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May 9, 2003

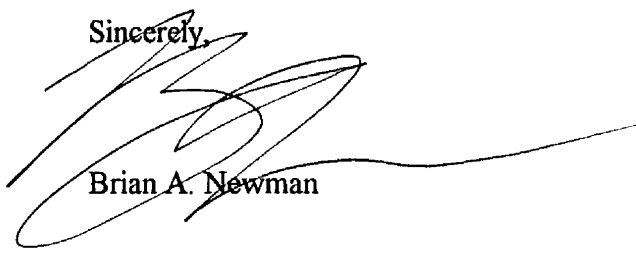
Ms. Blanca S. Bayo
Division of Commission Clerk and
Administrative Services
2540 Shumard Oak Blvd.
Tallahassee, FL 32301

**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**

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen (15) copies of The Florida Public Telecommunications Association's Response in Opposition to the Motion to Dismiss Filed by BellSouth. If you have any questions, please feel free to contact our office.

Sincerely,



Brian A. Newman

BAN/wgp
Enclosures

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DOCUMENT NUMBER 04239
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FPSC-COMMISSION CLERK

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: May 9, 2003

THE FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION'S
RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS
FILED BY BELL SOUTH

The Florida Public Telecommunications Association (the "FPTA") responds in opposition to the Motion to Dismiss filed by BellSouth Telecommunications, Inc. ("BellSouth") and says:

BACKGROUND

In February 1996, then President Bill Clinton signed the Telecommunications Act of 1996 (the "Act") into law. Congress' express purpose for passing § 276 of the Act was "... to promote competition among payphone service providers and promote the widespread deployment of payphone services to benefit the general public." As part of its implementation of the Act, the Federal Communications Commission (the "FCC") required Incumbent Local Exchange Companies ("ILECs") to file tariffs at the state level establishing cost based, non-discriminatory rates for basic payphone access lines and related usage and ancillary services on or before April 15, 1997. The FCC has delegated to the state Commissions the responsibility to ensure the ILEC's intrastate tariffs comply with federal law.

After the Act was passed, many states attempted to interpret the § 276 of the Act, including the application of the cost-based new services test to pay telephone access ("PTAS") rates. Those

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interpretations differed from state to state, left many questions unanswered and created many questions concerning the application of the new services test to PTAS rates. In response, the FCC issued its *Wisconsin Order* on January 31, 2002 for the express purpose of clarifying the application of the cost-based new services test to ILEC PTAS rates.¹ In the *Wisconsin Order*, the FCC provided the state commissions with a clear direction: (i) that the Act and the FCC's orders implementing the Act, including the *Wisconsin Order*, preempt any inconsistent state requirements; (ii) all PTAS rates charged by Regional Bell Operating Companies ("RBOCs") must comply with the cost-based new services test; and (iii) how to implement the new services test to RBOC PTAS lines. Specifically, the FCC found that all ILECs must reduce the monthly per line rate by the amount of the subscriber line charge (also known as EUCL) to prevent the over-recovery of costs associated with the facilities involved in providing PTAS to pay telephone service providers ("PSPs").

On August 11, 1998, the Florida Public Service Commission (the "PSC") attempted to address whether or not existing incumbent local exchange company tariffs for PTAS rates were, at that time, consistent with § 276 of the Act. While the PSC issued an order concluding that "[e]xisting incumbent local exchange company tariffs for smart and dumb line payphones services are cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and nondiscriminatory,"² it did so without the benefit of the FCC's *Wisconsin Order* and the FCC's many subsequent orders interpreting § 276 of the Act. As a result, the PSC's order is in direct conflict with the FCC's *Wisconsin Order*. Accordingly, the FPTA filed its petition requesting that the PSC, with the clear direction provided by the FCC in the *Wisconsin Order*, review its prior decision and BellSouth's tariffs with respect to PTAS rates.

¹*Order Directing Filings, FCC Memorandum Opinion and Order Bureau*, 17 FCC Rcd. 2051. (January 31, 2002) (*Wisconsin Order*).

²*Order No. PSC-98-1088-FOF-TL* at 6, August 11, 1998.

Despite the FCC's clear directive of the *Wisconsin Order*, BellSouth has failed to amend its tariffs to provide cost-based PTAS rates to pay telephone providers in the State of Florida. As an example, BellSouth has continued to pass on EUCL charges to Florida PSPs. Additionally (as alleged in FPTA's petition), since the effective date of the PSC's order (January 19, 1999) BellSouth's costs to provide PTAS have consistently decreased. Despite its decrease in costs, BellSouth has failed to correspondingly reduce its PTAS rates. Contrary to the assertion in BellSouth's Motion to Dismiss, FPTA has objected to the EUCL charges and the failure of BellSouth to lower its rates to correspond with its decrease in costs. Indeed, if BellSouth voluntarily complied with the *Wisconsin Order*, FPTA would not have been forced to file its Petition. BellSouth and FPTA are currently negotiating a substantial decrease in the PTAS rates (including a discontinuation of further EUCL charges) but BellSouth has refused to refund any of the rates charged, including the EUCL charges which it continues to assess in violation of the *Wisconsin Order*.

MEMORANDUM OF LAW

1. Federal Law preempts all state decisions conflicting with the FCC's implementation of § 276.

The threshold question addressed by the FCC in the *Wisconsin Order* is whether it had the authority to set the standard that states must apply in reviewing payphone line rate tariffs. In that proceeding, the LEC Coalition (which included BellSouth) requested that the FCC review the Bureau's March 2, 2000 Order that directed the four largest local exchange companies in Wisconsin to submit to the FCC their currently effective tariffs for intrastate payphone service offerings. The LEC Coalition challenged the FCC's jurisdiction over intrastate payphone line rates. In response, the FCC found it had the authority to regulate intrastate payphone line rates. In doing so, it relied in part on § 276(c) of the Act.

That provisions preempts “any State requirement” that is “inconsistent with the Commission’s regulations implemented pursuant to Section 276(b)(1).” *Wisconsin Order* at ¶ 7. Accordingly, the *Wisconsin Order* preempts any inconsistent state requirement, including the PSC’s order approving BellSouth’s unlawful tariffs.

2. Federal Law requires the PSC to order refunds to the extent necessary to force BellSouth to comply with § 276.

As part of the Act, Congress expressly directed the FCC to prevent Bell operating companies from discriminating against competing independent pay telephone service providers in the provision of payphone services.³ The FCC’s *Implementation Order* confirms that it intends to ensure that rates are nondiscriminatory. *See, e.g., Implementing Order* at 21294-95 ¶¶ 61-62. Although traditionally a matter of state jurisdiction, the FCC is required to ensure that ILEC intrastate rates comply with the Act. *Wisconsin Order* ¶ 31. As BellSouth recognized in its Motion to Dismiss, the FCC has delegated its obligation to ensure ILEC intrastate rate compliance with the Act to the state commissions. *Wisconsin Order* at ¶ 15.

The FCC’s implementation and review has taken several years and has required substantial clarification. The *Wisconsin Order* clarifies, however, that BellSouth has been over-charging the PSPs in violation of § 276 of the Act through its continual assessment of rates that are not cost-based and EUCL fees. *Wisconsin Order* at ¶ 61. The *Wisconsin Order* “requires [BellSouth] to set [its] intrastate payphone line rates in compliance with the Commission’s cost-based, forward-looking ‘new services’ test.” *Wisconsin Order* at ¶ 2. BellSouth’s failure to decrease its rates with its decreasing costs and its continued

³See *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1966*, 2002 WL 31374875, 17 F.C.C.R. 21274, FCC 02-292 at 1 ¶ 1 (CC Docket No. 96-128, Oct. 23, 2002) (*Implementation Order*).

pass-through of EUCL fees violates the new services test because it allows BellSouth to “over-recover” its costs. *Wisconsin Order* at ¶ 6. As the FCC recognized in its *Wisconsin Order*, BellSouth has an affirmative obligation under § 276 to conform its rates to the new services test. *Wisconsin Order* at ¶ 2. BellSouth has, however, ignored its duty and now seeks to retain its unlawful profits under the protection of the PSC’s prior order.

The PSC’s prior approval of BellSouth’s state tariffs clearly conflicts with the *Wisconsin Order* because it allowed BellSouth to continue charging EUCL fees to the PSPs. Further, as alleged in FPTA’s Petition, BellSouth’s costs have decreased since the PSC approved its tariffs in January of 1999. *FPTA Petition*, ¶ 6. BellSouth has refused, however, to lower its rates, and thus has continued to charge rates it knows violate § 276.

The FCC has broad authority under the Act to rectify over-compensation in violation of § 276 through refunds when necessary to ensure fair compensation. *MCI Telecom. Corp. v. FCC*, 143 F.3d 606, 609 (D.C. 1998). In its present capacity, the PSC is acting through the FCC’s delegation of power to implement the Act. Accordingly, the PSC shares the FCC’s equitable power and responsibility to force BellSouth to return its unlawful assessments to the PSPs to the extent necessary to bring BellSouth into compliance with the Act.

3. The PSC also has discretion to exercise its equitable ratemaking power under to force BellSouth to comply with §276 through the issuance of refunds.

Even if the PSC determines that Florida law on this subject is not preempted by federal law, Florida law does not prohibit a refund of BellSouth’s unlawful fees. Florida law requires the PSC to determine rates based upon equitable considerations. *GTE Florida Inc. v. Clark*, 668 So. 2d 971 (Fla. 1996). Refunds are not automatically barred as retroactive ratemaking under Florida law. *Id.*

The cornerstone to the general prohibition on retroactive ratemaking is the utilities’ reasonable

reliance on the approved rate. BellSouth's twisted application of the retroactive ratemaking doctrine in this instance is completely misplaced as it has not, and cannot demonstrate any reasonable reliance on the PSC's prior order in the wake of the FCC's *Wisconsin Order*. BellSouth was a member of the coalition involved in the Wisconsin matter that gave rise to the FCC's *Wisconsin Order*. *Wisconsin Order* at 1 n.1. As a fair reading of the *Wisconsin Order* indicates, the issue of the statutory lawfulness of ILEC rates is simply a continuation of the evolving implementation of the Act. BellSouth cannot now claim that it reasonably relied to its detriment on the PSC's initial approval of its state tariffs as a final resolution of the implementation of §276. The FCC's implementation of the Act has been ongoing and has involved multiple decisions. BellSouth has litigated this issue around the nation, and was therefore well aware of the inconsistent application of § 276 to ILEC rates. BellSouth knew (or should have known) that the FCC must ultimately resolve these inconsistencies as it did in the *Wisconsin Order*. Indeed, resolving the lack of conformity in state implementation of § 276 was an express objective of the *Wisconsin Order*. *Wisconsin Order* at ¶2. Accordingly, BellSouth knew the FCC's final interpretation and implementation of the new services test could conflict with the PSC's prior approval and subject it to refund any overcharges back to the PSPs.

Moreover, BellSouth is estopped to now claim a refund cannot be awarded because it promised to refund excess revenues when its agent sought and obtained a waiver of the statutory requirements. As alleged in FPTA's Petition, the Bell operating companies Payphone Coalition counsel, Michael K. Kellogg, promised the FCC that the Bell operating companies would issue refunds if the new statutory rate was lower than the existing rate. *FPTA Petition* ¶27. BellSouth cannot now claim it is prejudiced because the FPTA now asks the PSC to hold BellSouth to its promise.

Finally, BellSouth cannot use Florida's retroactive ratemaking doctrine as a shield against its continuing obligation under § 276 to conform its rates to the new services test. BellSouth continues to profit

from its flagrant disregard of the *Wisconsin Order* by continuing to assess EUCL fees in Florida and continuing to assess rates that have not decreased with its decreased costs.

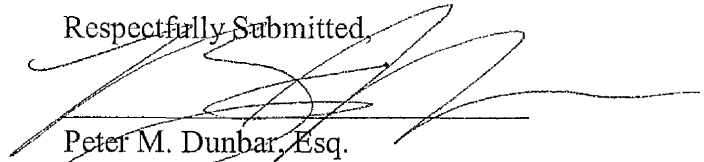
Notwithstanding its unlawful actions, BellSouth argues that PSPs are not entitled to refunds because on August 11, 1998 the PSC found that BellSouth's rates were in compliance with § 276. To accept BellSouth's argument, the PSC must rule that BellSouth has no obligation to amend its PTAS tariff to reflect changes in its costs. In other words, BellSouth asserts that it is the PSP's obligation to continually police BellSouth's rates to ensure it complies with § 276, and petition the PSC for ratemaking proceedings each time BellSouth's rates fall out of compliance. BellSouth is in the best position to know when its costs will decrease and merit a rate adjustment. If the PSC does not order a refund when BellSouth fails to timely conform its rates to the Act, BellSouth has absolutely no incentive to ever adjust its rates. Indeed, if refunds can never be ordered as BellSouth contends, BellSouth will never adjust its rates unless and until it is forced to do so.

At the very least, BellSouth should be required to refund the EUCL fees it has charged after the *Wisconsin Order* as well as the rates BellSouth knew no longer conformed to the new services test because of its decrease in costs. The PSC should not allow BellSouth to bury its head in the sand and enjoy the benefit of the overcharges it receives as it delays its inevitable compliance with the

Wisconsin Order.

WHEREFORE, FPTA respectfully requests that the Florida Public Service Commission deny BellSouth's Motion to Dismiss.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by and U.S. Mail to Meredith E. Mays, Regulatory Counsel, BellSouth Corporation, Legal Department, 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001, Nancy B. White, General Counsel- Florida, BellSouth Telecommunications, Inc., Suite 1910, 150 W. Flagler St., Miami, Florida 33130, and Linda Dodson, Staff Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, this 9th day of May, 2003.



ATTORNEY

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