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December 19, 2003

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

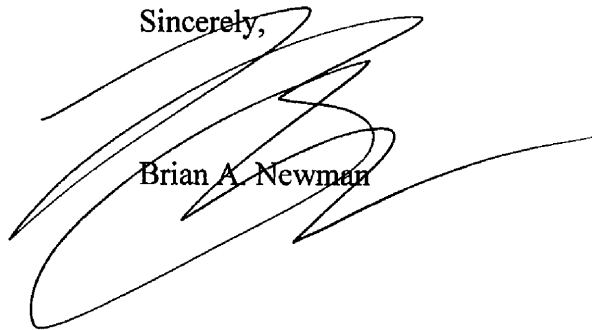
**In Re: Docket No. 030300-TP (Petition of Florida Public
 Telecommunications Association for Expedited
 Review of BellSouth Telecommunications, Inc.'s
 Tariffs with respect to Rates for Payphone Line
 Access, Usage, and Features**

Dear Ms. Bayo:

Enclosed is an original and fifteen (15) copies of The Florida Public Telecommunications Association's Notice of Filing Rebuttal Testimony of Bruce Renard, which we ask that you file in the captioned matter.

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

Sincerely,



Brian A. Newman

BAN/wgp
 Enclosures

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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.)

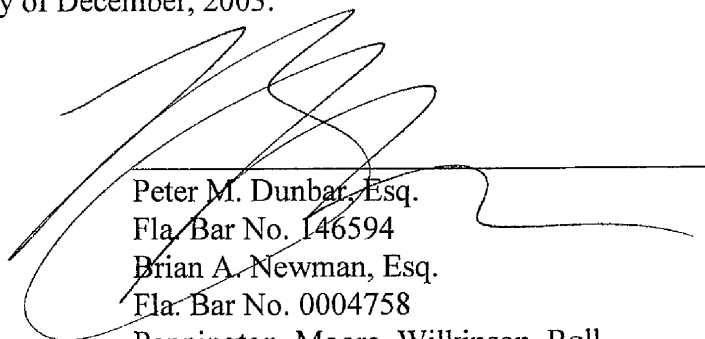
Docket No. 030300-TP

Filed: December 19, 2003

FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION'S
NOTICE OF FILING REBUTTAL TESTIMONY OF
BRUCE RENARD

Florida Public Telecommunications Association ("FPTA") hereby serves notice of filing
Rebuttal Testimony of Bruce Renard.

Respectfully submitted this 19th day of December, 2003.



Peter M. Dunbar, Esq.

Fla. Bar No. 146594

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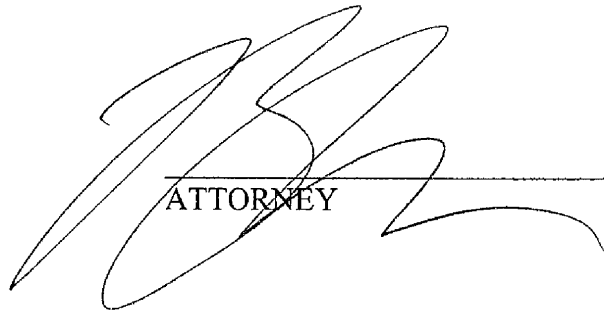
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Filing the Direct Testimony of Bruce Renard has been furnished by United States Mail this 19th day of December, 2003 to the following:

Meredith E. Mays, Regulatory Counsel
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ATTORNEY

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 Rates for Payphone)
Line Access, Usage, and Features.)

Docket No.: DN 030300-TD

**REBUTTAL TESTIMONY OF
BRUCE W. RENARD**

1 **Q. Please tell the Commission your name, business address and current**
2 **employment.**

3 A. My name is Bruce W. Renard. I am the Executive Director of the Florida Public
4 Telecommunications Association, Inc. ("FPTA"). My business address is 9432
5 Baymeadows Road, Suite 140, Jacksonville, Florida 32256.

6

7 **Q. Have you previously filed testimony in this docket?**

8 A. Yes.

9

10 **Q. What is the purpose of your testimony in this proceeding?**

11 A. The purpose of my testimony is to respond to issues raised by the testimony filed
12 by other parties in this docket. I respond specifically to the testimony of Kathy
13 Blake of BellSouth, Inc. ("BellSouth")

14

1 **Q. Ms. Blake alleges that the Commission’s PAA Order No. PSC-98-1088-FOF-**
2 **TL in Docket No. 97-281-TL, issued on August 11, 1998 (the “PAA Order”)**
3 **conclusively establishes that no credit or refund was or is due to the FPTA**
4 **membership. Is she Correct?**

5 A. No. implementation and application of “new services test” cost based rates to pay
6 telephone access lines have been an ongoing and evolving process. The FCC’s
7 Payphone Orders are intended to provide this Commission with guidance as to the
8 FCC’s intended application of the relevant payphone provisions of the Telecom Act
9 giving rise to the “new services test” requirements for payphone access line
10 pricing. The Payphone Orders also provide significant guidance regarding the
11 timeframe in which “new services test” pricing requirements would be applicable
12 under the Act, namely that all PTAS rates be cost based on and after April 15,
13 1997. When this Commission adopted the *PAA Order*, it did not have the benefit
14 of the FCC’s detailed explanation and clarification as later supplied in the *Second*
15 *Wisconsin Order*. To the extent that the *PAA Order* is shown to be in conflict with
16 the clarification provided in *Second Wisconsin Order*, this Commission is simply
17 fulfilling its administrative and equitable obligations to correct that conflict.
18 Moreover, BellSouth has been a party to each of the FCC proceedings, and any
19 subsequent appeals, that form the FCC’s *Payphone Orders* and the basis for
20 FPTA’s petition in this docket. Notwithstanding its intimate knowledge of the
21 requirements included in the *Payphone Orders*, BellSouth has failed to voluntarily
22 comply with the requirements of those Payphone Orders until the FPTA filed its
23 petition in this docket. BellSouth should not be permitted to “utilize” the

1 Commission's 1998 PAA Order as a means to avoid a refund of overages
2 generated by PTAS rates which it knew were out of compliance with federally
3 mandated "new services test" requirements for years - and which were being
4 fought by the RBOC Coalition in court throughout that time period.

5
6 **Q. When should BellSouth have been aware that its PTAS rates were not in**
7 **compliance with the FCC's Payphone Orders?**

8 A. BellSouth knew or should have known since the initial application of the "new
9 services test" on April 15, 1997 that there were open questions under active review
10 both at the federal administrative level and before the federal courts concerning
11 implementation of this set of payphone access line requirements. This evolving
12 application was to be expected in a complex "inter-jurisdictional" circumstance
13 such as this. Following the FCC's adoption of the "new services test" there were
14 numerous state proceedings underway across the county that generated a variety of
15 questions and issues that wound up making their way back to the FCC for
16 clarification and explanation as to the mechanics and nuances of implementing the
17 "new services test." In fact, BellSouth has been fully aware of these disputes and
18 issues even prior to April 15, 1997. The RBOC Coalition (of which BellSouth is a
19 member) advocated vigorously against application of the "new services test"
20 requirements before the FCC and its staff in 1996 and 1997 during the initial
21 implementation of the Act, again when the FCC's Common Carrier Bureau
22 considered and adopted the *First Wisconsin Order* in 2000, subsequently during the
23 full FCC's consideration and ultimate adoption of the *Second Wisconsin Order*

1 released March 2, 2000, and finally on appeal to the D.C. Circuit Court of Appeals
2 through July 11, 2003. Certainly, BellSouth and its counsel had intimate
3 knowledge of the potential that its position regarding application of “the new
4 services test” would be rejected and that its PTAS rates in Florida would thus be
5 rendered noncompliant - from the very beginning. Moreover, the FCC’s *Second*
6 *Wisconsin Order* was specifically intended to provide the states with clear guidance
7 on the implementation of Section 276 of the Telecom Act in this area; it did not
8 create “new law.” Accordingly, the new services test requirements are effective as
9 of April 15, 1997. BellSouth cannot now claim that it “relied” on this
10 Commission’s PAA Order implementing federal law when, prior to, simultaneous
11 with and subsequent to the PAA Order’s adoption BellSouth was itself challenging
12 the application of the “new services test” before the federal regulators and courts -
13 and significant clarifications were ultimately provided that plainly render the earlier
14 tariff rate void from the outset.

15
16 **Q. Ms. Blake takes the position that the FPTA never sought regulatory review or**
17 **judicial review of BellSouth’s PTAS rates after the Commission’s PAA Order.**
18 **Is that true?**

19 A. I do not believe that to be entirely correct. The FPTA participated in the
20 proceedings that are the basis of this Commission’s *PAA Order*. Rather than
21 pursue a long and costly adversarial rate proceeding before this Commission, the
22 FPTA felt it more prudent and a better use of limited resources to await FCC
23 clarification of the key guidelines for application of the “new services test” in all

1 state proceedings, including Florida. Ultimately, the FPTA filed its petition for
2 relief before this Commission once the FCC had issued its *Second Wisconsin*
3 *Order*, but prior to the final decision of the D.C. Circuit Court of Appeals
4 affirming that decision on appeal. The FPTA simply could not wait for the D.C.
5 Circuit Court's final opinion given the significant decline experienced by the pay
6 telephone industry generally and in the State of Florida specifically. We could no
7 longer wait for BellSouth to "voluntarily" implement cost based rates. And, over
8 time, it became increasingly evident that BellSouth would not comply with federal
9 law unless and until required to do so. Ms. Blake would like this Commission to
10 deny FPTA the "refund aspect" of the relief requested because FPTA did not
11 police BellSouth's PTAS rates sooner. As discussed in more detail later in my
12 testimony, I believe that position to be completely at odds with Congress' intent in
13 adopting Section 276 of the Telecom Act and this Commission's obligation to
14 timely implement that intent.

15
16 **Q. Ms. Blake takes the position that this Commission has no legal authority to**
17 **order a refund in this present case. Do you agree?**

18 A. No. Ms. Blake refers the Commission to BellSouth's Motion to Dismiss filed in
19 this docket, as support for her position. This reliance is misplaced for a number of
20 reasons which are described in the FPTA's Response in Opposition to BellSouth's
21 Motion to Dismiss, as previously filed in this docket and now attached to this
22 testimony as Exhibit 1. When viewed in the cold light of day, BellSouth's
23 arguments as set forth in its Motion to Dismiss are all based upon principles of

1 “equity” and not “law.” BellSouth cannot be permitted to claim reliance on this
2 Commission’s PAA Order as an “equitable” basis of protection from refunding of
3 clear overcharges, especially when it knew that the PAA Order was based upon
4 key issues still under review at the federal level and those issues were ultimately
5 clarified in a manner apposite to the positions strongly advocated by BellSouth.
6 Allowing BellSouth to retain millions of dollars unlawfully charged to PSPs since
7 1997 cannot be said to be doing “equity. This is especially so when the
8 fundamental application of the “new services test” to the RBOCs has been clarified
9 by the FCC twice and remained under judicial review until just recently.
10 Curiously, BellSouth has only now “voluntarily” reduced its Florida tariffed rates
11 by the EUCL charge of \$7.13 per month. Notwithstanding, BellSouth’s rates as
12 approved in the *PAA Order* did not “factor out” the EUCL and BellSouth
13 continued to charge the EUCL until October 27, 2003 - more than three and one-
14 half years after the FCC Common Carrier Bureau’s clarification that BellSouth
15 cannot include EUCL costs in deriving PTAS line rates. Equitable principles
16 should require at a minimum that all those EUCL amounts unlawfully collected by
17 BellSouth from PSPs be refunded with interest. Otherwise, BellSouth will be
18 unjustly enriched at the expense of the much smaller competitive pay telephone
19 companies throughout the State of Florida. Clearly, this is not the result Congress
20 intended when it adopted Section 276 of the Telecom Act, nor that intended by the
21 FCC in implementing that Section.

22
23 **Q. In her testimony, Ms. Blake takes the position that BellSouth was not required**

1 **to reduce its intrastate payphone line rates by the amount of the EUCL on a**
2 **specified date. Is she correct?**

3 A. No. The FCC's *Second Wisconsin Order* clearly requires that, in order to avoid a
4 double recovery of costs, the RBOC must demonstrate that in setting its payphone
5 rates it has taken into account other sources of revenue (i.e., the EUCL) that are
6 used to recover the costs of the facilities involved. That decision had the stated
7 purpose of "assisting states in applying the new services test to the BOC's
8 intrastate payphone line rates in order to ensure compliance with the Payphone
9 Orders and Congress' directives in Section 276." Further, the *Second Wisconsin*
10 *Order* was not intended to implement a new requirement prospectively. The FCC
11 made it very clear that the *Second Wisconsin Order*, which essentially affirmed all
12 aspects of the *First Wisconsin Order*, only clarified existing law and the
13 requirements of Section 276 of the Telecom Act as originally intended for
14 application by Congress and the FCC. Accordingly, charging and collecting the
15 EUCL, on top of an intrastate payphone line charge that had not "backed out" the
16 EUCL costs, anytime after April 15, 1997 is a per se violation of applicable federal
17 law. This double charging and the associated unjust enrichment of BellSouth, is
18 properly remedied through a refund to the customers, plain and simple.

19
20 **Q. In her testimony, Ms. Blake takes the position that BellSouth has no**
21 **responsibility to voluntarily reduce its PTAS rate pursuant to the Second**
22 **Wisconsin Order. Is she correct?**

23 A. No. Ms. Blake's position would stand Section 276's twin stated goals - the

1 widespread deployment of payphones and promotion of competition in payphone
2 services - completely on their heads. To take Ms. Blake's position to its logical
3 extreme, BellSouth would never be required to comply with Section 276's "new
4 services test" requirements, as clarified by the FCC and upheld by the federal
5 courts, unless and until challenged by a third party - and then compliance would
6 only have to be prospective. Obviously, even BellSouth does not believe its tariffs
7 in place prior to October 26,2003 were compliant with "new services test"
8 requirements since BellSouth has now "voluntarily" reduced its PTAS rates by the
9 amount of the EUCL. The double charging of the EUCL has been occurring since
10 April 15, 1997. Fixing this problem prospectively should not relieve BellSouth of
11 the obligation to refund the earlier overcharges with interest for the full period of
12 applicability. This is especially true in light of BellSouth's commitment to deliver
13 refunds as contained in the letter from Michael K. Kellogg to Mary Beth Richards
14 dated April 10, 1997, previously filed with the Commission in this docket.

1 **Q. If this Commission were to adopt Ms. Blake’s position with respect to**
2 **BellSouth’s denial of a refund and accept its recently filed new PTAS rate,**
3 **would this have any effect on the widespread deployment of payphones and/or**
4 **competition in the State of Florida?**

5 A. Yes. I believe it will have a severe negative impact on the widespread
6 deployment of payphones and payphone competition in the State of Florida. As
7 set forth in my previous testimony in this docket, the largest single monthly
8 “fixed” cost typically incurred to provide payphone service is the monthly bill that
9 a PSP must pay to the local exchange company for local access. There is no doubt
10 that a significant rate reduction will have a direct effect on the number of installed
11 payphones in Florida. Simply put, establishing a true cost-based payphone line
12 rate in compliance with the new services test, as set forth in Mr. Wood’s
13 testimony, will lower the revenue threshold for establishing a new payphone
14 location, which will, in turn, enable more payphones to be deployed. Additionally,
15 requiring BellSouth to refund the excessive profits it has collected from PSPs since
16 1997 will provide the payphone industry with a much-needed economic stimulus
17 that will help ensure some reasonable semblance of prospective widespread
18 deployment of pay telephones for the benefit of the general public in Florida. In
19 this regard, it must be noted that, as BellSouth exits the payphone business per its
20 previous announcements independent payphone providers such as the FPTA’s
21 members will be left to provide public payphone service to Florida’s citizens and
22 tourists throughout the BellSouth territory. FPTA views this as a significant
23 ongoing service need with serious public interest implication. Payphones play a

1 vital role in our nation's communications infrastructure, particularly for many
2 poor, rural and minority citizens. There remain significant segments of the
3 population that do not have easy access to basic telephone service. Those Florida
4 citizens and visitors rely on payphones as their primary access to our nation's
5 communications networks. BellSouth's exit from the payphone business will only
6 speed the loss of payphone availability to the general public in Florida. Based
7 upon a report filed with this Commission in connection with BellSouth's exit from
8 the payphone business, BellSouth had approximately 35,000 payphones installed in
9 the State of Florida as of March 2001 and 13,000 payphones installed as of
10 September 2003. BellSouth has begun its mass removal of all payphones located in
11 the State of Florida, which mass removal should be completed sometime during the
12 first or second quarter of the coming year. This particular juncture is, thus, an
13 extraordinarily important time for the Commission to consider this issue and act in
14 support of maintaining widespread public payphone availability in Florida.
15 Adoption of Ms. Blake's position would also be fundamentally adverse to
16 competition. Establishing a true cost-based payphone line rate in compliance with
17 the new services test will create an environment where payphone services can be
18 provided to consumers at lower cost. A lower rate for calls from payphones will in
19 turn make payphone calling more competitive with its current real-world
20 competitor - wireless calling. While BellSouth will no longer be providing
21 payphone services to consumers, it will remain a significant player in the cellular
22 world through its large interest in Cingular Wireless. Fewer payphones available
23 to the general public, is a good thing from a wireless viewpoint. It is, however,

1 clearly not a good thing from a public interest standpoint, especially in view of the
2 unique and compelling circumstances presented here and now.

3
4 **Q. In her testimony, Ms. Blake indicates that BellSouth should not have reduced**
5 **its rates to comply with the new services test because PTAS rates in Florida are**
6 **directly tied to basic business rates (1FB), which have increased over time. Is**
7 **her testimony correct?**

8 A. Ms. Blake is correct that Section 364.3375(2)(e) provides each pay telephone
9 station shall be “eligible to subscribe to flat-rate, single line business local
10 exchange services.” To the extent, however, 1FB basic business line rates are not
11 cost-based and, therefore, not compliant with Section 276 of the Telecom Act,
12 Section 364.3375(2) (e) must be viewed as “preempted” or read to be “non-
13 exclusive” and therefore permissive of BellSouth’s filing a lawful and compliant
14 payphone line rate in lieu of the 1FB business line rate for payphone lines. It
15 must be remembered, as well, that this section of Florida law was adopted at a time
16 when BellSouth had been imposing mandatory measured service on all lines
17 provided to its payphone competitors. The referenced section of Florida law was
18 passed to remove this restriction and provide a lower line charge. The cited
19 Florida law, although adopted well before the “new services test,” thus shares a
20 dual common intent with the later federal requirement - that of lowering a key
21 economic hurdle to payphone deployment and improved payphone competition.
22 Applying this common intent here results in a consistent outcome – not a conflict as
23 BellSouth would have this Commission believe.

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Q. In her testimony, Ms. Blake states that BellSouth's rates "have been, and are currently in compliance with the FCC's new services test" but further indicates that BellSouth has "taken certain steps in light of the additional guidance by the FCC in the [Second] Wisconsin Order and the fact that the parties were unable to reach a mutually acceptable resolution of this matter." Can you describe the "steps" taken by BellSouth and provide us with some insight as to why you believe BellSouth took those steps?

A. BellSouth revised its PTAS tariff to reduce its rates by the amount of the EUCL Charge, effective October 27, 2003, only after the FPTA filed its petition in this docket and the filing of testimony became imminent. Notwithstanding BellSouth's continuing claim that it had no obligation to do so, I believe that BellSouth did have an affirmative obligation to take at least this step from the "get go" - April 15, 1997 - or to now make refunds that will implement this same result. Once the later FCC clarifications were handed down and affirmed by the federal appellate courts, their obligation became absolute. A tariff filing to remove EUCL now does not somehow "cleanse" the past double charging of EUCL prohibited by the "new services test" throughout. Only a full refund, with interest, will accomplish that result and provide an outcome that will serve both the both the public interest and the equities of this case.

Q. Having reviewed all the testimony filed in this case, what is your bottom-line recommendation to this Commission?

1 A. I recommend that this Commission, consistent with applicable federal law and in
2 furtherance of the public interest, (i) adopt a prospective PTAS rate of \$17.65 in
3 accordance with the testimony of Don J. Wood in this docket, (ii) direct BellSouth to
4 refund all amounts paid for EUCL/SLC since April 15, 1997 and (iii) direct
5 BellSouth to refund to PSPs the difference between (a) the PTAS rates, including
6 rates for access lines, features, and usage paid by PSPs to BellSouth since January
7 20, 1999, and \$17.65.

8 **Q. Does this conclude your testimony?**

9 A. Yes it does.

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

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

³*See 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.

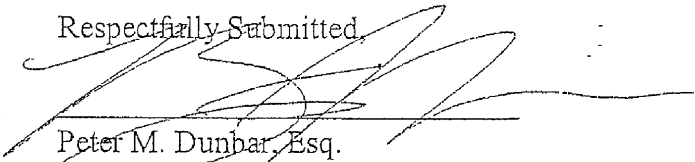
Notwithstanding its unlawful actions, BellSouth argues that PSPs are not entitled to refunds because on August 11, 1998 the PSC found that BellSouth's rates were in compliance with § 276. To accept BellSouth's argument, the PSC must rule that BellSouth has no obligation to amend its PTAS tariff to reflect 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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