BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Petition of Florida Public Telecommunications Association for Expedited Review of BellSouth Telecommunications, Inc.'s Tariffs With respect to Rates for Payphone Line Access, Usage, and Features	)	Docket No. 030300-TP
	)	Filed: April 15, 2003

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Motion to Dismiss the refund claims asserted by the Florida Public Telecommunications Association ("FPTA"). The FPTA has asserted two refund claims; one claim seeks a refund of subscriber line charges ("SLC"), the other claim seeks a refund of pay telephone access service ("PTAS") fees. Both refund requests fail to state a claim for which the Florida Public Service Commission ("Commission") may grant relief. FPTA is not entitled to any refunds because BellSouth at all times has charged FPTA members tariffed PTAS rates that comply with binding, effective, and unchallenged Commission orders. Likewise, BellSouth has charged FPTA the subscriber line charges set forth in its applicable FCC tariff.

FACTUAL BACKROUND

The facts leading to the FPTA's petition are as follows. In a series of Orders implementing section 276 of the Federal Telecommunications Act of 1996, the FCC delegated to the state Commissions the responsibility of determining whether an incumbent LEC's intrastate

payphone access line rates complied with the "new services test."[1] In 1997, the Commission staff sent a memorandum to BellSouth and other incumbent LECs with a copy of the FCC's *Second Waiver Order.* Staff's memo requested a detailed explanation and supporting documentation if a LEC believed its current intrastate payphone tariffs met the FCC's new services test. BellSouth had previously filed, in March 1997, its cost information for wholesale payphone offerings. On December 9, 1997, a staff workshop was held during which the FPTA and BellSouth decided to meet to resolve any issues by stipulation.

Between January 1998 through May 1998, BellSouth and the FPTA discussed PTAS rates. During these discussions, the FPTA was provided with BellSouth's cost studies concerning wholesale payphone offerings. BellSouth had notified the FPTA that "it is correct to charge the EUCL [end user common line charge, formerly referred to as the subscriber line charge or SLC] over and above the cost based rate established for the PTAS or Smartline service." The FPTA was fully aware that BellSouth would also charge an additional, line item EUCL on bills.[2]

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[1] *See, e.g.*, Order on Reconsideration, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C. Rcd 21,233 at ¶163 (November 8, 1996) ("Order on Reconsideration") ("We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276."); Order, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 F.C.C. Rcd 20,997 at ¶19 (April 4, 1997) ("Waiver Order") ("The [FCC] has delegated to each state the review, pursuant to federal guidelines, of payphone tariffs filed in the state."); Order, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 F.C.C. Rcd 21,370 at ¶11 (April 15, 1997) ("Second Waiver Order") ("On reconsideration, the [FCC] stated that although it had the authority under Section 276 to require federal tariffs for payphone services, it delegated some of the tariffing requirements to the state jurisdiction.").

[2] The imposition of the EUCL, formerly the SLC, stems from a long line of decisions relating to access charges. *See Access Charge Reform*, CC Docket No. 96-262, 12 FCC Rcd 15962 (1997) ("Access Charge Reform Order"); *and* Report and Order, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service* ("CALLs Order"), CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, 15 FCC Rcd 12962 (May 31, 2000). In the *Access Charge Reform Order*, the FCC set certain guidelines and limitations governing the imposition of the SLC, which were subsequently modified in the *CALLs Order*. The EUCL that BellSouth charges is set forth in BellSouth's FCC tariffs and is an additional line-item charge, similar to other taxes, fees, and charges, that appears on end users' bills.

In May 1998, the FPTA contacted the Commission acknowledging, "tariffs and supporting documents have been studied in detail." The FPTA also requested that the Commission staff "present a recommendation to the commission for proposed action on the tariffs that have been filed." The FPTA indicated a staff recommendation would "sharpen everyone's focus and clearly identify whether there are any remaining disputed issues."

On August 11, 1998, the Commission issued Order No. PSC-98-1088-FOF-TL in Docket No. 970281-TL ("PTAS Order") setting forth its decision on the FCC's new services test. The Commission recognized that BellSouth had filed cost information, finding that:

> We have reviewed the information provided and believe when viewed in the aggregate the existing rates for payphone services are appropriate. This aggregate level considers both required and typically purchased features and functions. Moreover, based on our review of these studies, we believe that these LECs' current tariffed rates for intrastate payphone services are cost-based and thus meet the 'new services' test.

PTAS Order, p. 5.

The Commission noted Florida was unique to other states, as it had long had payphone tariffs in place. Moreover, the Commission referred to three prior evidentiary hearings and two stipulations, rate reductions, and other actions taken to ensure an open pay telephone market. PTAS Order, p. 6. The Commission concluded:

> We note again that in most cases the existing tariffs are the result of one or more of our payphone-related proceedings in which costs were considered. All payphone providers (LEC and non-LEC) will be purchasing the same wholesale services at the same rates from the existing tariffs; therefore, the tariffs are not discriminatory. Accordingly, we find that the existing LEC tariffs for payphone services are cost-based, consistent with Section 276 of the Act, and nondiscriminatory; therefore, no further filings are necessary to modify existing tariffs.

PTAS Order, p. 7.

On September 1, 1998, the FPTA filed a petition protesting Order No. PSC-98-1088-FOF-TL, and requesting a hearing. Thereafter, on December 31, 1998, the FPTA withdrew its petition, and the Commission issued Order No. PSC-99-0493-FOF-TL ("Final PTAS Order"), closing Docket No. 970281-TL, with a final, effective date of January 19, 1999.

BellSouth has charged payphone service providers ("PSPs") the Commission approved PTAS rates, plus the applicable federal EUCL charge, in compliance with applicable Commission orders and its approved tariffs. Neither the FPTA nor any individual PSP has objected to BellSouth's rates. Neither the FPTA nor any individual PSP has previously argued that BellSouth's PTAS rates should be reduced by the amount of the EUCL (aside from the current FPTA petition). The FPTA voluntarily withdrew its petition seeking a hearing, and has not sought any further rehearing or judicial review of the *Final PTAS Order*.

The basis for the FPTA's Complaint arose from the FCC's January 31, 2002, *Wisconsin Order.*[3] In the *Wisconsin Order*, the FCC established certain guidelines to "assist states in applying the new services test to BOCs' intrastate payphone line rates." *Wisconsin Order,* ¶ 2. The Wisconsin Order set forth a methodology for computing direct costs, explained how to allocate overhead, discussed the SLC (now EUCL), and addressed usage. As to the EUCL, the FCC stated that a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federal tariffed SLC. *Wisconsin Order,* ¶ 61. The *Wisconsin Order* is currently on appeal to the United States Court of Appeals for the District of Columbia Circuit. *See The New England Public Communications Council, Inc. et al. v. Federal Communications Commission and United States of America,* Case No. 02-1055 (oral argument scheduled May 9, 2003).

The FPTA apparently interprets the *Wisconsin Order* as providing it with (1) a right to a refund of previously paid SLC or EUCL charges; (2) a refund of PTAS fees paid since the date of this Commission's *Final PTAS Order;* and (3) new PTAS rates. BellSouth is willing to negotiate with the FPTA an appropriate consent order allowing BellSouth prospectively to reduce its intrastate PTAS rates by the amount of the EUCL, obviously reserving all rights it may have as a result of the pending appeal of the *Wisconsin Order*. However, based on the well-established legal doctrines, including the prohibition against retroactive ratemaking and the filed-rate doctrine, BellSouth is neither required nor willing to pay any refunds of EUCL charges or PTAS fees sought by the FPTA.

ARGUMENT

A. The FPTA's Request for Refunds Fails to State a Claim for Which Relief Can be Granted by the Commission

In considering a motion to dismiss, this Commission must accept the allegations in the complaint as true and consider whether the facts alleged state a cause of action. *See Meyers v. City of Jacksonville,* 754 So.2d 198 (Fla. 1st DCA 2000); *City of Gainesville v. Department of Transportation,* 778 So.2d 519 (Fla. 1st DCA 2001). The following allegations in the FPTA's complaint establish, as a matter of law, that any claim for refunds cannot stand:

> On August 11, 1998, in Docket No. 970281-TL, the FPSC issued an *Order* concluding that "[e]xisting incumbent local exchange company tariffs for smart and dumb line payphone services are cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and nondiscriminatory. On March 9, 1999, the FPSC issued an *Order Closing Docket and Reinstating Order No. PSC-98-1088-FOF-TL,* and establishing the effective date of that *Order* as January 19, 1999.
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[3] Memorandum Opinion and Order, *In the Matter of Wisconsin Public Service Commission,* 17 FCC Rcd 2051 (rel. Jan. 31, 2002).

> [S]ince April 15, 1997 BellSouth's intrastate PTAS rates have included an amount for the federally tariffed subscriber line charge . . . .
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> * * * *
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> To date, Petitioner has not asked this Commission to address this issue. However, issuance of the FCC's *January Order* clarified significant aspects of the FCC's position rendering the issues, five years after the issuance of the *Waiver Order,* ripe for full consideration by this Commission.

Complaint, ¶ 4, ¶ 22 and second ¶ 22. It is clear from the Complaint that the FPTA never sought any regulatory or judicial review of BellSouth's Florida PTAS rates, and instead waited years later (and for that matter, nearly over a year after the issuance of the FCC's *Wisconsin Order* upon which it heavily relies) to lodge any formal request for a refund and for lower rates with this Commission.[4]

B. The FPTA Is Not Entitled to Refunds Because the Commission Has No Authority to Make Retroactive Ratemaking Orders

The law governing the FPTA's claims is clear. Over thirty years ago the Supreme Court of Florida explained that:

> Petitioner contends that in both orders the Commission departed from essential requirements of law by allowing both companies involved herein to retain those past charges deemed excessive rather than making said reduction orders retroactive.
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> * * * *
>
> It is Petitioner's contention that said rate reductions should be made retroactive to October 1, 1963 with appropriate refunds to the ratepayers. We do not agree with the petitioner's contention on this point. An examination of pertinent statutes leads us to conclude that the Commission would have no authority to make retroactive ratemaking orders.

City of Miami v. Florida Public Service Commission, 208 So.2d 249, 259 (Fla. 1968). The Florida Supreme Court explained that this Commission's statutory authority to set rates in

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[4] To be fair, the FPTA did contact BellSouth in November 2002 informally requesting a refund and lower PTAS rates; however, even that contact was not made until ten months *after* the *Wisconsin Order* was issued.

Section 364.14 is prospective only. The statutory language expressly limits rates to be fixed "thereafter." *City of Miami*, 208 So.2d at 260; *and* Section 364.14 (1)(c) ("the commission shall determine the just and reasonable rates, charges, tolls or rentals *to be thereafter observed and in force and fix the same by order*"). This Commission simply has no statutory authority to revise rates established years past, and order corresponding refunds.

The doctrine of retroactive ratemaking was addressed in detail in Docket No. 971663-WS, *In re Petition of Florida Cities Water Company.* In Order No. PSC-98-1583-FOF-WS, November 25, 1998, this Commission explained:

> This Commission has consistently recognized that ratemaking is prospective and that retroactive ratemaking is prohibited . . . . The general principal of retroactive ratemaking is that new rates are not to be applied to past consumptions. The Courts have interpreted retroactive ratemaking to occur when an attempt is made to recover either past losses (underearnings) or overearnings in prospective rates . . . In *City of Miami,* the petitioner argued that rates should have been reduced for prior period overearnings and that the excess earnings should be refunded. Both of these attempts were deemed to be retroactive ratemaking and thus were prohibited.

(citations omitted).

This Commission's *PTAS Order* and *Final PTAS Order* have not been appealed, they have not been revoked or modified by the Commission, and they have not been suspended or vacated by any court. These Orders direct the manner in which BellSouth is to charge for payphone access lines in Florida, and BellSouth has been charging (and continues to charge) for payphone access lines in compliance with these Orders. BellSouth simply cannot be required to issue refunds for charging rates that comply with valid and effective Orders of the Commission. Any such refunds would clearly violate the prohibition against retroactive ratemaking.

C. The FPTA Is Not Entitled to Refunds In Light of the Filed Rate Doctrine

The filed rate doctrine also prohibits the FPTA's claims for a refund. The "filed rate doctrine holds that where a regulated company has a rate for service on file with the applicable

regulatory agency, the filed rate is the only rate that may be charged." *Global Access Limited v. AT&T Corp.*, 978 F. Supp. 1068 (S.D. Fla. 1997); *citing Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 615 (11th Cir. 1995). Stated simply, the filed rate doctrine precludes a party from disputing a filed rate. "Application of the filed rate doctrine can at times be harsh, but its justification lies in the principle that carriers should not be able to discriminate against customers in the setting of service rates; one rate – the filed rate – is the applicable rate for all . . . ." *Global Access Limited,* 978 F. Supp. at 1073; *see also MCI Telecomm. Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (S.D. Fla. 1994).

The FPTA had the opportunity to challenge the *PTAS Order* and the *Final PTAS Order.* It could have appealed those orders, it could have asked for reconsideration and a full hearing, it could have sought or requested an offset or deduction of the EUCL charge from the PTAS rate, or, given that the Commission was acting pursuant to authority delegated to it by the FCC, it may have been able to appeal those Orders to the FCC. The FPTA, however, decided not to challenge the Commission's orders in any forum, and for nearly four years it has paid the rates that are set forth in BellSouth's filed tariffs (and that are consistent with the Commission's unchallenged orders). Now, the FPTA comes back to this Commission, implies that BellSouth can ignore the requirements of this Commission's prior Orders, and asks this Commission to require BellSouth to pay refunds for having complied with binding, effective, and unchallenged Commission Orders.

In doing so, the FPTA indisputably is seeking relief for a purported injury that allegedly was caused by the payment of rates that were (and are) on file with this Commission and with the FCC. Moreover, the rates were (and are) consistent with unchallenged orders entered by the Commission. All such claims "are barred by the 'filed rate doctrine.'" *See Commonwealth v.*

Anthem Ins. Cos., 8 S.W.3d at 52. *Cf.* Order, *In Re Consumers Power Company*, 52 P.U.R. 4th 536 (Mich. P.S.C. April 12, 1983) ("The interim and final orders in Case No. U-4717 were appealable to the Ingham county circuit court . . . . The AG, who was a party to Case No. U-4717, did not appeal those orders. By requesting the commission to order the refund of money collected on the rates established by those orders, the AG seeks to overturn those prior orders in a subsequent proceeding rather than the statutorily required procedure of appeal to the circuit court. His collateral attack on those orders is, therefore, unlawful and unreasonable.").

In *Arizona Grocery Co. v. Atchison, T&SF Ry. Co.*, 284 U.S. 370, 390 (1932), the Supreme Court declared that

> Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to the reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Since then, federal appellate decisions consistently have held that a federal commission may not order refunds when it determines that a rate that it previously allowed to become effective is not appropriate. *See, e.g.*, AT*&T v. Federal Communications Commission*, 836 F.2d 1386, 1394 (D.C. Cir. 1987) ("when the Commission determines that existing rates are excessive, it cannot order a refund of past payments under the revoked rate. Rather, the FCC can only correct the problem through a *prospective* prescription under section 205. The courts have consistently adhered to this basic rule of ratemaking)(J. Starr, concurring)(emphasis in original); *Sea Robin Pipeline Co. v. Federal Energy Regulatory Commission*, 795 F.2d 182, 189 n.7 (D.C. Cir. 1986) ("Sea Robin had a right to rely on the legality of the filed rate once the Commission allowed it to become effective. FERC may not order a retroactive refund based on a post hoc

determination of the illegality of a filed rate's prescription.").

This principle is firmly grounded in sound public policy. Any other rule "would lead to endless consideration of matters previously presented to the Commission and the confusion about the effectiveness of Commission orders." *Idaho Sugar v. Intermountain Gas Co.*, 100 Idaho 368, 373-74, 597 P.2d 1058, 1063-64 (1979). In the words of a federal appellate judge addressing the FCC's attempts to allow for refunds in violation of this rule:

> it is apparent that the refund rule that the Commission advances here does clear violence to the values of stability and predictability that Congress so carefully enshrined in the Communications Act. In the Commission's Orwellian world, carriers are no longer able to rely on filed rates; instead, they go about their business in constant jeopardy of being forced to refund enormous sums of money, even though they complied scrupulously with their filed rates.

AT&T v. Federal Communications Commission, 836 F.2d 1386, 1394 (D.C. Cir. 1987)(J. Starr, concurring). Clearly, the Commission should reject the FPTA's claims for refunds as a matter of law.[5]

D. There Are No Exceptions to the Application of Either Retroactive Ratemaking or the Filed Rate Doctrine that Apply Here.

BellSouth anticipates that the FPTA may argue that this Commission has and can issue refunds in situations where a carrier has overcharged its customers. Any such argument is simply wrong.

While this Commission has previously ordered refunds, such refunds result from unique sets of circumstances, which are not at issue in this case. For example, when this Commission has established interim rates, which rates are later modified, refunds from the date of any interim rates have been found to be appropriate. *See United Telephone Company of Florida v. Mann,* 403 So.2d 962 (Fla. 1981). Likewise, when this Commission improperly implemented the terms

of a remand order, which order was subsequently appealed, rate changes dating back to the date of the improper Commission action were proper. *See GTE Florida Inc. v. Clark,* 668 So.2d 971 (Fla. 1996). In the *GTE* case, the Florida Supreme Court distinguished rate changes dating back to orders that were appealed from cases "where a new rate is requested and then applied retroactively" as the FPTA is requesting here. *GTE Florida Inc.,* 668 So.2d at 973.

In this case, the FPTA has never appealed the *Final PTAS Order.* Moreover, this Commission did not establish interim PTAS rates that would be subject to final regulatory action at a later date. Thus, the FPTA's refund request does not fall within any recognized exceptions to the prohibition against retroactive ratemaking.

Similarly, Section 204 of the federal Telecommunications Act provides that when a carrier files a new or revised charge with the FCC, the FCC may hold a hearing on that new or revised charge. *See* 47 U.S.C. §204(a)(1). If the FCC decides to hold such a hearing, it may suspend the new or revised charge, order the carrier to keep an accounting of the amounts collected under that charge, and then allow the rate to go into effect on the condition that the carrier pay refunds, with interest, for "such portion of such charge for a new service or revised charges as by its decision shall be found not justified." *Id.* Section 204 clearly was at play in the FCC's physical collocation docket:

> This physical collocation tariff investigation began when the Common Carrier Bureau (Bureau) partially suspended LECs' physical collocation tariffs pursuant to Section 204(a) of the Act, initiated an investigation into the lawfulness of these tariffs, [and] imposed an accounting order . . . .

Second Report and Order, *In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and*

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[5] Even if FPTA had a viable claim for refunds (which it does not), Section A2.4.3.A of BellSouth's Florida General Subscriber Services Tariff provides, in pertinent part, that "[a]ny objection to billed charges should be promptly reported to the Company." FPTA members have not objected to any of their bills.

Switched Transport, 12 FCC Rcd 18,730 (June 13, 1997) ("Physical Collocation Order"). It also was at play in the FCC's LIDB docket ("the Bureau suspended the transmittals for one day, imposed accounting orders, and initiated investigations of the tariff transmittals referenced above").[6]

The refunds the FCC ordered in the *Physical Collocation Order* and in the *LIDB Order* were *not* the result of some inherent right to refunds in cases involving the new services test. Nor were they the result of the Commission's decision to revisit the legality of rates that had already gone into effect and that had been in effect for several years. In other words, the FCC did *not* do what the FPTA is asking this Commission to do -- review rates that it had already approved (and that the carrier had already been charging in compliance with an unchallenged FCC Order), decide that those rates were too high, and then order refunds.[7]

Instead, the refunds the FCC ordered in the *Physical Collocation Order* and in the *LIDB Order* were the result of the FCC's decision to allow new or revised rates to go into effect on the condition that a hearing on those rates would be held and that the carrier collecting those rates would pay refunds based on the outcome of that hearing. Nothing in either the *Physical Collocation Order* or the *LIDB Order* suggest that having decided not to challenge the Commission's Orders nearly four years ago, the FPTA can now collaterally attack those Orders (and the rates established by those Orders) and receive refunds to boot.

E. Neither BellSouth's Position before the FCC when it Sought a Waiver of the Intrastate Tariff Filing Requirements Nor the FCC's *Second Waiver Order* Supports the FPTA's Request for Refunds.

FPTA will likely argue that not paying the refunds the FPTA seeks in this docket

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[6] Order, *In the Matter of Local Exchange Carrier Line Information Database,* 8 FCC Rcd 7130 (August 23, 1993) ("LIDB Order").

conflicts with BellSouth's position before the FCC when it sought a waiver of the intrastate tariff filing requirements. *E.g.,* Complaint, second ¶ 22, p. 12. Any such an argument is meritless. After considering BellSouth's request for a waiver, the FCC issued an Order plainly stating that "[a] LEC who seeks to rely on the wavier granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, *when effective*, are lower than the existing tariffed rates." *Second Waiver Order,* ¶ 2, 25. Because BellSouth's tariffed rates, which rates met the new services test and were effective January 19, 1999, were not lower than existing rates, no refunds were due to FPTA members then and no refunds are due now. BellSouth's actions are entirely consistent with its position in seeking a waiver from the FCC.

The FPTA implies that what BellSouth and the FCC really meant was that even after the rates the Commission established in the *PTAS Order* and the *Final PTAS Order* became effective, and even after all parties declined to seek reconsideration or appeal such orders, BellSouth would agree to pay refunds, all the way back to April 15, 1997, if any person or entity could, at any unspecified time in the future, convince any commission or court that the Florida Commission really should have established different rates way back in 1999. The FPTA's argument defies both common sense and the controlling legal principles discussed above and their refund claims should be rejected forthwith.

F. State Commissions With Similar Refund Requests Have Rejected Such Claims

In cases analogous to the FPTA's Complaint, payphone associations in both Ohio and Kansas have initiated regulatory actions before their respective state commissions seeking

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[7] As explained in above, the prohibition against retroactive ratemaking and the filed rate doctrine would preclude any such order.

refunds. Both state commissions denied the refund claims. The Kansas Commission noted:

> [a]ll Kansas local exchange companies have approved payphone line tariffs in place and there is no evidence they have not been billing payphone providers in accordance with those tariffs. Telephone companies are required to charge the rates set out in their approved tariffs. There is no basis for retroactive implementation of new tariffs, if we find the current tariffs must be revised.

Order, *In Re: Matter of the Application of the Kansas Payphone Association Requesting the Commission Investigate and Revise the Dockets Concerning the Resale of Local Telephone Service by Independent Payphone Operators and Tariffs Pursuant to the FCCs "New services Test" Decision Issued January 31, 2002,* Docket No. 02-KAPT-651-GIT (December 10, 2002) (Attachment 1, p. 11). Likewise, the Ohio Commission "rejects the PAO's request for refunds. Such refunds would constitute unlawful, retroactive ratemaking." Order, *In Re: the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services,* Case No. 96-1310-TP-COI (November 26, 2002) (Attachment 2, p. 11). This Commission should summarily reject the FPTA's claims for refunds, just as the Kansas and Ohio Commissions did with similar claims.

CONCLUSION

For the reasons explained above, the Commission should dismiss the portion of the FPTA's Petition seeking refunds from BellSouth.

Respectfully submitted, this 15 day of April, 2003.

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Docket No. 030300-TP
BellSouth Telecommunications, Inc.'s
Motion to Dismiss

Attachment 1

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

Before Commissioners: John Wine, Chair
Cynthia L. Claus
Brian J. Moline

In the Matter of the Application of the Kansas Payphone Association Requesting the Commission Investigate and Revise the Dockets Concerning the Resale of Local Telephone Service by Independent Payphone Operators and Tariffs Pursuant to FCC "New Services Test" Decision Issued January 31, 2002.	))))))	Docket No. 02-KAPT-651-GIT

ORDER

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for a decision. Being fully advised in the premises and familiar with its files and records, the Commission finds and concludes as follows:

1. On February 22, 2002, the Kansas Payphone Association (KPA) filed an Application with the Commission requesting a review of existing decisions and tariffs regarding resale of local telephone service by independent payphone operators. KPA stated the Federal Communications Commission (FCC) issued an order on January 31, 2002, *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, FCC 02-25 (FCC 02-25), setting out "new services test" requirements. The FCC order was attached to KPA's Application.

2. On April 9, 2002, Commission Staff filed a Motion for a More Definite Statement. On April 10, 2002, Southwestern Bell Telephone Company (SWBT) filed a Motion for a More Definite Statement.

3. On May 8, 2002, the Commission issued an Order granting the Motions for a More Definite Statement and directed KPA to file its statement by June 14, 2002.

4. On June 13, 2002, KPA filed its More Definite Statement. On July 11, 2002, the Commission issued an Order permitting Responses to KPA's More Definite Statement by August 9, 2002, allowing KPA to file a Reply by August 23, 2002. Responses were filed by the State Independent Alliance (SIA), Sprint Communications Company L.P. (Sprint) and Southwestern Bell Telephone Company (SWBT). On September 11, 2002, KPA filed a Motion to Accept Pleading Out of Time and its Reply to the Responses.

5. In its Motion, KPA explained that its initial counsel had withdrawn and that its new counsel had required additional time to gain an understanding of the issues and prepare a Reply. KPA further stated no party would be prejudiced by acceptance and consideration of its Reply because no further proceedings have been scheduled at this time and the Commission is not constrained by a statutory deadline.

6. The Commission finds that KPA's Motion to Accept Pleading Out of Time shall be granted. The Commission agrees that there is no time line that must be met in this docket and delay does not prejudice the other parties to the docket. The Commission finds it will benefit from hearing fully from all parties and will consider KPA's late-filed Reply.

7. In its More Definite Statement (MDF), KPA appears to request that it be allowed to file a cost of service study for SWBT's payphone tariffs based on a forward-looking cost methodology, such as TELRIC or TSLRIC, apply the UNE overhead loading factors to payphone lines and adjust the tariffs to account for SLC or EUCL charges. (MDF, ¶¶ 1, 3, 4, 5.) At ¶ 7 of its Reply, KPA corrects the impression left by the MDF, that it seeks to perform a cost study for SWBT. KPA notes it has no ability or desire to perform a cost study for SWBT. At ¶ 4 of the MDF, KPA asserts that the Commission's finding in Docket No. 97-SWBT-415-TAR (415 docket) that every service a payphone provider can take does not need to be cost-based is

contradicted by FCC 02-25. KPA provides no cite to any specific language supporting its assertion. This is one of the problems with KPA's More Definite Statement. It repeatedly references FCC 02-25 but does not cite to any particular portion of the Order, nor to any language that it believes supports its allegations. This makes the Commission's job more difficult in that it requires the Commission to search FCC 02-25 to determine whether it in fact supports KPA's arguments. It also makes it difficult for other parties to provide complete responses to KPA's arguments and thus deprives the Commission of full input from those parties.

8. KPA references Docket No. 00-SWBT-1094-TAR in which the Commission allowed SWBT to reduce its SmartCoin rate from $12.00 to $2.25 per month while KPA members have to pay $7.00 per month for answer supervision which is one of the many bundled elements in the SmartCoin rate. KPA alleges this should have made the Commission aware that all SWBT's payphone rates are not cost based. (MDF, ¶ 5.)

9. KPA also states it requested the Commission apply the 02-25 Order to all Kansas LECs because the Commission determined in the 97-KAPT-102-GIT (97-102 Order) that the new services test applied to all Kansas LECs.

10. KPA references section 276 of the Federal Telecommunications Act. It prohibits Bell Operating Companies (BOCs) from subsidizing or discriminating in favor of their own payphone operations and requires the FCC "to take all actions necessary ... to prescribe regulations ..." to establish a per call compensation plan; discontinue inter and intra-state access charge payphone service elements; prescribe non-structural safeguards for BOC payphone services; and provide for BOC and independent payphone providers to negotiate and contract with location providers and carriers that carry intraLATA and interLATA calls, unless it finds

the latter is not in the public interest. Congress preempted any state requirements that were inconsistent with FCC regulations.

11. KPA asserts that the FCC has codified "the new services test" at 47 C.F.R. section 61.49(h)(2). (MDF, ¶ 9(1).) Section 61.49 addresses the supporting information that must be provided by carriers subject to price cap regulation for tariff filings. Subsection (h) requires submission of cost data to document that a carrier does not recover more than a reasonable portion of its overhead cost. There is no subsection (h)(2). KPA also refers to ¶¶ 38-44 of an opinion in CC Docket No. 89-79.[1] In those paragraphs the FCC addresses pricing of new services. KPA does not identify what specific language in those paragraphs it deems relevant. It appears ¶ 42 may be the most relevant. It states in pertinent part:

> [A] LEC introducing new services will be required to submit its engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of providing the new service, absent overheads, and must also satisfy the net revenue test. LECs may develop their own costing methodologies, but they must use the same costing methodology for all related services. . . . [C]ost support submitted with the tariff must consist of the following information: (1) a study containing a projection of costs for a representative 12-month period; (2) estimates of the effect of the new service on traffic and revenues, including the traffic and revenues of other services; and (3) supporting workpapers for estimates of costs, traffic, and revenues.

KPA further references an April 4, 1997 Clarification Order in CC Docket No. 96-128[2] in which the FCC clarified that the "new services test" would apply to the pricing of basic payphone lines whether they were new or not.

12. KPA contends it is clear that SWBT and other LECs have not complied with the new services test. (MDF, ¶ 13.) KPA refers to Commission Docket No. 97-SWBT-415-TAR claiming SWBT failed to file cost-support data in that docket. KPA further alleges all the LECs

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[1] *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charges Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4531 (1991).

[2] *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996.* CC Docket No. 96-128 (DA97-678) Released: April 4, 1997.

need to file cost-support data in order to comply with the new services test and that none of them have done so. KPA requests that the Commission implement FCC 02-25 and adjust payphone tariffs to comply with the new services test. (MDF, ¶ 13.)

13. In its Response to KPA's More Definite Statement, SWBT states KPA reiterates its allegations from earlier dockets that no cost of service study has been performed by any Kansas LEC in accordance with the new services test and that KPA fails to provide specific allegations as to how the approved payphone tariffs fail to comply with FCC 02-25 as required by the Commission's May 8, 2002 Order in this docket. SWBT states it cannot reply to KPA's Application or its More Definite Statement because it would be required to speculate as to how KPA believes current tariffs fail to comply with FCC 02-25. (SWBT Response, ¶ 10.) SWBT concludes KPA's Application is nothing more than another attack on the Commission's decisions in the 97-SWBT-415-TAR and 97-KAPT-102-GIT dockets in which the Commission found that SWBT had provided financial analysis for all its unbundled payphone services and the access line and that SWBT's rates were consistent with all four of the FCC's payphone orders. SWBT references the Commission's May 16, 1997 Order in Docket No. 97-KAPT-102-GIT. (SWBT Response, ¶ 11.)

14. State Independent Alliance (SIA) responded that it disagreed with KPA's allegation that none of the LECs had filed cost support data in the 97-102 docket. It pointed out that the SIA member companies filed cost support data on June 23, July 1, and September 22, 1999. SIA stated it did not believe a Commission order had been issued addressing those filings.[3] SIA asserts that FCC 02-25 requires application of the new services test only to price cap regulated carriers and is based on a forward-looking cost methodology which rural LECs

[3] The Commission issued an Order on those filings on October 9, 2000. In that Order the Commission found that all the companies, including the non-SIA rural companies passed the New Services Test, except three, whose prices were below the cost floor.

have not, to date, been required to implement. SIA points out that requiring rural LECs to base their payphone rates on forward looking costs would be very expensive and provide little, or no, benefit. (SIA Response, ¶ 4.) With respect to KPA's claim for refunds, SIA states the current tariffs were approved by the Commission and any refund requirement would amount to retroactive ratemaking. Should the Commission decide that new tariffs are required, they should apply on a going-forward basis only. (SIA Response, ¶ 6.) SIA states it does not believe testimony and an evidentiary hearing would be necessary in this docket unless the Commission decides to require the rural LECs to base their payphone access rates on forward looking cost. (SIA Response, ¶ 7.)

15. Sprint asserts FCC 02-25 applies only to regional Bell Operating Companies (RBOCs); 47 U.S.C. § 276 requires only RBOCs to not discriminate between its affiliated payphone provider and independent payphone providers; and, the FCC does not have authority over intrastate payphone rates. Sprint also points out that it submitted cost data in the 102 docket. (Sprint Response, ¶ 3.) Sprint notes that KPA's refund request is precluded by the prohibition on retroactive ratemaking, citing *State ex rel v. Public Service Commission* 11 P. 2d 999 (Kan 1932) and *Kansas Gas & Electric v. KCC*, 794 P. 2d 1165 (Ct. App. 1990.)

16. In its Reply to the Responses, KPA stresses a number of significant events have occurred since the current tariffs were approved. KPA mentions FCC 02-25, modifications by SWBT and other LECs of payphone rates or rates for network elements that are used in providing payphone services, and approval of SWBT's K2A. (Reply, ¶ 2.) KPA cites ¶ 68 of FCC 02-25. That paragraph provides that BOCs' intrastate payphone rates "should be calculated using forward-looking direct cost methodology such as the TELRIC or TSLRIC, but the full pricing regime of sections 251 and 252 does not apply." It also states "overhead loading rates for

telephone line rates should be cost based, and such rates may be calculated using UNE overhead loading factors . . .. Finally, BOCs' payphone line rates should be adjusted to account for SLC charges as set forth herein." KPA notes this guidance was not available when the Commission approved the current payphone services tariffs. (Reply, ¶ 3.) KPA reiterates its earlier argument that SWBT changed the rate for its SmartCoin service from $12.00 to $2.25 per month. KPA states "answer supervision," for which KPA members are charged $7.00 per month, is one of the bundled elements of the SmartCoin service. KPA asserts this pricing difference appears discriminatory and warrants a Commission investigation. (Reply, ¶ 4.)

17. KPA reference FCC 02-25, ¶ 54, in which the FCC finds it appropriate for "states to adopt the same method for calculating a ceiling for overhead allocation as we did in the *Physical Collocation Tariff Order*,[4] recognizing the states that continue to use UNE overhead allocations for payphone services are also in full compliance with section 276 and our precedent." KPA notes the K2A, which was not available to the Commission in the previous payphone investigation provides the Commission with TELRIC based UNE rates which can be used as a comparison to the rates charged to payphone providers. (Reply, ¶ 5.)

18. KPA acknowledges the objections of the responding companies regarding extension of this investigation to companies other than SWBT. KPA does not disagree that the FCC's authority on this issue is limited to the BOCs, but notes the FCC encouraged state commissions to apply the same rules to other LECs, citing ¶ 42 of FCC 02-25. KPA also notes this Commission determined in the 102 docket to apply the same standards to all Kansas LECs with respect to payphone issues. (Reply, ¶ 6.)

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[4] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (June 14, 1997) (*Physical Collocation Tariff Order.*)

19. The Commission first observes that we addressed the issues of payphone access charges for all Kansas LECs in the102 docket. We found that they complied with the four FCC orders relevant to these issues at that time. KPA did not appeal our decision so it is precluded from attacking the decisions made in that docket at this time. However, FCC 02-25 appears to impose certain requirements on BOC intrastate payphone service offerings that are different from those in effect at the time the 102 docket was conducted. In order to put the issues in this docket in context, a brief analysis of FCC 02-25 is necessary.

20. The FCC expresses its belief that FCC 02-25 "will assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the Payphone Orders and Congress' directives in section 276." (FCC 02-25, ¶ 2.) Thus, the FCC's intent to require state commissions to reexamine intrastate payphone line rates is clear. The FCC addresses its jurisdiction to set standards for states to apply to intrastate payphone line rates. The FCC concludes that section 276 provides that authority[5] and SWBT has not challenged the FCC's jurisdiction to set these standards for intrastate rates in this docket.

21. The FCC first addresses the requirements it established in the Payphone Orders and finds that BOCs "should use a forward-looking methodology that is consistent with the *Local Competition Order*."[6] (FCC 02-25, ¶ 49.) The FCC observes that a state may use its accustomed TSLRIC or other forward-looking cost methodology to develop the direct costs of payphone line service costs. States are not required to use a TELRIC methodology. (FCC 02-25, ¶ 48.) The FCC adds that BOCs may include retail costs, such as marketing and billing, that they can show are attributable to payphone line services. (FCC 02-25, ¶ 50.) The opinion addresses overhead loading factors but does not establish a specific factor. FCC 02-25 makes it

[5] FCC 02-25, ¶¶ 31-42.
[6] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (Aug. 8. 1996) (*Local Competition Order*).

clear that BOCs have some flexibility in calculating overhead allocations, which must be carefully reviewed for reasonableness and that "BOCs bear the burden of affirmatively justifying their overhead allocations." (FCC 02-25, ¶ 56.) FCC states, "we believe that it is appropriate for states to adopt the same method for calculating a ceiling for overhead allocations as we did in the *Physical Collocation Tariff Order*, recognizing that states that continue to use UNE overhead allocations for payphone services are also in full compliance with section 276 and our precedent." FCC also states ARMIS data relating to the plant categories used to provide payphone services could be used to calculate an upper limit on overhead loadings. (FCC 02-25, ¶ 54.) FCC 02-25 requires BOCs to "reduce the monthly per line charge determined under the new services test by the amount of the applicable federally tariffed SLC." (FCC 02-25, ¶ 61.) Further, "any rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost-based and priced in accordance with the new services test." (FCC 02-25, ¶ 64.)

22. The FCC concludes FCC 02-25 by stating at ¶ 68, "[i]n sum we issue this *Order* to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*." The FCC then lists the Order's "basic propositions."

> First, BOCs' intrastate payphone line rates, including usage rates, should comply with the flexible, cost-based new services test. Second, these rates should be calculated using a forward-looking, direct cost methodology such as TELRIC or TSLRIC, but the full pricing regime of sections 251 and 252 does not apply. Third, overhead loading rates for payphone line rates should be cost-based, and such rates may be calculated using UNE overhead loading factors, provided that such rates do not exceed an upper limit calculated using the methodology from either the *Physical Collocation Tariff Order* or the *ONA Tariff Order*. Finally, BOCs' payphone line rates should be adjusted to account for SLC charges, as set forth herein. (¶ 68.)

23. All Kansas incumbent local exchange companies provided cost studies to support their rates charged to private payphone providers. SWBT's tariffs, based on those cost studies

were approved in the 97-SWBT-415-TAR docket in 1997. Based on FCC 02-25, we conclude that the FCC may now have refined its definition of the "new services test" and that it expects the states to ensure that BOCs provide payphone lines at cost-based rates in accordance with those definitions. (FCC 02-25, ¶ 42.) The Commission had not yet addressed TELRIC or TSLRIC rates in 1997 when SWBT's tariffs were approved. In its Response, SWBT did not address whether its current payphone tariffs comply with the requirements set out in FCC 02-25. SWBT's Response focused on the deficiencies of the MDF and the fact that the Commission has approved SWBT's current payphone tariffs. The Commission finds that in order to ensure that SWBT's payphone line rates are in compliance with FCC 02-25 SWBT must file a compliance report with the Commission. That report must be supported by relevant cost documentation. Staff shall then review the report, including any necessary discovery and advise the Commission on what action, if any, is necessary to ensure compliance. We therefore direct SWBT to file its report with supporting documentation, showing whether their current tariffs are in full compliance with FCC 02-25. SWBT shall file its report by February 12, 2003.

24. KPA has raised the issue that SWBT's SmartCoin© may be discriminatorily priced in comparison to "answer supervision." The Commission is concerned about discriminatory pricing issues and orders SWBT to file a report on January 15, 2003, that addresses this issue. The report should include answers to the following questions:

a. How many SmartCoin© features are sold to SWBT coin service and how many are sold to all private payphone providers?

b. How many "answer supervision" features are sold to SWBT coin service and how many are sold to all private payphone providers?

c. If only private payphone providers buy "answer supervision" and only SWBT coin service buys SmartCoin©, please explain in simple terms why this happens. Please also provide any relevant technical explanation.

d. How does SmartCoin© differ from "answer supervision?" What other features and functions are provided in the SmartCoin© feature?

e. Provide an explanation of the interchangeability of SmartCoin© and "answer supervision."

f. Explain why the pricing of these two services are not discriminatory to private payphone providers.

25. Sprint and SIA assert in their responses that FCC 02-25 is applicable only to BOCs. The FCC acknowledges in the Order that section 276 of the Federal Telecommunications Act only gives it authority over the intrastate payphone line rates charged by BOCs. (¶¶ 31-42.) At ¶ 42, the FCC "encourage[s] states to apply the new services test to all LECs, thereby extending the pro-competitive regime intended by Congress to apply to the BOCs to other LECs that occupy a similarly dominant position in the provision of payphone lines." In Docket No. 97-KAPT-102-GIT, in which we last considered payphone line rates generically, we required all incumbent local exchange companies to file cost studies to support their rates, based on our statutory authority. We have not yet established TELRIC or TSLRIC rates for rural local exchange companies. We have also not established TELRIC rates for Sprint, although Sprint's Kansas universal service support is based on the TSLRIC methodology. At this time we do not direct Sprint or the rural local exchange companies to file a report. We may review their payphone line rates at a later time, after first assuring compliance by SWBT with FCC 02-25.

26. All Kansas local exchange companies have approved payphone line tariffs in place and there is no evidence they have not been billing payphone providers in accordance with those tariffs. Telephone companies are required to charge the rates set out in their approved tariffs. There is no basis for retroactive implementation of new tariffs, if we find the current tariffs must be revised.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. SWBT is directed to file a report on its compliance with FCC 02-25 by February 12, 2003.

B. SWBT shall file its responses to the questions regarding SmartCoin© and "answer supervision" by January 15, 2003.

C. Sprint and the rural local exchange companies are not required to file reports at this time.

D. Any party may file a petition for reconsideration of this Order within fifteen days of the date this Order is served. If service is by mail, service is complete upon mailing and three days may be added to the above time frame.

E. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further order or orders as it may deem necessary and proper.

BY THE COMMISSION IT IS SO ORDERED.

Wine, Chr.; Claus, Com.; Moline, Com.

Dated: DEC 10 2002

ORDER MAILED

DEC 10 2002

Executive Director

Jeffrey S. Wagaman
Executive Director

EP

Docket No. 030300-TP
BellSouth Telecommunications, Inc.'s
Motion to Dismiss

Attachment 2

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services.	))))	Case No. 96-1310-TP-COI

ENTRY

The Commission finds:

(1) On June 17, 2002, the Payphone Association of Ohio (PAO) filed a motion to expand the scope of this proceeding and to require the incumbent local exchange carriers (ILECs) to comply with the Federal Communication Commission's (FCC's) "New Services Test."[1]

More specifically, the PAO requests an order from the Commission directing Ameritech Ohio (Ameritech) to file payphone tariffs that include rates based upon the New Services Test. The PAO further requests that Ameritech use existing and approved TELRIC (total element long-run incremental cost) studies for unbundled network elements (UNEs) as adjusted to account for federally tariffed subscriber line charges (SLC). For the incremental difference in rates applied to purchases of payphone services, the PAO demands that refund checks be issued to payphone service providers. The refund checks should account for the incremental difference in rates for services dating back to April 15, 1997, the date upon which the Commission approved Ameritech's payphone tariff.

(2) The PAO asks that other ILECs prepare forward-looking cost studies for payphone line services that comply with the New Services Test. In the alternative, the PAO requests that ILECs file benchmark rates and analyses consistent with Ameritech's TELRIC costs. If no party objects within a 30-day period, the Commission should order the ILECs to submit tariffs based upon the cost studies or benchmark rates. A 15-day period should be granted to review the tariffs to determine if a given tariff complies with the cost study or benchmark rates. If there are objections to either the cost studies or the tariffs, the Commission should establish a comment period or schedule a settlement conference. If there are no objections, the Commission should issue an entry approving the tariffs. As with Ameritech, the other ILECs should issue refund checks to

1 See, Order on Reconsideration, CC Docket No. 96-128, 11 FCC Rcd 21233 (issued November 8, 1996).

account for the incremental difference in rates applied to purchases of payphone services. The checks should account for the time period dating back to the approval of the ILECs' respective tariffs.

(3) The PAO proposes a procedure whereby Ameritech would be directed to file tariffs. A period of 30 days would be granted in which to file objections. In the event, that objections are filed, a brief comment period should be scheduled.

(4) In its supporting memorandum, the PAO points to the need for payphone services by low income Ohioans. According to the PAO, 300,000 payphone lines have been disconnected over the past few years. The PAO contends that a disproportionately high number of disconnects are attributable to relatively high payphone line charges. The result is an ever-decreasing number of payphones available to the poor who cannot afford residential service or cell phones.

(5) The PAO points out that with the promulgation of Section 276 of the Telecommunications Act of 1996 (the Act) Congress sought, as one of its goals, the expansion of payphone services. Furthermore, the FCC, on September 20, 1996, released a Report and Order in CC Docket No. 96-128 implementing Section 276 of the Act.[2] On November 8, 1996, the FCC released its Order on Reconsideration in CC Docket No. 96-128. Among its orders, the Order on Reconsideration required that payphone line services be priced at cost-based rates in accordance with the New Services Test.

(6) The PAO has documented the history of this proceeding. The PAO states that on December 9, 1996, the Commission opened this docket to carry out on an intrastate basis the requirements of Section 276 of the Act and the FCC's decisions in CC Docket 96-128. Pursuant to an entry issued by the Commission on December 19, 1996, ILECs filed tariffs. The Commission approved the tariffs on March 27, 1997, and required them to be filed and effective on or before April 15, 1997. The PAO moved to intervene on April 8, 1997. Coin Phone Management Company, AT&T Communications of Ohio, Inc. (AT&T), The Ohio Telecommunication Industry Association, and MCI Telecommunications Corp. also moved to intervene. By entry issued May 22, 1997, the Commission directed the ILECs to provide by June 12, 1997, additional information regarding payphone services. On June 30, 1997, the PAO moved to conduct an evidentiary hearing to determine whether the

2 *In the Matter of the Implementation of the Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996.*

ILECs were in compliance with Section 276. On January 29, 1998, the attorney examiner granted petitions to intervene and provided the parties an opportunity to submit comments and reply comments. On January 28, 1999, the Commission scheduled an evidentiary hearing and permitted discovery. On September 5, 2001, the attorney examiner issued an entry scheduling a prehearing conference for September 14, 2001. It was determined at the conference to attempt mediation to resolve the issues. The parties, however, were unable to resolve the issues through mediation.

(7) In its June 17, 2002 memorandum, the PAO relies upon a memorandum opinion and order released by the FCC on January 31, 2002, in a Wisconsin proceeding (the Wisconsin Decision).[3] According to the PAO, the Wisconsin Decision purports to clarify what state commissions must do to ensure that payphone rates are in compliance with Section 276.

(8) The PAO contends that the FCC has preempted the Commission's decisions in this docket insofar as Ameritech's payphone rates. The PAO further contends that, since 1996, Ameritech's rates have exceeded those that are required by Section 276 of the Act. Consequently, the PAO concludes that it is incumbent upon the Commission to establish reasonable rates as soon as practicable.

The PAO points out that Ameritech does not need to conduct new cost studies. Approved TELRIC studies that meet the New Services Test already exist. The PAO, therefore, seeks an order from the Commission requiring Ameritech to file new payphone line tariffs based upon existing TELRIC cost studies for UNEs. The PAO proposes a chart of specific services that should be included in the tariff.

Supporting its claim for refunds, the PAO points to an April 10, and 11, 1997, request written on behalf of the Regional Bell Operating Company (RBOC) Payphone Coalition (the Coalition) wherein the Coalition sought a waiver of the New Services Test requirement. The Coalition offered three conditions in lieu of compliance. One of the conditions was that refunds would be issued if future New Services Test compliant tariffs result in lower rates. The refunds would date back to April 15, 1997. The FCC granted the waiver.[4] By this

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3 *In the Matter of Wisconsin Public Service Commission Order Directing Filings, Bureau/CPD No. 00-01 (Memorandum Opinion and Order,* Released January 31, 2002).

4 *In the Matter of the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128 (Order adopted April 15, 1997).

letter, the PAO argues that the RBOCs were aware in April 1997 of their need to comply with the New Services Test.

(9) Insofar as other ILECs, the PAO notes that the FCC acknowledged that it did not have jurisdiction over non-BOC intrastate payphone line rates. Nevertheless, the PAO states that the FCC encouraged state commissions to apply the New Services Test to all LECs. The PAO, therefore, argues in favor of applying the New Services Test to all Ohio LECs. Recognizing that most LECs do not have existing TELRIC rates, the PAO urges the Commission to order ILECs to conduct studies using a forward-looking cost approach. Furthermore, the PAO believes that the allocation of common overhead must be cost based.

(10) To avoid unfairness and discriminatory treatment, relative to Ameritech, the PAO suggests that the other ILECs be ordered to issue refunds to the extent that their rates have exceeded what payphone rates should have been under the New Services Test. Refunds should account for the period from which the other ILECs' tariffs were approved in this docket.

(11) Ameritech filed a memorandum contra on July 19, 2002. Ameritech argues that the PAO's requests should be denied in their entirety. Ameritech characterizes the PAO's motion to expand the scope of this proceeding as yet another attempt to attack collaterally the April 27, 2000, entry and the June 22, 2000, entry on rehearing issued in this docket. Insofar as the Wisconsin Decision, Ameritech emphasizes that the decision does not preempt the Commission's authority over intrastate payphone rates. According to Ameritech, Section 276 of the Act only provides that BOCs extend nondiscriminatory treatment to BOC-affiliated payphone providers and independent payphone providers. For this reason, Ameritech believes that the FCC has exceeded the authority granted by Section 276. Because the Wisconsin Decision effectively imposes FCC authority over intrastate payphone rates, Ameritech has appealed the ruling to the United States Court of Appeals for the District of Columbia. Arguing that the Wisconsin Decision marks such a radical departure from FCC and Commission precedent, Ameritech advises that its holdings should not be adopted in Ohio. In any event, because of the pending appeal, Ameritech contends that the Wisconsin Decision is not ripe for application in Ohio.

(12) Reviewing the PAO's requests for TELRIC pricing, notice, comments, and refunds, Ameritech concludes that the requests are inconsistent with the Wisconsin Decision and state law.

(13) With respect to TELRIC pricing, Ameritech highlights that the Wisconsin Decision permits the use of any forward-looking methodology to ascertain the costs of payphone services and the allocation of overhead. Thus, the PAO's request for TELRIC pricing is too restrictive. Furthermore, Ameritech states the independent payphone providers are not "telecommunications carriers" under the Act. Consequently, they are not entitled to TELRIC pricing for UNEs. Payphone lines are retail products.

Even if existing TELRIC rates were used, as suggested by the PAO, Ameritech argues that such rates would be inappropriate. Ameritech emphasizes that its TELRIC rates are based upon the costs to serve competitive local exchange carriers (CLECs). To determine appropriate rates for the costs of independent payphone providers would require an entirely different cost study. Ameritech expects that the wholesale rates for CLECs would be quite different from the retail rates for independent payphone providers.

(14) Commenting on the subscriber line charge (SLC), Ameritech states that the SLC is an appropriate charge for independent payphone providers. The intent of the charge is to allow LECs to recover regulated costs. Since the charge is applicable to both LEC and non-LEC payphone lines, there can be no subsidy or discrimination.

Ameritech criticizes the Wisconsin Decision for broadening payphone usage costs. Noting a previous FCC order that only payphone specific services are properly considered for federal tariffing requirements, Ameritech condemns the Wisconsin Decision for expanding the scope of the FCC's authority to consider other services. Ameritech also points to this Commission's previous order that stated that features that are merely incidental to payphone service are not subject to the federal tariffing requirement.

(15) As for the PAO's procedural recommendations, Ameritech rejects the recommendations on the grounds that they would violate Section 4905.26, Revised Code, and deny Ameritech its due process rights. Without an opportunity to present testimony and cross-examine witnesses, Ameritech contends that it would be denied an opportunity to be heard. Moreover, Ameritech is concerned that without a record it would be denied the opportunity for supreme court review.

(16) Ameritech criticizes the PAO's refund proposal as being equivalent to improper retroactive ratemaking. Because the Commission decided against refunds and reimbursements in

the June 22, 2000, entry on rehearing, Ameritech deems the PAO's request for refunds as an improper second request for rehearing.

(17) Ameritech accuses the PAO of misconstruing the letters written on behalf of the Coalition on April 10, and April 11, 1997. Ameritech explains that it recognized that in some states it would not have tariffs in compliance with the New Services Test by the April 15, 1997, deadline. The Coalition, by its letters, requested a 45-day waiver in those states in which tariffs were not in compliance. During the 45-day period the noncompliant states would be identified and compliant tariffs would be filed by May 19, 1997. The BOCs agreed to issue a refund only in those states subject to the waiver and where the new tariff rate was lower than the previous rate. Ameritech asserts that its Ohio payphone tariff was never identified as one of those that was not compliant with the New Services Test. Thus, refunds were issued only where noncompliant tariffs were identified, where new tariffs were filed by May 19, 1997, and where the new tariffs were for lower rates.

(18) As did Ameritech, ALLTEL Ohio, Inc. (ALLTEL), Cincinnati Bell Telephone Company (CBT), Verizon North, Inc. (Verizon), and the Ohio Telecom Association (OTA) filed memoranda contra on July 19, 2002.

(19) ALLTEL, CBT, Verizon, and the OTA emphasize that the New Services Test applies only to BOCs and that Ameritech is the only BOC in Ohio. CBT points out that even the Wisconsin Decision acknowledges that the FCC's authority does not extend to non-BOC intrastate payphone line rates. According to the OTA, the Wisconsin Decision merely encourages the application of the New Services Test to non-BOCs.

Verizon enumerates reasons why the New Services Test should not be applied to non-BOC LECs. Neither Congress nor the Commission has determined its application to be appropriate. Several dozen ILECs would be required to undertake expensive studies. Payphone competition is already working in Ohio and is evidenced by the increasing market share of independent payphone service providers in Verizon's service area. Finally, Verizon contends that the PAO has made no showing that the rates resulting from new cost studies would be any more supportive of the Commission's goals than the current rates. Without any federal law requirement and without any indication that Ohio would be better off, Verizon concludes that the PAO's request for cost studies is unsupported by any compelling reason.

The OTA adds that the burden of cost studies would outweigh any benefits. By the OTA's count, 41 studies would be required. Statewide uniformity would be the only achievement. In compiling the studies, each ILEC would be required to divert substantial resources. Because many ILECs have only a few payphones in their area, the OTA questions the utility of cost studies.

(20) CBT and Verizon assert that their costs and tariffs have been approved and are in compliance with Section 276 of the Act and the FCC's orders. Moreover, CBT states that the Commission has approved its tariff rates for payphone access lines in CBT's alternative regulation rate case (*In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases*, Case No. 96-899-TP-ALT).

(21) All the ILECs reject the PAO's request for refunds. Like Ameritech, the ILECs remind the Commission that refunds have already been considered and rejected as unlawful, retroactive ratemaking by the Commission in its April 27, 2000, entry and June 22, 2000, entry on rehearing.

(22) The PAO filed a reply memorandum on August 5, 2002, addressing memoranda contra filed by the ILECs. Contrary to Ameritech's assertions, the PAO argues that the FCC has preempted the Commission's authority over intrastate payphone rates. The PAO relies on the Wisconsin Decision, arguing that it is the most current law available and must be applied by the states. Applying the law of the case, the PAO concludes that Ameritech's payphone line rates and usage charges must comply with the New Services Test.

The PAO dismisses Ameritech's criticisms of the Wisconsin Decision. The PAO rejects Ameritech's contention that the Wisconsin Decision marks an unprecedented intrusion into state ratemaking. Citing as an example the issuance of the FCC's TELRIC pricing rules as a methodology to be used by states to develop prices for UNEs, the PAO finds a precedent for such action.

(23) Although the PAO agrees with Ameritech that the FCC did not mandate TELRIC as the only appropriate pricing measure, the PAO points out that the FCC expressly authorized the use of TELRIC. TELRIC is a specific type of cost-based, forward-looking methodology that would comply with the New Services Test. According to the PAO, it is the Commission, not Ameritech, that should determine the appropriate methodology. The PAO suggests that TELRIC be used,

inasmuch as it is an approved methodology and Ameritech's TELRIC rates are currently ready for use. The use of Ameritech's approved TELRIC rates would not impinge upon Ameritech's due process rights since the rates have been the subject of a hearing and cross examination. The PAO, therefore, urges the Commission to direct Ameritech to file tariffs using its approved TELRIC pricing methodology.

(24) Noting Ameritech's assertion that payphone service providers are not telecommunications carriers entitled to TELRIC pricing for unbundled network elements, the PAO responds that Section 276 of the Act places independent payphone service providers in a class separate from carriers or end users. The PAO points out that the FCC considered this argument in the Wisconsin Decision. The FCC made the distinction that the payphone providers were not asking for UNEs. Instead, the payphone providers were simply identifying TELRIC methodology as a means to estimate forward-looking costs pursuant to the New Services Test. The PAO agrees with Ameritech that payphone service providers are not carriers. Nor are they the functional equivalent of end-use business customers. The PAO emphasizes that independent payphone service providers are entitled to payphone line rates based upon the New Services Test.

(25) Concluding that the New Services Test is applicable to BOCs like Ameritech, the PAO argues that the test should be applicable to non-BOCs as well. The PAO reminds the Commission that in its December 19, 1996, entry in this proceeding it determined that it would carry out, on an intrastate basis, the requirements of Section 276 of the Act and the FCC's decision in CC Docket No. 96-128. This determination, according to the PAO, negates the non-BOCs' argument that the FCC did not mandate that the New Services Test be applied to non-BOCs.

Because ILECs have an incentive to charge their competitors unreasonably high prices, the PAO implores the Commission to impose cost-based pricing. By doing so, the PAO believes the Commission will promote competition and widespread availability of competitive payphone services in Ohio.

(26) The PAO disputes the contention that independent payphone service providers are becoming increasingly competitive in the market. If there is an increase in market share, the PAO deduces that it is solely attributable to ILECs withdrawing from the marketplace.

The PAO is steadfast in its belief that cost studies will reveal that rates should be lower than current rates. Using Ameritech as an example, the PAO points out that Ameritech's cost-based rates are significantly lower than Ameritech's payphone line tariffs. The PAO expects that cost studies of other ILECs will result in reductions too.

(27) The PAO believes that CBT should be subject to the New Services Test. The PAO disputes CBT's assertion that its tariff is in compliance with the requirements of Section 276 of the Act, the FCC's Payphone Orders, and the Commission's investigation. To the contrary, the PAO proclaims that there has been no showing that CBT's cost information was based upon forward-looking costs.

It is insufficient for CBT to assert its alternative regulation plan as a defense to an examination of its payphone access line rates. The PAO believes that CBT, by asserting its alternative regulation plan, is being inconsistent with the terms of the March 19, 1998, stipulation in Case No. 96-899-TP-ALT.[5] The PAO emphasizes that the Commission did not relinquish its authority to investigate payphone line services in CBT's alternative regulation proceeding. Consequently, the alternative regulation plan notwithstanding, the Commission may still apply the New Services Test.

(28) The PAO rejects Verizon's claim that its cost studies and tariff comply with the New Services Test. The PAO claims that Verizon, by resorting to "misguided analysis," arrives at faulty conclusions in determining its compliance with the New Services Test. As an example, the PAO discloses that Verizon does not rely upon TELRIC-based costs. Instead, Verizon relies upon embedded costs and statewide composite rates. This is unacceptable to the PAO because embedded costs are historical costs; they are not forward-looking. The PAO also criticizes Verizon's tariff for failing to adhere to an approved cost methodology and for failing to include usage rates. Furthermore, the PAO contends that payphone service providers must be given local exchange services to enable them to use either "smart" or "dumb" payphones. Simply provisioning a line without allowing the transport of local calls is insufficient. As with other non-BOCs, the PAO urges the Commission to order Verizon to file cost studies or benchmark rates that comport with the forward-looking requirement of the New Services Test.

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5 *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan which May Result in Future Rate Increases.* CBT filed final TELRIC rates on September 5, 2002.

(29) The PAO reiterates that it is entitled to refunds from Ameritech. If the New Services Test reveals that Ameritech's tariff rates are higher than what they should be, the PAO urges the Commission to order Ameritech to issue refunds to payphone service providers for the incremental difference. The PAO emphasizes that the FCC's regulations preempt contrary state requirements. Consequently, the FCC's regulations preempt Ameritech's payphone line rates, the Commission's approval of the rates, and Ohio law on refunds.

The PAO also argues that refunds are appropriate to prevent a double recovery. Ameritech has collected dial-around compensation for over five years. The PAO describes Ameritech's authority to collect dial-around compensation as the quid pro quo for filing tariffs in compliance with the New Services Test.

To allow Ameritech to keep the incremental difference would unjustly enrich Ameritech and allow Ameritech to renege on its promise recorded in an April 11, 1997, letter from Michael Kellogg to Marybeth Richards. The letter, according to the PAO, promises that credits would be issued where new compliant tariff rates are lower than existing rates. The PAO is unmoved by the parol evidence referenced in Ameritech's memorandum contra. The PAO finds the letter itself clear and unambiguous.

(30) The PAO refers to the Commission's December 19, 1996, entry wherein the Commission sought to carry out the requirements of Section 276 of the Act and the FCC's payphone orders. Noting that ILECs have filed payphone line tariffs, the PAO claims that none of the tariffs comply with the New Services Test. As a result, the PAO contends that for over five years payphone service providers have been paying rates in excess of Commission requirements. Citing the actions of other state utility commissions, the PAO points out that refunds have been ordered in other jurisdictions. Upon establishing lower rates, the PAO urges the Commission to order a true-up dating back to April 15, 1997.

(31) In essence, the PAO requests that ILECs file tariffs that comply with the New Services Test and issue refunds that reflect the difference in the tariff rates approved in this proceeding and the rates to be established under the New Services Test beginning from the date of initial approval. These requests should be denied. In an April 27, 2000, entry, the Commission set forth the issues to be considered in this proceeding. The issues were as follows:

(a) whether payphone rates are forward-looking, cost-based rates pursuant to the FCC's New Services Test;

(b) whether LECs discriminate, by rates or service, in favor of their own payphone operations to the detriment of other payphone service providers;

(c) whether LECs improperly subsidize their payphone operations with revenue derived from noncompetitive services;

(d) whether overhead has been calculated pursuant to the New Services Test; and

(e) whether the LECs' end-user common line charge revenue should be deducted from its rates.

(32) In light of the Wisconsin Decision, the Commission will revisit and revise the issues relevant to this proceeding. Even the PAO acknowledges that the Wisconsin Decision imposes the New Services Test only upon RBOCs. In light of the Commission's prior review of non-BOC tariffs, the Commission shall forego any further examination of the payphone tariff rates already approved in this proceeding. Consequently, the Commission will dismiss from this proceeding all non-BOCs. Only Ameritech and the PAO shall remain as parties in this proceeding. The core issue remaining in this proceeding will be to determine whether Ameritech is providing payphone services at forward-looking, cost-based rates.

(33) Until the issuance of an order that establishes a permanent payphone service rate, the Commission shall impose an interim, forward-looking rate for payphone services. The interim rate shall be subject to a true-up to offset any over- or under-collection. Ameritech shall provide payphone service providers with direct notice, by a conspicuous bill message or bill insert, that there is a reduced interim rate and that the reduced interim rate will be subject to a positive or negative true-up. The interim rate shall be effective no later than 45 days from the date of this entry and shall remain in effect until the establishment of a permanent rate in this docket. As decided previously, the Commission rejects the PAO's request for refunds. Such refunds would constitute unlawful, retroactive ratemaking.

(34) The interim rates shall track Ameritech's TELRIC rates and shall be set as follows:

Payphone Service UNE	B	C	D
2-Wire Unbundled Loop	$ 5.93	$ 7.97	$ 9.52
ULS Port Basic Line Port	$ 4.63	$ 4.63	$ 4.63
2-Wire Cross Connect	$ 0.15	$ 0.15	$ 0.15
Total	$10.71	$12.75	$14.30

The rate per minute for each local call shall be set at $.003226. As an estimate to reflect the billing and marketing expenses incurred by Ameritech and to account for originating line screening service costs, the above rates shall be multiplied by a factor of 1.60. Because Directory Assistance is not classified as a UNE and can be self-provided by payphone service providers, Ameritech shall be allowed to charge its tariffed retail rate for the service. Likewise, Ameritech shall be allowed to continue to charge tariffed retail rates for those services not unique to payphone access line service. In accordance with the Wisconsin decision, the interstate SLC shall not be assessed during the period of interim rates.

(35) Consistent with these findings, the attorney examiner is directed to schedule a prehearing conference to schedule a hearing and to address related procedural matters.

It is, therefore,

ORDERED, That the PAO's motion to expand the scope of this proceeding is denied. It is, further,

ORDERED, That, in accordance with Finding (32), all non-BOC telephone companies are dismissed as parties to this proceeding. It is, further,

ORDERED, That Ameritech and the PAO shall remain as parties. It is, further,

ORDERED, That, in accordance with Finding (33), Ameritech shall provide notice of interim rates to payphone service providers. It is, further,

ORDERED, That, in accordance with Finding (34), the Commission shall impose interim rates for payphone services until such time that permanent rates can be established. It is, further,

ORDERED, That the attorney examiner shall schedule this matter for hearing at the earliest convenience of the parties. It is, further,

ORDERED, That copies of this entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

LDJ/vrm

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Gary E. Vigorito
Secretary