
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.

**RELY BRIEF OF
BELLSOUTH TELECOMMUNICATIONS, INC.**

Stephen H. Grimes
Holland & Knight LLP
P. O. Drawer 810
Tallahassee, Florida 32302

and

Raoul G. Cantero, III
Adorno & Zeder, P.A.
2601 S. Bayshore Drive, Suite 1600
Miami, Florida 33133
Counsel for Appellant

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ARGUMENT

1. Appellees' Assertions Regarding The Standard Of Review Are Incorrect.

BellSouth agrees with the Appellees' general proposition that orders of the Public Service Commission are ordinarily clothed with a presumption of validity. However, what Appellees fail to mention is that, "[s]uch deference may not be accorded where the Commission exceeds its statutory authority." GTC, Inc. v. Garcia, 791 So. 2d 452 (Fla. 2000). In this case, the Commission exceeded its authority by attempting to regulate BellSouth's interest carrying charge, a charge that is neither a basic service nor a nonbasic service, as expressly defined in Chapter 364, and thus is outside the scope of the Commission's authority. Therefore, this Court should afford no deference to the Commission's Order that is the subject of the instant appeal.

Even if the presumption of validity applied to the Commission's Order, the Order must be reversed if it is clearly erroneous. PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988). Recently, this Court, in Verizon Florida, Inc. v. Jacobs, 27 Fla. L. Weekly, S5137 (Feb. 14, 2002), found that the Commission's interpretation of Section 364.336, Florida Statutes, was clearly erroneous because, as in this case, its interpretation violated basic statutory interpretation principles and the express wording of the statute. Thus, even if the higher standard of review applied, for the reasons set forth in the Initial Brief (13-24) and those set forth herein, the

Commission's Order finding that BellSouth's interest carrying charge constituted a nonbasic service was clearly erroneous and must be reversed.

2. Appellees' Attempts To Justify The Commission's Decision That The Interest Carrying Charge Is A Telecommunications Service Are Incorrect And Ignore Basic Statutory Interpretation Principles.

It is undisputed that Section 364.02(8), Florida Statutes (1999), defines nonbasic service as a telecommunications service. Yet, conspicuously absent from the Appellees' briefs is any serious effort to refute BellSouth's detailed explanation that, by any standard of statutory interpretation, its interest carrying charge cannot be construed to be a "telecommunications service." Public Counsel apparently believes that somehow BellSouth is providing a telecommunication service by not immediately terminating the customer even though BellSouth is prohibited from doing so by Commission rules. (See Initial Brief pp. 16-17). Meanwhile, the Commission simply asserts that the interest carrying charge is part of the total charge to the customer or that it is a "derivative" telecommunications service, so it must be a "telecommunications service." The failure to address the clear, express wording of Section 364.051(6)(a) (the price cap statute) and Section 364.02(8) (the definition of nonbasic service) is fatal to the Appellees' arguments.

As this Court recently made clear in the Verizon decision, supra, the plain language of a statute governs its interpretation. In that case, Verizon challenged the Commission's decision requiring it to impute directory advertising revenue billed and

collected by Verizon for an affiliate, Verizon Directories, which publishes and sells yellow pages directory advertising. Verizon did not include the money it bills and collects for Verizon Directories in its regulated revenues. At issue was Section 364.336, Florida Statutes (2001), which provided, in pertinent part, that “[E]ach telecommunications company licensed or operating under this chapter . . . shall pay to the commission . . . a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business.” Verizon argued that the money it billed and collected for Verizon Directories should not be included as part of its regulatory fee assessment because it was not part of Verizon’s gross operating revenue. Notwithstanding the clear wording of Section 364.336, the Commission rejected this argument and ordered otherwise.

On appeal, this Court held that the phrase “its gross operating revenues” must be given its plain and ordinary meaning. The Court, in reversing the Commission, stated:

The pertinent language of section 364.336 is plain when it states that telecommunications companies, operating under chapter 364, are only required to pay regulatory assessment fees based on a percentage of their own gross operating revenues derived from intrastate business. In its order, the Commission imputes Directories’ revenues to Verizon for purposes of regulatory assessment fee calculation. Yet, nothing in the plain language of section 364.336 serves as a basis for allowing the Commission to impute revenues to Verizon from Directories in the regulatory assessment fee calculus. Accordingly, we hold that the Commission does

not have the authority under section 364.336 to impute Directories' yellow pages advertising revenues to Verizon.

Id. at 6.

This case is no different. Under the plain language of Section 364.02(8), in order for BellSouth's interest carrying charge to constitute a "nonbasic service," and therefore be subject to Commission regulation, that charge must constitute a **telecommunications service**. Under the same principle of statutory construction, the Court applied in Verizon, the phrase "telecommunications service" must be given its plain and ordinary meaning. See also, Citizens v. Florida Pub. Serv. Comm'n, 425 So. 2d 534 (Fla. 1982). As made clear in the Initial Brief, there is no question that, based on the plain and ordinary meaning of "telecommunications" and "service", the 1.5% interest carrying charge is not a "telecommunications service" and thus is not a nonbasic service.

The Commission's argument that the interest carrying charge constitutes a nonbasic telecommunications service because such a charge is part of the total cost of providing service to delinquent customers is flawed. With such an argument, as set forth more fully in the Initial Brief, the Commission disregards the statutory requirement that a nonbasic service must constitute a "telecommunications service."

The seminal issue is not whether the interest carrying charge is part of

BellSouth's total cost when customers do not pay their bill on time; rather, the relevant inquiry under Section 364.051 is whether or not that charge is for a nonbasic service and thus a telecommunications service. Consequently, it does not matter how the Commission or BellSouth classifies the interest carrying charge or whether the costs associated with the loss of the use of money are recovered in a separate charge or subsumed in other charges. If the charge is not a nonbasic service, it is not subject to Commission regulation.

The Commission's argument that the 1.5% interest carrying charge is a telecommunications service because it is a "derivative" telecommunications service fares no better. The most glaring flaw in this argument is that the word "derivative" does not appear in the statutory definition of nonbasic service set forth in Section 364.02(8) or in any other part of Chapter 364. Similar to the Commission's argument in Verizon, supra, the Commission impermissibly expands the definition of nonbasic service in order to justify its decision. Simply put, there is no authority whatsoever that allows the Commission to regulate "derivative" telecommunications service or to expand otherwise the scope of the definition of a nonbasic service. Accordingly, as this Court did in Verizon, wherein it reversed the Commission's Order because it found that the plain language of Chapter 364 prohibited the Commission's action, the Commission's decision that the 1.5% interest carrying charge is a nonbasic service because it is a "derivative" telecommunications service is not supported by the plain

language of Section 364.02(8) and must be rejected.

Furthermore, the Commission's "derivative" telecommunications argument does not withstand reasoned analysis. Essentially, the Commission argues that the interest carrying charge must be a telecommunications service because it is derivative of providing telecommunications service. (Comm. A. Br. at 17). The fact that BellSouth provide services other than core telecommunications service does not make these other services subject to Commission regulation.

Under the Commission's rationale, voice mail would be considered a telecommunications service and thus a nonbasic service, yet a federal court, in reversing the Commission, held that voice mail service was not a telecommunications service. MCI Telecomm. Corp. v. Sprint-Florida Inc., 139 F. Supp. 2d 1342 (N.D. Fla. 2001). Likewise, under this analysis, BellSouth's Internet access service would be considered a nonbasic service even though the Federal Communications Commission has held that said services are not telecommunications services. FCC, Notice of Proposed Rulemaking, CC Docket No. 62-33, Feb. 15, 2002, at paragraph 14.

In sum, the 1.5% interest carrying charge is not a service provided by BellSouth. It is neither advertised nor promoted or otherwise offered to customers as an alternative to having their accounts terminated for nonpayment. Rather, it is a penalty for the failure to timely pay a bill for BellSouth's provision of core telecommunications

services. Notwithstanding the Commission's impermissible expansion of the definition of nonbasic service in order to justify its decision, the simple fact is that the interest carrying charge is not subject to Commission regulation because it is not a nonbasic service as defined by Section 364.02(8).

3. BellSouth Is Not Restructuring The Late Payment Charge With The Interest Carrying Charge.

The Commission argues that BellSouth is attempting to avoid the limitations of the price cap statute by recharacterizing the original late payment charge as an interest carrying charge. (Commission Brief p. 9). This argument should be rejected for the following reasons.

First, as established above, the interest carrying charge is not a nonbasic service and thus is not subject to the price cap statute. Therefore, regardless of how the Commission attempts to characterize the interest carrying charge, the Commission does not have the authority to regulate it.

Second, the interest carrying charge recovers an entirely different set of costs than did the original late payment charge. The Commission has the temerity to suggest that the cost of the use of money may have been included in BellSouth's original late payment charge¹ by referring to a June 29, 2000, staff memo which stated:

¹ Whether or not BellSouth previously recovered the loss of the use of money with the original late payment charge is irrelevant to the determination of whether the 1.5% interest carrying charge instituted in 1999 is a "telecommunications service" and thus a nonbasic service. It only becomes relevant with respect to the determination of

. . . staff cannot confirm what the original 1.5% LPC . . . was designed to recover or include.

(R.24). Obviously, the staff member making this observation did not refer to the Commission's 1987 records to see what the late payment charge included. Recommending approval of the original late payment charge on May 28, 1987, the Commission's staff explained that the expenses intended to be recovered were those required to be incurred by BellSouth in treating delinquent accounts and "generated by activity such as the business office making and receiving calls to delinquent customers." (R.168). The staff also pointed out that the income from the late payment charge would only partially offset the costs associated with administering the collection process. (R-173). The Commission adopted its staff's recommendation and approved the late payment charge, stating that the charge would contribute to the recovery of expenses incurred by Southern Bell "in treating customer accounts." In re: Review of Southern Bell Telephone and Telegraph Company's Late Payment Charge, 87 F.P.S.C. 7:300 (1987). (R.221). There can be no dispute that the late payment charge did not cover the cost of the use of money lost as a result of unpaid bills. In fact, the very document that the Commission purports to quote from states that "after reviewing the cost study, staff believes the LPC [late payment charge] did

whether the 1.5% carrying charge is a new charge in the event that it is found to be a "telecommunications service."

not recover the interest expense associated with subscribers who continued to pay late." (R.24).

Third, the cases cited by the Commission do not support its argument. The case of BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594 (Fla. 1998), has nothing to do with this appeal. That case involved rate regrouping under rate of return regulation and there was no issue with respect to whether a particular service was properly characterized as a telecommunications service or a new nonbasic service.

Similarly, the case of Southern Bell Telephone & Telegraph Company v. Deason, 632 So. 2d 1377 (Fla. 1994), has no bearing whatsoever on the instant appeal, except to further buttress BellSouth's position that the Commission cannot circumvent the plain language of Section 364.02(8) to regulate BellSouth's interest carrying charge. In that case, the Court rejected BellSouth's claim that certain documents were exempt from Commission inspection because there was no such limitation in Section 364.183(1), the statute authorizing the Commission to inspect company records.

4. The Commission's Own Argument Supports BellSouth's Case.

On page 19 of its brief, the Commission states that "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 services." (emphasis added). If BellSouth's interest carrying charge is not a cost to customers of BellSouth for its provision of telecommunications services, it cannot be a charge

for the provision of telecommunication services. Thus, based on the Commission's own words, the interest carrying charge cannot be a nonbasic service. Further, as stated above, the assertion that BellSouth seeks to charge for its costs as a means to evade the price cap is not only incorrect but it is also unresponsive to the issue of whether the interest carrying charge is a telecommunications service and thus subject to Commission regulation.

5. The Triggering Of Two Charges By A Single Act Does Not Make Those Charges Elements Of A Single Telecommunications Service.

The Commission missed the point made by BellSouth in its brief on page 30 with respect to a cellular customer in Miami who pays roaming charges for calls made outside of Florida and 69 cents per minute of use beyond 250 minutes per month. When this customer has exceeded the threshold number of minutes and makes a five minute cellular call from Miami to Atlanta, the customer has incurred two separate charges: (1) roaming charges for the call; and (2) 69 cents per minute exceeding 250 minutes of use. While this one action triggers two charges, it does not mean that the two charges are the same or that they result from the same service. By the same token and contrary to the Commission's rationale, the fact that BellSouth's late payment charge and its interest carrying charge are both triggered by one event does not make these two separate charges a single charge. Whether the customer can avoid being assessed with both charges either by not calling Atlanta or not exceeding 250 minutes

of use is irrelevant. The point is that a single act can trigger two separate charges.

6. BellSouth's Previous Characterization Of The Interest Carrying Charge Is Irrelevant.

Recognizing the weakness of their position with respect to whether BellSouth's interest carrying charge is a charge for a telecommunications service, the Appellees devote much of their briefs to the proposition that BellSouth cannot prevail because it has changed its position and thus is somehow estopped from arguing that the interest carrying charge is not a nonbasic service. They point out that in 1996 and throughout the transition to price regulation, BellSouth represented that its 1986 late payment charge (which is distinct from the interest carrying charge) belonged in the miscellaneous basket of nonbasic services. They then suggest that because the interest carrying charge is really the same charge, it must also be a nonbasic service.

This premise cannot stand for several reasons. As previously explained, before price regulation, all revenue-producing items were subject to review by the Commission because BellSouth was regulated on the basis of its rate of return. When price regulation was instituted in 1996, the existing late payment charge was designated as being in the miscellaneous basket of nonbasic services because there was no other place to put it.

Of course, the issue in this case is not over the status of the late payment

charge, which has now been restructured to a flat fee and has been approved by the Commission. The 1.5% interest carrying charge is an entirely different and new charge. Unlike the late payment charge, it does not seek to recover the expenses incurred by BellSouth in the collection of overdue accounts.

Moreover, BellSouth has never characterized the new interest carrying charge as a nonbasic service. BellSouth used the tariff provision symbol "C," designating the change in existing service, because its tariff included a change in its existing late payment charge to a flat rate fee. In fact, BellSouth's cover letter accompanying the tariff correctly indicated that it was filing a revision to its tariff because it was revising its late payment charge while also notifying the Commission that it was instituting a new charge – the interest carrying charge. Further, in the executive summary of the tariff, BellSouth explicitly referred to the 1.5% interest charge as a new charge. Thus, BellSouth has never changed its representation concerning the status of its interest carrying charge. But even if it had, there could be no estoppel because Appellees have not changed position to their detriment in reliance upon such a representation. See Department of Rev. v. Anderson, 403 So. 2d 397 (Fla. 1981) (essential element of estoppel is "a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.").

Furthermore, even if the Commission believes that BellSouth has changed its position with respect to these charges, the Commission cannot base its decision on

this premise. BellSouth's casual characterization of its charges is not determinative and cannot change the law. Just as a party cannot confer jurisdiction on a tribunal when jurisdiction is lacking as a matter of law, neither can a party's unilateral choice of descriptive language to describe an action supersede the force of law applicable to that action. Analogous to a court lacking subject matter jurisdiction, the Commission has no jurisdiction over the interest carrying charge because said charge is not a nonbasic service, regardless of how BellSouth may or may not have previously characterized the interest carrying or late payment charges. Accordingly, the Court should disregard Appellees' argument that BellSouth's previous actions or stipulations somehow gave the Commission the authority to regulate the interest carrying charge.

7. The Interest Carrying Charge Is Not A Ploy.

The Commission's suggestion of BellSouth using a "ploy" to obtain a "massive rate hike" is disingenuous. If BellSouth succeeds in this appeal, its rates for telecommunications services will remain absolutely the same. BellSouth cannot understand how the Appellees can reasonably object to its efforts to seek reimbursement for the loss of the use of its money from those who fail to pay their bill on time.

CONCLUSION

Because BellSouth's carrying charge is not a "telecommunications service," the Commission has no authority to seek to block its imposition. In any event, even if the

carrying charge is construed to be a telecommunications service, it is a new service that is not subject to regulation under the price cap statute.

The Commission's order must be reversed.

Respectfully submitted this 22d day of February, 2002.

HOLLAND & KNIGHT LLP

Stephen H. Grimes (FBN 032005)
Post Office Drawer 810
Tallahassee, Florida 32302
(850) 224-7000
(850) 224-8832 (Fax)

and

Raoul G. Cantero, III (FBN 552356)
Adorno & Zeder, P.A.
2601 S. Bayshore Drive, Suite 1600
Miami, Florida 33133

**Attorneys for Appellant BellSouth
Telecommunications, Inc.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by United States mail to Counsel for Appellees, Harold McLean, General Counsel and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399; and Robert D. Vandiver and Stephen M. Presnell, Office of the Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 810, Tallahassee, Florida 32399-1400; this 22d day of February, 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