth's response included late payment charges as an "other" nonbasic service. (R-314).

On November 13, 1995, BellSouth responded to a request made at a previous "Non Basic Service Category Workshop." (R-316). Staff had asked BellSouth for a

sample price-out of an increase in an existing nonbasic services. In its sample price-out provided to staff, BellSouth listed late payment charges as a residential ancillary service in its sample price-out for an increase in the proposed category "residential ancillary service." (R-320).

On March 6, 1996, BellSouth responded to a request to provide information regarding which nonbasic services belong within each nonbasic service category. (R-325). BellSouth's response provided what it called its "actual list of non-basic services according to category." The "other nonbasic services" category included late payment charges. (R-336).

Further evidence of this construction can be found in a filing made by BellSouth in June, 1997, to increase the 1.5% fee to a 1.63% fee. (R-349). As part of the filing, BellSouth included a price-out of the late payment charge increase to the miscellaneous nonbasic service category and showed that the increase to the late payment charge

resulted in no more than a 6% increase to the miscellaneous nonbasic service category. (R-357). Again, this plainly shows BellSouth's own construction that the 1.5% fee (and its proposed 1.63% fee) was a nonbasic service subject to the restriction that the category to which it belonged could not increase by more than 6% per year. Ultimately, BellSouth withdrew the tariff filing on July 14, 1997. (R-348).

On July 9, 1999, BellSouth filed a tariff purporting to revise the late payment charge to a fixed charge of \$1.50 for residential customers and \$9.00 for business customers. (R-455). At the same time, BellSouth filed a tariff to create a "new" monthly interest charge of 1.5% of a customer's unpaid balance in excess of six dollars. Except for the new name and threshold amount, the 1.5% charge on late payments was identical to the late payment charge that had been in existence for approximately thirteen years.

Together, BellSouth expected the two charges to generate \$56,137,279 per year, compared to the amount of \$30,258,230 generated by the previous late payment charge, for a net increase of \$25,879,049. Order at p. 13 (R-450).

On July 27, 2000, the Commission issued a proposed agency action order finding that BellSouth's two tariffs violated Section 364.051, Florida Statutes. (R-34). The Commission found that the two filings amounted to a restructure of the late payment charge. Order at p. 13 (R-450). What was once a charge of 1.5% on unpaid

balances greater than \$1.00 had become a 1.5% charge on unpaid balances greater than \$6.00 plus a fixed charge of \$1.50 for residential customers and \$9.00 for business customers. The price increase of the combined tariff filings far exceeded the 6% increase allowed for a nonbasic service category.

BellSouth petitioned the Commission for a formal hearing on August 17, 2000. (R-44). BellSouth and the Office of Public Counsel filed a joint stipulation of the record on May 30, 2001 (R-131), and the Commission subsequently upheld its initial finding that the two filings amounted to a restructure of the late payment charge. (R-438). BellSouth filed a notice of administrative appeal on September 28, 2001. (R-471).

SUMMARY OF THE ARGUMENT

The Florida Public Service Commission retains broad regulatory jurisdiction subsequent to the sweeping regulatory changes enacted in the 1995 legislative session. The tariff restructuring at issue, the late payment charge, turned upon an interpretation of the term "nonbasic services" as used in Section 351.051(5)(a), Florida Statutes. The Commission reasonably found the late payment charge to be a nonbasic charge pursuant to the statute.

Nonbasic service is a residual definition that is further broadened by the

legislative command to construe the term "service in its broadest and most inclusive sense." The Commission found that the 1.5% late payment charge was meant to enhance the cash flow to BellSouth's core telecommunications operations. Absent the core telecommunications operations, the charges could not exist. In the absence of the charges, Bell South would begin the process of termination of telephone service to its customers. The Commission reasonably found the late payment alternative to termination a "service" given the legislative command of broad construction.

The term "telecommunication service" is something more than telephone poles, or the physical plant of the company. It involves the relationship of the telecommunications company and its customers, the Florida consumers. That is exactly why the Florida Statutes grant the Commission jurisdiction over rate increases such as this.

BellSouth repeatedly identified earlier versions of tariff as a nonbasic service from 1995 - 1997. When BellSouth filed revisions to its tariff, it identified those revisions as being changed language as opposed to new language. Tariffs have the force of law and all matters therein are strictly construed against BellSouth. As such, BellSouth is estopped from claiming such tariff is a new charge.

STANDARD OF REVIEW

Commission orders come this Court clothed with the statutory presumption that they were carried out within the Commission's jurisdiction and power. This Court only recently referred to this standard as a "well-established rule." GTC, Inc. v. Garcia, 791 So. 2d 452, 454 (Fla. 2000). The Commission's interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous. Florida Interexchange Carriers Assn. v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996).

ARGUMENT

I. THE COMMISSION ACTED WITHIN ITS DISCRETION IN FINDING THE LATE PAYMENT CHARGE A NONBASIC SERVICE.

As this Court has recognized, the 1995 amendments to Chapter 364, Florida Statutes, did not completely divest the Public Service Commission of jurisdiction to regulate telecommunication companies. The Commission retains broad regulatory power under Section 364.01, Florida Statutes. GTC, Inc. vs. Garcia, 791 So. 2d 452, 458 (Fla. 2000).

"Nonbasic service" is defined in Section 364.02(8), Florida Statutes, as a residual definition, encompassing "any telecommunications service" provided by a

local telecommunication company other than specifically listed services defined in statute. Thus, except for the enumerated defined activities, nonbasic service represents all of the "telecommunication service" a regulated company provides. This catch-all category is further broadened by Section 364.02(11), Florida Statutes, which states that "service is to be construed in its broadest and most inclusive sense."

Given this broad definition, the commission concluded that the 1.5% late payment charge at issue in this case was meant to improve the cash flow to BellSouth's telecommunication services' operation. Order at p. 10; (R-447). Absent the core telecommunications operations, such charges could not be imposed. Id. In the absence of the 1.5% late payment charge, BellSouth would begin the process of cutting off service to customers who did not pay their bill by its due date. The mere payment of the late payment charge will not indefinitely assure service, the entire amount owed being due and payable, however BellSouth has, by tariff, established a process that results in continuation of service during the notice and extended time for payment of the full charges, including the late payment charge. It was reasonable for the Commission to conclude this constituted a "service" to the consumers. Id. From the consumer's viewpoint, while a late payment charge of 1.5% may not be welcome news, it certainly is a better alternative than the loss of telephone service.

Telecommunications services do not end when the call is completed because

the telecommunications carrier has a continuing relationship with the customer to bill for the call and deal with customer service issues that may arise. Payment is an inseparable element of the provision of services by BellSouth. The commission recognized that "telecommunications service" encompasses this entire relationship between the customer and the telecommunications company. Moreover, this is exactly the role the legislature intended the commission to play.

See §364.01, Fla. Stat.

The expansive reach of the concept of "service," the consumer protections enunciated in Section 364.01, Florida Statutes, this Court's teachings in Garcia, supra, all suggest that commission jurisdiction is something more than the corpus of wires and poles. Rather the jurisdiction conferred by Florida Statutes speaks to the relationship of telecommunications companies and their customers. Often the Commission becomes involved when pecuniary issues are involved. Here the Commission found that BellSouth could expect a net increase of \$25,879,049 from the changed tariff. Order at 13 (R-450). BellSouth has not challenged the amount or the fact that this sum exceeds the six percent threshold of Section 364.051(5)(a), Florida Statutes. The Commission acted reasonably to protect consumers pursuant to the statutory charge it has been given.

When the Commission made its finding that the 1.5% late payment charge was

a nonbasic service, it did not write on a clean slate. As discussed supra, BellSouth itself had repeatedly classified its previous 1.5% charge as a nonbasic service. The company identified the previous 1.5% late payment charge as included in the "nonbasic service" category on October 27, 1995, November 13, 1995, and March 6, 1996. (R-314; 320; 336). Price regulation only became an option for certain telecommunication companies on January 1, 1996. §364.051, Florida Statutes It was at this time that "nonbasic services" were first identified in Chapter 364, Florida Statutes. Thus, from the time the statutory definition was enacted until this litigation, BellSouth had placed the earlier 1.5% late payment charge in the nonbasic service category. Order at p. 12 (R-449).

In June of 1997, BellSouth filed a tariff to increase the 1.5% fee to 1.63%. (R-349). Again the company listed the 1.5% late payment charge as falling under the nonbasic services category. Although this tariff was withdrawn, this does show a consistent pattern of reference to the 1.5% interest charge as a nonbasic service by BellSouth. (R-348).

The statutory command to construe "services" broadly, the duty to protect consumers and the repeated references to the 1.5% interest charge as a nonbasic service by BellSouth all led the Commission to conclude the 1.5% interest charge was a nonbasic service. This was an entirely reasonable conclusion given this information,

plus the fact that the increase to consumers well exceeded the 6% threshold for Commission action, a fact not challenged here. This Court should find the Commission acted within its jurisdiction.

Citizens assert that the Commission's decision here could pass muster pursuant to a de novo standard, but that is not what the law requires. GTC, supra. When the statutory presumptions are put into the mix, this case becomes even more compelling. This decision was squarely within the Commission's expertise and discretion.

II. THE BELLSOUTH TARIFF REVISIONS HERE DO NOT CONSTITUTE A NEW NONBASIC SERVICE.

In Part II of its Brief, BellSouth argues that even if this Court were to conclude the rate increases here are nonbasic services, this Court should find such increases to be new charges. BellSouth Brief at 29. The most fundamental problem with this argument is that BellSouth in its tariff characterized the tariff language as a "change" rather than "new" language. See Order at p. 11; 14 (R-448; 451).

Tariffs filed with the commission have the force of law. BellSouth Telecommunications, Inc. v. Kerrigan, 55 F. Supp. 1314, 1318 (N.D. Florida 1999). Tariffs should be considered as contracts between customers and utilities, with all the ambiguities strictly construed against the drafter (here BellSouth).¹ In the matter of Black Radio Network v. Public Service Commission of New York, 253 A.D. 2d, 22, 26, 685 N.Y.S. 2d 816, 818 (N.Y., App. Div. 1999).

Here, BellSouth, in its cover letter accompanying the tariff indicated that it was filing a "revision" to its tariff. That letter also states; "this tariff filing will revise the late payment charge for Florida subscribers." Order at p. 19; (R-456). In the Executive

¹ BellSouth identifies the tariff as the "contract with its customers" BellSouth Brief at 27. The principle that tariffs are strictly construed against the utility is analogous to the familiar principle from contract law that any ambiguities in a contract will be construed against the drafter of that contract. See Hurt v. Leatherby Ins. Co., 380 So. 2d 432, 434 (Fla. 1980).

Summary which BellSouth touts in its brief, the Executive Summary uses the words "revise" and "change" three times and "new" only once. In the tariff itself, BellSouth makes no indication of any "new" language. There, BellSouth only indicates changed wording. (R-457-462).

Because tariffs are to be strictly construed against the drafter, BellSouth cannot now make the argument this change is new. BellSouth is precluded and estopped from this argument by its own tariff, which has the force of law. The commission correctly recognized that BellSouth was making changes to an existing tariff, not implementing a new charge. That judgment should be upheld by this Court.

BellSouth simply never convinced the Commission this restructuring constituted a new service. Order at 11; (R-448). The Commission extensively explained why it reached this conclusion. Order at 11-15; (R-448-452). Perhaps the clearest expression of the Commission quotes the Citizens, stating the "nature of the charge does not change simply by changing its name." Order at 14; (R-451).

CONCLUSION

The Commission reasonably concluded that the 1.5% charge at issue constituted a telecommunications service pursuant to Section 364.051(5)(a), Florida Statutes and that such service was not a new service. This Court should uphold that determination.

Respectfully submitted this 28th day of January, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States mail to Counsel for Appellant, Stephen H. Grimes, Holland & Knight LLP, Post Office Drawer 810, Tallahassee, Florida 32302, and Raoul G. Cantero, III, Adorno & Zeder, P.A., 2601 S. Bayshore Drive, Suite 1600, Miami, Florida 33133; and Counsel for Appellee, Richard Bellak, Assistant General Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399; this 28th day of January, 2002.

Attorney

CERTIFICATE OF FONT

I HEREBY CERTIFY that this brief was prepared using the Times New Roman 14-point font, which is proportionately spaced.

Attorney