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May 30, 2001

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000733-TL (Inv. Tariff Late Payment Charges)

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief, which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White

Nancy B. White (KA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

APP ____
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CERTIFICATE OF SERVICE
Docket No. 000733-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail and (*) Hand Delivery this 30th day of May, 2001 to the following:

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Nancy B. White (KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation to determine Whether BellSouth Telecommunications Inc.'s tariff filing to restructure its late payment charge is in violation of Section 364.051, F.S.	)	Docket No. 000733-TP
	)	Filed: May 30, 2001

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") submits this brief in support of its positions on the issues listed by the Commission in Order No. PSC-00-2279-PCO-TL, issued on November 30, 2000.

INTRODUCTION AND SUMMARY

In 1999, BellSouth decided to restructure its thirteen year-old late payment charge and to institute a new interest charge on delinquent payments. Although BellSouth is unaware that a Florida consumer has ever complained about the tariff revisions, this Commission has tentatively concluded that BellSouth's tariff violates the Florida price cap statute, Section 364.051(6), Florida Statutes. That statute, however, caps the price of telecommunications services, and an interest charge is simply not a telecommunications service. Instead, whether interest is charged on an unpaid telephone bill or an unpaid credit card bill, an interest charge is a fee for the cost to recover the use of money. As a result, BellSouth's interest charge is limited by Florida's usury laws and not by the price cap statute. To conclude otherwise contradicts well-established principles of statutory construction, conflicts with past decisions of this Commission, and effectively punishes BellSouth for having acted in 1986 to place the costs of collecting overdue payments on late paying customers rather than on the general ratepaying public.

STATEMENT OF FACTS

On February 3, 1986, BellSouth (then Southern Bell Telephone and Telegraph Company) filed a revision to its tariff instituting a late payment charge of 1.5 percent on outstanding balances greater than $1 not paid by the next billing date. In so doing, BellSouth became the first investor-owned utility subject to this Commission's jurisdiction to levy a charge designed to "place the costs associated with collection of late payments on those customers making late payments."[1] This Commission "endorse[d] the concept of delinquent customers bearing the costs of late payments rather than the general body of ratepayers," but, due to the novelty of the late payment charge, approved BellSouth's tariff for an experimental period of one year, in order to monitor the implementation of the charge.[2]

At the end of the trial period, this Commission's staff recommended that BellSouth's experimental tariff, with certain modifications as to its implementation, be made permanent. The staff noted that the purpose of the late payment charge was threefold: to recoup the costs "specifically incurred by treating delinquent accounts"; to ensure that "individuals who cause avoidable costs pay directly for them"; and to encourage prompt payment.[3] The staff concluded that the late payment charge had met the first two goals in part — because the revenue from the late payment charge did not cover the full cost of collecting on delinquent accounts — but that it was not high enough to encourage prompt payment.[4] Nonetheless, the staff recommended

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[1] Notice of Proposed Agency Action, Order Approving Late Payment Charge, *In re Southern Bell Tariff Filing To Institute a Late Payment Charge*, Order No. 16014, Docket No. 860172-TL, at 1 (Fla. Pub. Serv. Comm'n Apr. 18, 1986) ("*Order Temporarily Approving Late Payment Charge*").

[2] *Id.*

[3] Staff Issue and Recommendation Summary, *Review of Southern Bell Telephone Company's Late Payment Charge*, Docket No. 870456-TL, at 11-12 (May 28, 1987).

[4] *See id.* at 12-16.

retaining the charge based on its belief that it is "appropriate that the costs of the collection effort be born by the customer who causes them."[5] This Commission adopted the staff's recommendation, explaining that it had "consistently taken action to place costs on the cost-causer rather than the general body of ratepayers" and that it saw "no reason for the general body of ratepayers to support late-paying customers."[6]

On July 9, 1999, BellSouth filed a revision of the tariff provisions that established the late payment charge. That filing, which took effect on August 28, 1999, replaced the variable charge for late payment instituted in 1986 with a flat fee of $1.50 for residential subscribers and $9 for business subscribers, to be applied when a customer had an unpaid balance greater than $6.[7] BellSouth estimated that this restructuring of the late payment charge would, in the aggregate, constitute a price increase that would raise the cost of services in the miscellaneous nonbasic service category by 5.01 percent.[8]

In addition to converting the late payment charge from a variable to a fixed fee, the July 9 tariff filing also instituted a brand new tariff provision: an interest charge on overdue balances greater than $6. *See footnote no. 7.* The interest charge was set at 1.5 percent per month, which is equivalent to the maximum annual rate permitted under the Florida statute that defines usurious contracts. *See* Fla. Stat. § 687.02. Unlike the late payment charge, which enabled

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[5] *Id.* at 16.

[6] Order Approving Late Payment Charge, *In re Review of Southern Bell Telephone and Telegraph Company's Late Payment Charge*, Order No. 17915, Docket No. 870456-TL, at 1 (July 27, 1987) ("*Order Approving Late Payment Charge*").

[7] The $6 minimum exempts basic Lifeline customers from the requirement of paying either the interest charge or the restructured late payment charge. *See* Letter from M. Criser III to B. Bayó at 3 (July 6, 2000).

[8] Staff Memorandum, *Investigation To Determine Whether BellSouth Telecommunications, Inc.'s Tariff Filing To Restructure its Late Payment Charge is in Violation of Section 364.051, F.S.*, Docket No. 000733-TL (June 29, 2000) ("*Staff Recommendation*").

BellSouth to recover some of the costs incurred in collecting on delinquent accounts, the interest charge was designed to enable BellSouth "to recover the carrying charges on money" — that is, the costs due to the loss of the use of the money while payment is delayed, which are different from the costs incurred to ensure that overdue balances are eventually paid in full.[9] Even the Commission Staff recognized that the late payment charge did not recover the interest expense as associated with subscribers who continued to pay late. See Staff Recommendation dated June 29, 2000 in Docket No. 000733-TP, p.5.

In August 1999, this Commission's staff and the Office of Public Counsel ("OPC") expressed concerns to BellSouth that its tariff filing might violate the price cap statute. On August 13, 1999, BellSouth informed the staff that, in the event the tariff were found to be unlawful, it would provide refunds to affected customers.[10] In light of this promise and the ongoing discussions between BellSouth and the OPC, the staff refrained from further investigating BellSouth's tariff.

The instant investigation into the legality of the July 1999 tariff filing was not prompted by any complaint from a purchaser of telephone service about either the change to a flat-fee late payment charge or the institution of the interest charge. Instead, on May 8, 2000, then-Commissioner Clark received a complaint from a Kansas-based business that places white pages listings in BellSouth's Florida directory on behalf of other companies. The nature of that complaint was that the business had insufficient time between receiving a bill from BellSouth and the payment due date to send the bills to its clients for approval, have the clients return the approved bills, and then make payment. Although BellSouth confirmed that the billing cycle at issue complied with the relevant Florida regulations, it attempted to resolve this issue by offering

[9] *Id.* at 2.

the company alternate billing dates and the option of yearly billing. Both offers were rejected.[11] Notably, the timing issue that formed the basis for this complaint was unrelated to the institution of the interest charge.

On July 27, 2000, following the staff's investigation into the lawfulness of BellSouth's July 1999 tariff, this Commission issued a Notice of Proposed Agency Action in which it tentatively found that BellSouth's tariff resulted in a price increase for the miscellaneous nonbasic service category of greater than 6 percent, in violation of section 364.051(6)(a).[12] BellSouth had argued to this Commission that its change from a variable to a fixed late payment charge was permissible under the price cap statute, because it caused the expected revenue from the miscellaneous nonbasic service category to increase by less than 6 percent. BellSouth further argued that the newly instituted interest charge was not a telecommunications service and, therefore, was subject to the usury law rather than the price cap statute. Alternatively, BellSouth argued that even if the Commission elected to define interest charges as a service, the interest charge was a new service and, therefore, was not a price increase.

This Commission agreed that the fixed late payment charge increased the miscellaneous nonbasic services category by a permissible amount.[13] This Commission also agreed that, if the interest charge were a new service, then the tariff would not violate the price cap statute because "the revenue from new services is not initially included for purposes of [category] monitoring."

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[10] *See* Letter from N. Sims to W. D'Haeseleer (Aug. 13, 1999).

[11] *See* Letter from M. Criser III to B. Bayó, at 3 (July 6, 2000).

[12] Because this Commission followed its staff's recommendation in nearly all respects, the staff's memorandum is not discussed in detail.

[13] Notice of Proposed Agency Action Order Finding Tariffs in Non-Compliance, *In re Investigation To Determine Whether BellSouth Telecommunications, Inc.'s Tariff Filing To Restructure its Late Payment Charge is in Violation of Section 364.051, F.S.*, Order No. PSC-00-

Notice of Proposed Agency Action at 5. The Commission then tentatively concluded, however, that the interest charge was not "a new service" and, instead, was "merely . . . a new method of charging for late payments." *Id.* at 3; *see also id.* at 5 ("BST's tariff restructuring to add another rate element, the percentage interest charge, cannot be construed to be the same as introducing a new service."). The Commission also provisionally rejected BellSouth's contention that the interest charge is not a nonbasic service, and therefore subject to the usury laws rather than the price cap statute. The Commission stated:

> The 1.50% interest charge is financial compensation that BST receives from its late paying customers for carrying the customers' late payments resulting from subscribed telecommunications services. As such, the LPC is a derivative telecommunications service, since interest charges are assessed on subscribers' usage of telecommunications services. Section 364.02(11), Florida Statutes, states that "[S]ervice is to be construed in its broadest and most inclusive sense." Thus, the LPC should be construed as being a part of a telecommunications service.[14]

Having counted the interest charge in calculating the price increase for the miscellaneous nonbasic services category, this Commission proposed to determine that BellSouth's tariff effected an increase of greater than 6 percent, in violation of section 364.051(6)(a). *See Notice of Proposed Agency Action* at 5-6.

Although the staff had recommended that BellSouth's tariff be cancelled immediately, and refunds issued within 90 days,[15] this Commission allowed the tariff to remain in effect,

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1357-PAA-TL, Docket No. 000733-TL, at 4 (July 27, 2000) ("*Notice of Proposed Agency Action*").

[14] *Notice of Proposed Agency Action* at 5. This Commission appeared to treat the 1.5 percent interest charge on overdue balances over $6 as simply a renaming of the variable late payment charge established in 1986, rather than as a novel tariff item. *See id.* Although this Commission, and its staff, recognized that the late payment fee had never been designed to compensate BellSouth for the interest expense associated with delayed payments, *see id.* at 4; *Staff Recommendation* at 5, it ultimately concluded that "the nature of the cost is [not] germane." *Notice of Proposed Agency Action* at 4.

[15] *See Staff Recommendation* at 7.

pending the decision of any affected party to request a formal hearing. *See Notice of Proposed Agency Action* at 6. BellSouth filed a request for such a hearing on August 17, 2000. By Order No. PSC-01-0228-PCO-TL, issued on January 23, 2001, the Commission held that the case proceed pursuant to Section 120.57(2), Florida Statutes via a joint stipulation of the facts and briefs by the parties.

ARGUMENT

With all respect, the Commission's tentative conclusion in the *Notice of Proposed Agency Action* is incorrect. BellSouth's interest charge is not a "derivative telecommunications service," nor is it "another rate element." Rather, an interest charge on late payment — which can be imposed by BellSouth, American Express, or the Ford Motor Credit Company — is a fee to recover the costs for the loss of use of monies. Because an interest charge is a type of service distinct from telecommunications, an interest charge is not a telecommunications service or "a part of a telecommunications service." Therefore, an interest charge cannot be a nonbasic service governed by section 364.051(6)(a). Instead, the cap applicable to BellSouth's interest charge is found in usury law, no different from the source of the limit applicable to interest charges imposed by any other entity.

In any event, if BellSouth's interest charge were a nonbasic service, it would be a new service in the miscellaneous nonbasic service category. The interest charge pays for a new service, loss of the use of money, that is different from the late payment charge, which is intended to recoup the separate cost of collection efforts. Moreover, treating the interest charge as an element of an existing telecommunications service effectively punishes BellSouth for having instituted its late payment charge in 1986, an action this Commission rightly recognized benefited consumers. If the Commission determines that the interest charge is a

telecommunications service which BellSouth denies, it should be classified as a new service. The revenue raised by that charge should not be included in determining whether BellSouth's July 1999 tariff filing violates section 364.051(6)(a).

For these reasons, this Commission should approve BellSouth's July 1999 tariff filing and should order no refunds. If this Commission concludes otherwise, refunds should be limited to the amount collected under the interest charge, as the restructuring of the late payment charge has been determined to be in compliance with Commission rule.

STATUTORY AND REGULATORY BACKGROUND

The Florida price cap statute, enacted in 1995, governs proposed price increases for those telephone companies, like BellSouth, that have elected to be governed by price regulation. *See* Fla. Stat. § 364.051(1)(a)-(b). Carriers electing price regulation are exempted from a number of requirements of the rate of return regulatory system, *see id.* § 364.051(1)(c), and instead have their prices governed by three different provisions. The provision most pertinent to this proceeding, section 364.051(6)(a),[16] caps the prices of "nonbasic services" as follows:

> Each company subject to this section . . . may set or change, on 15 days' notice, the rate for each of its nonbasic services, except that a price increase for any nonbasic service category shall not exceed 6 percent within a 12-month period . . . and the rate shall be presumptively valid.[17]

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[16] Subsections (4), (5), and (6) of section 364.051 were renumbered on June 20, 2000 pursuant to an amendment that deleted subsection (3). *See* Florida Law Ch. 00-334 (S.B. 1748) (2000). Subsection (3) required this Commission, by December 1, 1997, to issue a report determining whether there was a need to extend the price caps on basic local telecommunications service. *See* Fla. Stat. § 364.051(3). Because this Commission has used the pre-amendment numbering in posing the issues for the parties to address, this brief does so as well.

[17] Fla. Stat. § 364.051(6)(a). The statute also provides that once "there is another provider providing local telecommunications service in an exchange area," "the price for any nonbasic service category may be increased in an amount not to exceed 20 percent within a 12-month period." *Id.*

This Commission has "continuing regulatory oversight of nonbasic services" in order, among other things, to "ensur[e] that all providers are treated fairly in the telecommunications market." Fla. Stat. § 364.051(6)(b).

In addition to the general limit on the increase in the price of nonbasic services, the price cap statute also contains two other limits on price increases. One of those provisions pertains to a specifically defined class of "protected" nonbasic services.[18] Notwithstanding the general permission in § 364.051(6)(a) to increase nonbasic service prices, this provision froze the price of protected nonbasic services at the rates effective on July 1, 1995. *Id.* § 364.051(6)(a)(1)-(2). This freeze, however, lapsed on January 1, 2000. *See id.* Currently, prices for protected nonbasic services may be increased subject to the same rule that applied since 1995 to "unprotected" nonbasic services.

The final price cap provision pertains to basic local telecommunications service. The statute froze prices for basic residential and business local services at the rates effective on July 1, 1995. *Id.* § 364.051(2). Depending on the size of the regulated telecommunications company, this freeze persisted until January 2000 or January 2001. *Id.* Currently, prices for basic local service are no longer frozen and a local exchange telecommunications company may, on 30 days' notice, adjust its prices for basic services once in any twelve-month period by "an amount not to exceed the change in inflation less 1 percent." *Id.* § 364.051(4).

Many, but not all, of the relevant terms of the price cap statute are defined in Section 364.02, *Florida Statutes*. "Nonbasic service" is defined as "any *telecommunications service*

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[18] Protected nonbasic services are "[a] voice-grade, flat-rate, multi-line business local exchange service, including multiple individual lines, centrex lines, private branch exchange trunks, and any associated hunting services, that provides dialtone and local usage necessary to place a call within a local exchange calling area; and [t]elecommunications services provided

provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in § 364.16, or a network access service described in § 364.163." *Id.* § 364.02(8) (emphasis added). Section 364.02 also contains definitions of "service," "telecommunications company," and "basic local telecommunications service." "Service," according to the statute, "is to be construed in its broadest and most inclusive sense." *Id.* § 364.02(11). A "telecommunications company" is defined to "include every corporation ... offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility."[19] Finally, the statute defines "basic local telecommunications service" as, among other things, "voice-grade, flat-rate residential, and flat-rate business local exchange services which provide dial tone local usage necessary to place unlimited calls within a local exchange area." *Id.* § 364.02(2). Section 364.02 defines neither "telecommunications" nor "telecommunications service."

As noted above, the statute caps prices for nonbasic services by "nonbasic service category," a term this Commission has defined by regulation. In January 1996, following three months of workshops, this Commission adopted a stipulated agreement among a number of telephone companies setting out ten categories of nonbasic services.[20] Those categories include business and residential local exchange services (other than basic, single-line, flat-rate service), optional (or vertical) services, directory and operator services, toll services, transport services,

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under contract service arrangements to the SUNCOM Network, as defined in chapter 282." *Id.* § 364.051(6)(a)(1)-(2).

[19] The statute defines "telecommunications facility" as any property "used and operated to provide two-way telecommunications service to the public for hire within this state." *Id.* § 364.02(13).

[20] *See* Notice of Proposed Agency Action Order Adopting Proposal, Order No. PSC-96-0012-FOF-TL, Docket No. 951159-TL, at 3 (Fla. Pub. Serv. Comm'n Jan. 4, 1996) ("*Nonbasic Service Categories Order*").

payphone services, and miscellaneous services. *See Order No. PSC-96-0012-FOF-TL.* The only category that is arguably pertinent here, the miscellaneous service category, is given the following "functional service description": "Company-provided ancillary services other than those indicated in preceding categories. Examples of such services: provision of 911 and E911 equipment; equipment for the hearing impaired." *Id* The stipulated agreement also provides examples of the types of services in each category, although these are "for illustrative purposes only" and are "not intended to alter the definitions of the categories." *Id.* For the miscellaneous nonbasic service category, the examples are special number assignment, apartment door answering, high voltage protection, trouble location charge, 911, and returned check charges. *Id.* Nowhere, however, does the *Nonbasic Service Categories Order* mention an interest charge.

ISSUES AND POSITIONS

Issue 1: Is BellSouth's interest charge of 1.50% on unpaid balances, as filed in T-991139, a rate element of an existing service that is subject to the provisions of Section 364.051(6)(a), *Florida Statutes*?

**** Position: The interest charge is not a fee for a telecommunications service and, therefore, is not subject to Section 364.051(6)(a) as a rate element of any existing nonbasic telecommunications service covered by that statute.**

Florida law defines "nonbasic service" as "any *telecommunications service* provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement . . . , or a network access service." Fla. Stat. § 364.02(8) (emphasis added). This Commission has previously recognized that a service is not a "telecommunications service" merely because it is provided by a telecommunications company. Instead, determining whether a service is a telecommunications service requires a functional

analysis of the service.[21] Thus, the Commission held that neither the yellow pages advertising nor the billing services that GTE provided to other publishers of yellow pages directories are telecommunications services.[22]

Federal law uses the same functional analysis. For example, although a telephone company is normally regulated as a common carrier under Title II of the Communications Act of 1934, when a telephone company provides cable service over its wires it will be regulated under Title VI as if it were a cable company.[23] As the D.C. Circuit has explained, "[w]hether an entity in a given case is to be considered a common carrier" and, thus, regulated like a telephone company, turns not on that entity's usual status but "on the *particular practice* under surveillance."[24]

Applying this functional analysis to the instant case demonstrates that BellSouth's interest charge is not a telecommunications service. Recouping the cost of the loss of use of money, whether under a narrow or the "broadest and most inclusive" definition of that term, is obviously not telecommunications. *id.* § 364.02(11). As shown below, an interest fee lacks the characteristic — the transmission of information — found in the other services regulated as telecommunications services under the price cap statute. Because BellSouth's interest charge

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[21] *See* Order Denying Petition for Declaratory Ruling, Institution of Rulemaking and Injunctive Relief, *In re Petition for Declaratory Ruling, Institution of Rulemaking Proceedings, and Injunctive Relief, Regarding Intrastate Telecommunications Services Using the Internet, by America's Carriers Telecommunication Association*, Order No. PSC-96-1545-FOF-TP, Docket No. 960355-TP, at 4 (Fla. Pub. Serv. Comm'n Dec. 19, 1996) ("*ACTA Order*").

[22] *See* Order Granting Motion to Dismiss, *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*, Order No. PSC-99-0825-FOF-TP, Docket No. 990132-TP, at 4-5 (Fla. Pub. Serv. Comm'n Apr. 22, 1999) ("*GTE Order*").

[23] *See* 47 U.S.C. §§ 522(a)(7), 571(a)(3).

[24] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) (emphasis added).

happens to be imposed by a telecommunications company — and is not a telecommunications service — it is not a "nonbasic service" and not subject to the provisions of section 364.051(6)(a).

The conclusion that BellSouth's interest charge is not a nonbasic service under the price cap statute is compelled by four principles of statutory construction. First, although the price cap statute defines "nonbasic service" as "any *telecommunications* service," it does not further define "telecommunications," either alone or as part of the term "telecommunications service." Under settled principles of Florida law, that word should be given its plain and ordinary meaning, as defined in the dictionary. *See, e.g., Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 292 (Fla. 2000); *Suddath Van Lines, Inc. v. Department of Environmental Protection*, 668 So. 2d 209, 212 (Fla. App. 1996). The leading telecommuncations dictionary defines "telecommunications" as the "transmission, reception and the switching of signals, such has electrical or optical, by wire, fiber, or electro/magnetic (i.e., through-the-air) means." *Newton's Telecom Dictionary* (16th ed. 2000). Federal law similarly defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing." 47 U.S.C. § 153(43). In ordinary usage, therefore, an interest charge is not telecommunications because it does not involve the transmission of signals or information. Because the interest charge is not a telecommunications service, it is also not a nonbasic service subject to section 364.051(6)(a).

Second, although the price cap statute does not expressly define "telecommunications service," it does contain definitions of two types of telecommunications service. Basic local telecommunications services is defined as "voice-grade, flat-rate residential, and flat-rate business local exchange services which provide dial tone, [and] local usage necessary to place unlimited calls within a local exchange area." *Id.* § 364.02(2). Protected nonbasic services are

defined to include, among things, "voice-grade, flat-rate, multi-line business local exchange service[s]" such as "centrex lines, private branch exchange trunks, and any associated hunting services." *Id.* § 364.051(6)(a)(1). When a statute provides specific examples of a general, undefined term, the related canons of statutory construction known as *ejusdum generis* and *noscitur a sociis* call for the general term to be limited "to include only things or persons of the same kind, class, or nature as those specifically enumerated." *Smith v. State*, 606 So. 2d 427, 428 n.2 (Fla. App. 1992); *see also United Auto Serv. Ass'n v. Phillips*, 740 So. 2d 1205, 1209 (Fla. App. 1999) ("[U]nder the doctrine of *noscitur a sociis,* the meaning of statutory terms and the legislative intent behind them may be discovered by taking them in the context of words associated with them in the statute."). Interest charges are qualitatively different from dial tone and centrex lines; they are neither required to make a local exchange call nor features used during such a call. Accordingly, the interest charge is not a telecommunications service.[25]

Third, it is an established principle in interpreting statutes that "the same meaning should be given to the same term within subsections of the same statute." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000); *see Allstate*, 761 So. 2d at 292. The price cap statute was enacted in 1995 as part of Chapter 95-403. The term "telecommunications service" appears in numerous places throughout that law, in contexts in which it would be absurd to conclude that BellSouth's interest charge can be regulated as a telecommunications service. For example, the law requires an alternative local exchange telecommunications carrier to provide any other

[25] Section 364.051(6)(c), which governs the price of a given nonbasic service, requires that the price of such services "include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service." No monopoly components are involved recovering the cost of the use of money while customers' payments are delayed, providing further evidence that treating an interest charge as a nonbasic service is incompatible with the statutory scheme.

telecommunications carrier with "access to, and interconnection with, its telecommunications services." *See* Ch. 95-403, § 14 (codified at Fla. Stat. § 364.16(2)). Not only is it difficult to understand how carriers could give another carrier access to an interest charge, there is no conceivable reason why the Florida legislature would insist that they do so. Similarly, the law codifies the legislature's concern that "telecommunications services are being used or have been used by a customer . . . to violate state or federal law." *Id.* § 20 (codified at Fla. Stat. § 364.245). Telecommunication services so used may be "discontinued . . . [and] reinstated only by court order." *Id.* Again, it makes no sense in the context of this section for "telecommunication service" to include an interest charge for the recovery of costs due to the loss of use of money while payment is delayed.

Fourth, "telecommunications service" is defined in Chapter 203, Florida Statutes, and that definition should be read *in para materia* with the use of that same term in Chapter 364. *See Gamble v. State*, 723 So. 2d 905, 907 (Fla. App. 1999); *McClung-Gagne v. Harbour City Volunteer Ambulance Squad, Inc.*, 721 So. 2d 799, 801-02 (Fla. App. 1998); *Fla. Jur. 2d Statutes* §§ 177-179 (1984). Section 203.012(5) defines "telecommunication service" to include, among other things, "[l]ocal telephone service, toll telephone service, . . . [c]ellular mobile telephone . . . , and pagers and paging service." That definition does not include an interest charge, even when "assessed on subscribers' usage of telecommunication services." *Notice of Proposed Agency Action* at 5. Nor does an interest charge bear any resemblance to the services listed in section 203.012(5), all of which involve the transmission of information.

Not only do the principles of statutory construction discussed above compel the conclusion that BellSouth's interest charge is not a nonbasic service governed by section

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It is BellSouth's position that the late payment charge is also not a telecommunications

364.051(6)(a), but also this Commission's administrative precedents lead to the same conclusion. First, an interest charge fits within none of the categories of nonbasic services established in the *Nonbasic Service Categories Order*. An interest charge does not belong in any of the first nine categories because it is not a business or residential local exchange service, optional (or vertical) service, directory or operator service, toll service, transport service, or payphone service. *See id.* Attach. Exh. A. Nor does an interest charge fit within the miscellaneous services category, which is defined as "[c]ompany-provided ancillary services *other than those indicated in preceding categories*." *Id.* (emphasis added). Here, as well, the canons of *ejusdum generis* and *noscitur a sociis* call for the general term "ancillary services" to be limited to those services that are qualitatively similar to the services explicitly mentioned in the other nine categories. The services identified in the *Nonbasic Service Categories Order* as belonging in the miscellaneous service category — such as E911 equipment, equipment for the hearing impaired, and apartment door answering[26] — meet this requirement. Along with the services in the other nine categories, they share the quality of being used during a telephone call or involving the use of the telephone network. An interest charge, however, has nothing in common with either the services in the other nine categories or the listed examples of miscellaneous services, further confirming that it is not a nonbasic service.

Second, as noted above, a pair of decisions by this Commission stand for the proposition that whether a service is a "telecommunications service" turns not on whether it is provided by a telecommunications company, but rather on a functional analysis of the service. In the first of these decisions, this Commission held that software enabling users to make free long-distance calls over the Internet is not a telecommunications service and "is more closely akin to customer

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service, but that argument is for another case.

premises equipment."[27] The software, this Commission explained, simply converted a voice signal into data packets and the "software manufacturer provide[d] no transmission services" for those packets.[28] In the second decision, this Commission similarly found that the advertising, billing, and collection services GTE offered to third-party publishers of yellow pages are not telecommunications services, notwithstanding that GTE is a telecommunications company.[29] In both cases, the Commission recognized that "the 'critical issue' of whether the service or product at issue 'constitutes telecommunications services for hire.'"[30] Like Internet telephony software and yellow pages advertising, billing, and collection services, interest charges have no features in common with "telecommunications services for hire," which involve the transmission of information.

Finally, even if it were a close question whether BellSouth's interest charge is a telecommunications service, which it is not, this Commission has recognized that when "there is reasonable doubt as to the scope of [an agency's] power, it should be resolved against the exercise of that power."[31]

For these reasons, this Commission erred in concluding that BellSouth's interest charge is a rate element of a nonbasic service that is subject to the provisions of section 364.051(6)(a). The mere fact that the interest charge is "assessed on subscribers' usage of telecommunication services" does not make it a "derivative telecommunications service." *Notice of Proposed*

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[26] *See Nonbasic Service Categories Order* Attach. Exhs. A & B.

[27] *ACTA Order* at 4.

[28] *See id.* at 4, 6.

[29] *See GTE Order* at 4-5.

[30] *Id.* at 6 (quoting *ACTA Order* at 4) (internal quotation marks omitted). Although the question in that case was one of jurisdiction, the same functional analysis applies in that case.

Agency Action at 5. To see this most clearly, assume that a customer paid his telephone bill with his credit card, but then failed to pay his credit card bill on time. The credit card company would charge interest on the unpaid bill, and the balance due would be based on that customer's "usage of telecommunications services." The credit card company, however, is not thereby providing a derivative telecommunications service, nor should its interest charge "be construed as a part of a telecommunications service." *Id.* The same should hold true for BellSouth. The customer is the one who decides how the bill should be paid and when it should be paid, not BellSouth.

This Commission should approve BellSouth's July 1999 tariff filing on the ground that BellSouth's interest charge is not a telecommunications service and therefore that it is not a nonbasic service subject to the price cap in section 364.051(6)(a). BellSouth's interest charge is, instead, capped by section 687.02(1), *Florida Statutes*. Indeed, because the interest charge is presently at the statutory maximum, BellSouth cannot raise it without permission of the Florida legislature. To carry it to an extreme, if the interest charge is determined to be a telecommunications service, then the price regulation statute would allow the charge to be increased by 6% each year without limit and without regard to the usury laws.

Issue 2: Is the interest charge filed by BellSouth in T-991139 a "new service" for the purposes of Section 364.051(6)(a), *Florida Statutes*?

> ****Position: The interest charge is not a fee for any service, new or old, regulated by Section 364.051(6)(a). If the interest charge were a fee for a service regulated by that statute, it would be a new service.**

Because BellSouth's interest charge is not a telecommunications service at all, this Commission need not decide whether it is a "new service" for purposes of section

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[31] *GTE Order* at 6 (citing *State ex rel. Burr et al., State R.R. Comm'rs v. Jacksonville Terminal Co.*, 71 So. 474 (Fla. 1916)).

364.051(6)(a).[32] If, however, this Commission concludes that the interest charge is a nonbasic service, then it should hold further that it is a new service. To hold otherwise would work considerable unfairness on BellSouth, contrary to the directions of the Florida legislature.

BellSouth has not previously imposed an interest charge on its customers who do not pay their bills timely. The late payment charge that BellSouth instituted in 1986, as this Commission has recognized, was designed to recoup the "costs of collection" on delinquent accounts, such as the costs of sending letters to late paying customers or employing collection services.[33] By contrast, the interest charge allows BellSouth to recover the costs imposed by untimely payment alone, such as the cost of borrowing money to meet cashflow needs or loss of the interest BellSouth could have earned on the money if paid on time.

Although the two charges share a similar trigger — a customer's decision not to pay his bill on time — the fact that a single action by a customer triggers two charges is not sufficient to make those charges elements of a single telecommunications service. For example, if a customer with measured rate service dials "411" to obtain directory assistance, he will be charged both for making the local call and for the directory assistance. Yet the two charges are not rate elements of a single service — indeed, measured rate service and directory assistance fall within different

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[32] This Commission appears to have considered the question whether a telecommunications service is a "new service" in only one other decision. *See* Order Closing Docket, *In re Investigation of Tariff Filing To Determine Whether GTE Florida Incorporated's Trouble Location Charge for Single-Line Customers is in Compliance with Section 364.051, F.S.*, Order No. PSC-96-1535-FOF-TL, Docket No. 96073-TL (Dec. 17, 1996). In that order, this Commission declined to resolve the question whether GTE's institution of a single-line trouble location charge was a new service — GTE had previously tariffed a multi-line trouble location charge — because even if it was not a new service the tariff instituting the charge for that service complied with section 364.051(6)(a).

[33] *Order Approving Late Payment Charge* at 2; *see also Order Temporarily Approving Late Payment Charge* at 1 ("The purpose of this charge is to place the costs associated with the collection of late payments on those customers making late payments.").

nonbasic service categories.[34] Because BellSouth has never previously imposed an interest charge on late payments, it should be treated as a new service, even though the imposition of that charge is triggered by an event that also results in the imposition of an existing charge, namely the late payment charge.

Moreover, this Commission should treat BellSouth's interest charge as a new service in order to "ensur[e] that all providers are treated fairly in the telecommunications market." Fla. Stat. § 364.051(6)(b). BellSouth's decision, in 1986, to institute a late payment charge was an innovation in Florida, as no other investor-owned utility under this Commission's jurisdiction placed the costs of collecting late payments on those that caused the costs, rather than on the general body of ratepayers.[35] This Commission rightly praised BellSouth's decision to force delinquent customers to bear these costs.[36]

If BellSouth had not instituted a late payment charge in 1986, the fixed late payment charge and the interest charge in its 1999 tariff would both be new services for purposes of section 364.051(6)(a)[37] — irrespective of whether they are separate services or two elements of a single service. As this Commission confirmed in the *Notice of Proposed Agency Action*, "the revenue from new services is not initially included for purposes of [nonbasic service category]

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[34] The services fall within the "Residential Non-Basic Exchange Access" and "Local Directory Assistance and Directory Services Categories," respectively. *See Nonbasic Service Categories Order* Attach. Exh. B.

[35] *See Order Temporarily Approving Late Payment Charge* at 1.

[36] *See id.*; *see also Order Approving Late Payment Charge* at 1 ("We see no reason for the general body of ratepayers to support late-paying customers.").

[37] Assuming that an interest charge is a telecommunications service and therefore subject to the price cap in section 364.051(6)(a).

monitoring."[38] The July 1999 tariff, therefore, would unquestionably be valid under the price cap statute.

Therefore, the only reason that this tariff is currently under investigation is that BellSouth took the step of instituting a late payment charge in 1986. While BellSouth is unable to force late payers, rather than all ratepayers, to bear the costs of delayed payment, those local exchange telecommunications companies that had not followed BellSouth's lead in imposing a late payment charge would be free now to file a tariff imposing — as new services — the very same late payment charge and interest charge found in BellSouth's July 1999 tariff. The Florida legislature gave this Commission "continuing regulatory oversight of nonbasic services" in order to prevent such unfairness. Fla. Stat. § 364.051(6)(b).

For these reasons, if this Commission concludes that the interest charge is a nonbasic service, then it should conclude further that it is a new nonbasic service and approve BellSouth's July 1999 tariff filing.

Issue 3: Does BellSouth's tariff filing (T-991139) violate Section 364.051(6)(a), *Florida Statutes*? If so, what amount needs to be refunded, and how should the refund be determined and made effective?

> ** **Position: BellSouth's tariff does not violate Section 364.051(6)(a). In the event this Commission concludes otherwise, refunds should be limited to the amount collected under the interest charge. BellSouth will calculate the amounts customers paid in interest under T-991139 and refund that amount within 120 days from the time the Commission's order becomes final.**

As explained above, BellSouth's tariff filing does not violate section 364.051(6)(a). It is uncontested that BellSouth's restructuring of the late payment charge from a variable to a fixed amount is permissible under the price cap on nonbasic services. BellSouth's interest charge does not violate section 364.051(6)(a) because it is a charge to recover the cost of money and is

[38] *Notice of Proposed Agency Action* at 5.

governed by the usury laws and is not a telecommunications service. Even if the interest charge were a telecommunications service, this Commission should find that it is a new service because BellSouth has never before imposed a charge based on the costs of delayed payment and to hold otherwise would work considerable unfairness on BellSouth. For these reasons, this Commission should approve BellSouth's July 1999 tariff filing and order no refunds.

If this Commission concludes that BellSouth's tariff violates section 364.051(6)(a), it should limit refunds to amounts collected through the interest charge. As shown above, the restructuring of the late payment charge results in a lawful increase in the price of the miscellaneous nonbasic service category. BellSouth will calculate the amounts its customers paid under the interest charge from August 1999 through the date on which the decision of this Commission becomes final and nonappealable. BellSouth will refund to each customer the amount of interest paid during this period. If possible, such refunds will be made by crediting the amount of interest charged on the customer's bill. When BellSouth cannot provide a refund through bill credits, it will send the customer a draft for the appropriate amount.

BellSouth will make such refunds within 120 days of the date on which the decision of this Commission becomes final and nonappealable. Accumulating and processing the necessary data to provide each customer with a refund of the precise amount in interest paid is extremely time consuming. By way of comparison, it took BellSouth over two months to collect and process the data necessary for the most recent general sharing refund. That refund, however, went to all customers of record. A refund to each customer that paid the interest charge of the exact amount paid in interest is considerably more complex. Accordingly, if this Commission requires BellSouth to provide any refunds, it should provide BellSouth with at least 120 days in which to do so.

CONCLUSION

For the foregoing reasons, this Commission should approve BellSouth's July 1999 tariff filing in its entirety and order no refunds.

Respectfully submitted this 30th day of May, 2001.

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