BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review of BellSouth Telecommunications, Inc.'s Intrastate tariffs for pay telephone access Services (PTAS) rate with respect to rates for Payphone line access, usage, and features, by Florida Public Telecommunications Association	)	Docket No. 030300-TP Filed: June 15, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

This case involves the monthly intrastate rates BellSouth Telecommunications, Inc. ("BellSouth") charges payphone service providers ("PSPs") for pay telephone access service ("PTAS"). Despite the fact that this Commission approved BellSouth's PTAS rates in two decisions from 1998 and 1999 that were never challenged, the Florida Public Telecommunications Association ("FPTA") asks this Commission to disregard its prior orders by asking for refunds. This Commission should forcefully reject this request.

Concerning prospective PTAS rates in Florida, both parties agree that the Commission can set rates on a going forward basis, and that if the Commission chooses to modify rates, one statewide average rate is the correct approach. The parties also agree that it is appropriate to add as a separate line item charge on PSP's bills the end user common line charge (formerly known as the subscriber line charge) ("EUCL") that BellSouth tariffs at a federal level. The parties disagree on the amount of overhead that should be added to BellSouth's direct costs to arrive at total costs and as a result the parties diverge on the appropriate statewide average rate. BellSouth has proposed a method of determining overhead that complies fully with the applicable law, while the FPTA suggests this Commission should adopt an arbitrary and artificially low overhead percentage. The Commission should adopt BellSouth's overhead

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
MMS ____
RCA ____
SCR ____
SEC 1
OTH ____

proposal if it elects to modify PTAS rates prospectively and in doing so set the going forward, statewide PTAS rate at $17.23. In contrast, the FPTA proposes a statewide average rate of $10.91, which is well below the statewide average UNE-P rate in Florida, and which should be summarily denied.

II. BACKGROUND

The FPTA filed this case because the FCC issued an order in 2002, commonly referred to as the *Wisconsin Order*[1], which addressed the manner in which state commissions should set intrastate PTAS rates. Tr. at 55.[2] Because the sequence of events leading to the *Wisconsin Order* relates directly to the issues in this case, an overview of the relevant regulatory background follows.

A. The FCC's Payphone Orders

In 1996 and 1997, the FCC issued a series of Payphone Orders implementing Section 276 of the Federal Act.[3] Tr. at 189. Among other things, these orders established that intrastate rates for PTAS lines must comply with the new services test ("NST"), which required a carrier to provide cost data to establish that the rate for a service will not recover more than a just and reasonable portion of the carrier's overhead costs.[4] Tr. at 190. These orders also concluded that, consistent with Section 276 of the Act, PSPs were entitled to compensation for completed

---

1 Memorandum Opinion and Order, *In the Matter of Wisconsin Public Service Commission,* Bureau/CPD No. 00-01, 17 FCC Rcd. 2051 (rel. Jan. 31, 2002), *aff'd New England Public Comm. Council v. FCC*, 334 F.3d 69 (D.C. Cir. July 2003), *cert. denied* 2004 U.S. LEXIS 3066 (April 26, 2004) (*"Wisconsin Order"*).

2 *See* cross examination of Mr. Bruce Renard:
Q: Do you expect that the FPTA would have been here today had the 2002 order not been issued?
A: No, I don't think we would.

3 *See* Report and Order, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 96-338 at ¶146 (rel. Sept. 20, 1996)("Payphone Order"); Order on Reconsideration, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 96-439 at ¶163 n.492. (rel. November 8, 1996)("Order on Reconsideration").

4 *See* 47 C.F.R. §61.49(h)(1).

intrastate and interstate calls originated by their payphones.[5] *Id.* Before collecting this "per-call" compensation, a LEC had to certify that its PTAS rates were compliant with the NST.[6] Tr. at 190.

On April 10, 1997, BellSouth and other RBOCs requested that the FCC grant a limited waiver of this prerequisite to collecting per-call compensation.[7] *Id.* In making this request for a waiver, the RBOCs stated "that they voluntarily commit 'to reimburse or provide credit to those purchasing the services back to April 15, 1997' . . . 'to the extent that the new tariff rates are lower than the existing ones.'"[8] *Id.* In addressing this request, the FCC entered an order that said:

> we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines required by the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver 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. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.[9]

Tr. at 190-191.

---

5 *See* Payphone Order at ¶¶48-76.

6 *See* Order on Reconsideration at ¶131.

7 *See* Order, *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 97-805 ¶13 (rel. April 15, 1997)("Second Waiver Order").

8 *Id.*

9 *Id.* at ¶25 (emphasis added).

B. The Florida Public Service Commission's Implementation of the FCC's Payphone Orders

In 1997, the Commission staff sent a memorandum to BellSouth and other incumbent LECs with a copy of the FCC's *Second Waiver Order.* Order No. PSC-98-1088-FOF-TL ("PTAS Order"), p. 4. 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. *Id.* BellSouth had previously filed, in March 1997, its cost information for wholesale payphone offerings. *Id.,* p. 5. On December 9, 1997, a staff workshop was held during which the FPTA and BellSouth decided to meet to attempt to resolve any issues by stipulation. *Id.,* p. 4.

Between January 1998 through May 1998, BellSouth and the FPTA discussed PTAS rates. Hrg. Exhs. 1 and 2. During these discussions, BellSouth provided the FPTA with its cost studies concerning wholesale payphone offerings. *Id.* In addition, BellSouth notified the FPTA that it was correct to charge PSPs the EUCL as well as the intrastate PTAS rate. *See* Hrg. Exh. 2. As a result, the FPTA knew BellSouth intended to charge an additional, line item EUCL on bills, consistent with its applicable FCC tariffs.[10]

In May 1998, the FPTA contacted the Commission acknowledging, "tariffs and supporting documents have been studied in detail." Hrg. Exhs. 1, 4. The FPTA also requested

---

[10] 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 1997 the access rules changed and required the prospective application of EUCL charges to both independent and LEC-owned payphones. *See Communications Vending Corp. of Arizona v. FCC,* 365 F.2d 1064 (D.C. Cir. 2004) *and* 47 C.F.R. § 69.5 (a). The prior federal rules exempted public payphone service from EUCL charges, but imposed EUCL charges upon semi-public payphone service. In the *Access Charge Reform Order*, the FCC set certain guidelines and limitations governing the imposition of the EUCL, 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. *See* Hrg. Exh. 1.

that the Commission staff "present a recommendation to the commission for proposed action on the tariffs that have been filed." *Id.* The FPTA indicated a staff recommendation would "sharpen everyone's focus and clearly identify whether there are any remaining disputed issues." *Id.*

On August 11, 1998, the Commission issued its *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 it had 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 requested 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 the *PTAS Order,* the *Final PTAS Order,* 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 this 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 FPTA concedes that "[e]xcept for the petition filed in the present case, the FPTA has not asked the Commission to review BellSouth's . . . rates during the last seven years." Hrg. Exh. 3.

C. The FCC's *Wisconsin Order*

In early 2000, the Wisconsin Public Service Commission decided that it had no jurisdiction under state law to review LECs' PTAS rates, and as a result, the FCC's Common Carrier Bureau ("Bureau") acted to address that decision. The Bureau directed the ILECs in Wisconsin to submit copies of their intrastate PTAS tariffs to it, acting in circumstances analogous to this Commission's proceedings in Docket No. 970281-TL. [11] The Bureau found that total element long run incremental cost ("TELRIC") was the presumptive measure of NST-compliant rates.[12] The Bureau's order, by its express terms, applied only "to the LECs in Wisconsin specifically identified herein." *Bureau Order,* ¶ 13.

The Bureau's order was appealed to the full Commission, and on January 31, 2002, the FCC issued the *Wisconsin Order.* The FCC stated its belief that "this Order will assist states in

---

[11] *See* Order, *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, DA No. 00-347, Order, 15 FCC Rcd 9978 (March 2, 2000) ("Bureau Order").

[12] *Id.*

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,"[13] and it generally established the following principles:

1. Methodology for Computing Direct Costs. The FCC ruled that: (a) states are not *required* to use TELRIC methodology to develop direct costs; (b) states *may* use TSLRIC (or another forward-looking methodology) to develop direct costs; and (c) LECs may include in their direct costs retail costs that they can show are attributable to PTAS lines. Specifically, the *Wisconsin Order* provides that:

> LECs should use a forward-looking methodology that is "consistent" with the Local Competition Order. TELRIC is the specific forward-looking methodology described in 74 C.F.R. §51.505 and required by our rules for use by states in determining UNE prices. States often use "total service long run incremental cost" (TSLRIC) methodology in setting rates for intrastate services. It is consistent with the Local Competition Order for a state to use its accustomed TSLRIC methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs.
>
> As such, we do not impose on payphone line services the Sections 251 and 252 pricing regime for local interconnection services. For example, while we have prohibited LECs from including certain "retail" costs in their prices for UNEs, no such prohibition applies to payphone line services. If they wish, the LECs may include in their direct cost calculations those "retail" costs, such as marketing and billing costs, that they can show are attributable to payphone line services.[14]

2. Allocation of Overhead. The FCC decided that while states may use "UNE loading factors to determine an appropriate overhead allocation for payphone services," those UNE overhead loading factors do not establish a "default ceiling."[15] Instead, "[t]here are other approaches that are also consistent with our precedent regarding overhead assignments to new services provided to competitors."[16] Specifically, the FCC concluded that:

> it is appropriate for states to adopt the same method for calculating a ceiling for overhead allocation 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

---

13 *Id* at ¶2, *but see New England Public Comm. Council, Inc. v. FCC,* 334 F.3d 69, 75 (D.C. Cir. 2003), *cert. denied* April 26, 2004 ("*Appellate Order*") (on appeal, the FCC claimed its order pertained only to rates in Wisconsin).

14 *Id.* at ¶¶49-50.

15 *Id.* at ¶52.

16 *Id.*

> 276 and our precedent. Moreover, it is also consistent with our past application of the price cap new services test, and permissible in this context, for states to determine overhead assignments using the methodology that the Commission used to evaluate the reasonableness of ONA tariffs in the ONA Tariff Order. In that investigation, the Commission used ARMIS data to calculate an upper limit for both the ratio of direct cost to direct investment and the ratio of overhead cost to total cost. Analogously, states could use ARMIS data relating to the plant categories used to provide payphone services in calculating an upper limit on overhead loadings.[17]

3. Treatment of SLC/EUCL. The FCC decided that "in establishing its cost-based, state-tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federal tariffed SLC."[18]

4. Usage. The FCC determined that "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."[19]

The FPTA filed its petition in this docket on March 26, 2003, fourteen months after the issuance of the *Wisconsin Order*, seeking both refunds and new PTAS rates. At the time the FPTA's petition was filed, the *Wisconsin Order* had been appealed. On July 11, 2003, the United States Court of Appeals, District of Columbia Circuit affirmed the *Wisconsin Order,* which it found "establishes a rule that affects payphone line rates in every state." *New England Public Comm. Council, Inc. v. FCC,* 334 F.3d 69, 75 (D.C. Cir. 2003), *cert. denied* April 26, 2004 ("*Appellate Order*"). In doing so, the D.C. Circuit rejected the FCC's argument that the *Wisconsin Order* applied only in that state – "[c]ontrary to the Commission's argument, the order on review is more than just an 'adjudicatory-type proceeding pertaining to rates in Wisconsin.'" *Id.*

---

17 *Id.* at ¶54.
18 *Id.* at ¶61 (emphasis added).
19 *Id.* at ¶64.

III. ISSUES AND POSITIONS

Issue No. 1 (a): Has BellSouth reduced its intrastate payphone line rates by the amount of the interstate EUCL? If not, has BellSouth ceased charging the EUCL on payphone lines?

SUMMARY OF BELLSOUTH'S POSITION

*** Yes, although BellSouth had no affirmative obligation to do so. ***

DISCUSSION

BellSouth includes the EUCL on PSP's bills pursuant to the terms of effective FCC tariffs. *See* Exh. 1. Such FCC tariffs have been in place since 1997[20] and continue today, although the monthly EUCL amount has varied over time. Regardless of the outcome of this proceeding, BellSouth must continue to charge PSPs the federal EUCL pursuant to the terms of its applicable FCC tariffs. *See Mellman v. Sprint,* 975 F.Supp. 1458, 1462 (N.D. Fla. 1996) (a tariff constitutes the law and is not merely a contract).

Concerning BellSouth's state tariffs, there is no dispute that BellSouth filed a revision to its General Subscriber Services Tariff ("GSST"), Section A7.4 to reduce its approved and effective PTAS rates by the amount of the federal EUCL. Tr. at 195. This reduction became effective on November 10, 2003. Tr. at 196; *see also* Exh. 11. Although the FPTA's prehearing statement suggested BellSouth should not have included the EUCL on invoices sent to PSPs, the FPTA has since conceded BellSouth has reduced its tariffed rates. Tr. at 44. Moreover, the FPTA agreed it is not seeking (nor could it) Commission action concerning BellSouth's FCC tariffs, nor does the FPTA contest BellSouth's inclusion of the EUCL as a separate line item charge on PSPs monthly bills. Tr. at 54.

Issue No. 1 (b): As of what date was BellSouth required to reduce its intrastate payphone line rates by the amount of the interstate EUCL?

[20] *See* Hrg. Exh. 1 (which includes copies of the applicable FCC tariffs setting forth BellSouth's EUCL charges).

SUMMARY OF BELLSOUTH'S POSITION

*** There is not a date certain; rather, pursuant to the *Wisconsin Order*, the obligation to reduce intrastate payphone line rates by the amount of the interstate EUCL must occur on a prospective basis in connection with a state commission review of intrastate payphone line rates. ***

DISCUSSION

The FPTA claims that BellSouth "was required to reduce its intrastate payphone line rates by the amount of the interstate EUCL on or before April 15, 1997." FPTA's Prehearing Statement, p. 3; *also* Tr. at 7. The FPTA's argument cannot stand. The FPTA relies upon language within the *Wisconsin Order* to support this view. However, the FPTA cannot cite to a single sentence in that decision that contains a refund obligation back to 1997. Tr. at 59.[21] Instead, the FCC was well aware that state commissions had previously set intrastate payphone rates, noting "many states have relied on our *Payphone Orders* and have diligently applied the new services test, as we directed, to intrastate payphone line rates." *Wisconsin Order,* ¶ 44. At the same time, the FCC recognized "the administrative record . . . shows disparate applications of the new services test in various state proceedings." *Id.* ¶ 2. If the FCC had intended to impose a broad refund requirement, any such language would have been expressly stated, particularly given that the FCC was fully aware of "disparate applications" of the new services test in various states.

Nonetheless, the FPTA stubbornly claims that the *Wisconsin Order* "was not intended to implement a new requirement prospectively." Tr. at 45. The FPTA's argument fails, not only because there is no language in the *Wisconsin Order* that requires a refund, but because the FCC

[21] On cross-examination, Mr. Renard testified that he could not point to any language in the *Wisconsin Order* that requires this Commission to order a refund without "researching it or studying it." (Tr. at 59). Given that the *Wisconsin Order* was issued in 2002 and formed the basis for the FPTA's petition, it is reasonable to expect that the FPTA has had ample opportunity to research and study its terms and that the FPTA would have cited to any such requirement to issue refunds if it existed. The reality, of course, is that there is no such language in the *Wisconsin Order*.

itself maintained a contrary view on appeal, claiming its decision applied to Wisconsin only. *See Appellate Order,* 334 F.3d at 75 ("[c]ontrary to the Commission's argument, the order on review is more than just 'an adjudicatory-type proceeding . . . pertaining to rates in Wisconsin.'"). The FPTA cannot contend that federal law requires a refund when the responsible federal agency maintained a more limited view of its own order.

In any event, with the issuance of the *Appellate Order*, the *Wisconsin Order* applies to the states, meaning that if a refund obligation existed it would have stated clearly within that decision. A careful reading of the *Wisconsin Order,* however, shows that only prospective language is used when describing how to effectuate its terms. Notably, the FCC explained "in *establishing* its cost-based, state-tariffed charge for payphone line service, a BOC must reduce the monthly per line charged determined under the new services test by the amount of the applicable federally tariffed SLC . . . . *At whatever point in time* a state reviews a BOC's payphone line rates for compliance with the new services test, it must apply an offset for the SLC *that is then in effect.*" *Id.,* ¶ 61 (emphasis added). By using prospective language such as "establishing" and "at whatever point in time", the only logical conclusion is that any reductions must occur on a going forward basis.

In a last ditch attempt to maintain its refund claim, the FPTA tries to shift the blame for its inaction upon BellSouth, suggesting BellSouth's voluntary tariff modifications occurred only as a result of its petition. This argument does not and cannot justify the FPTA's claim that the applicable law *required* a rate reduction going back to a date *before* the issuance of the *Wisconsin Order*. The FPTA concedes the *Wisconsin Order* had been appealed at the time its petition was filed. Tr. at 43. Likewise, there is no dispute that the FPTA and BellSouth attempted to resolve this matter, attempts that were unsuccessful. At the conclusion of

unsuccessful settlement negotiations and after the issuance of the *Appellate Order*, BellSouth revised its Florida intrastate tariff. Hrg. Exh. 1. As Ms. Blake explained, when considering the *Appellate Order* and the breakdown of settlement discussions *combined with* the petition, these events all factored into BellSouth's decision to revise its tariff. Tr. at 217-218. The FPTA's attempt to cast BellSouth's actions in a negative light should be disregarded. Any outcome that penalizes BellSouth for proactively reducing its tariff at the termination of settlement discussions would only chill such actions in the future.

Issue No. 1 (c): Can the FPSC order refunds to Florida's Payphone Service Providers for the time period bracketed between (a) and (b)? If so, what is the expected amount of any required refunds and how should any refunds be effected?

SUMMARY OF BELLSOUTH'S POSITION

*** Refunds are not required. Moreover, refunds would not be appropriate in this case and this Commission has no authority to order any refunds. ***

DISCUSSION

There is no legal or factual basis for any refunds in this proceeding. As a preliminary matter, well-established legal doctrines, including, but not limited to, the prohibition against retroactive ratemaking, the filed rate doctrine, and the doctrine of administrative finality, prohibit such relief. *See* Hrg. Exh. 11. In addition to these well-established legal doctrines, the FPTA's claimed basis for refunds -- (1) federal preemption requires refunds; (2) federal law requires refunds; and (3) equitable ratemaking considerations under Florida law requires refunds -- cannot stand. These legal doctrines, the FPTA's claims, and BellSouth's affirmative defenses, which also preclude a refund order, are discussed in detail below.

A. 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.
>
> * * * *
>
> 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 Section 364.14 is prospective only since the authorizing statute 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 cannot 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 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 violate the prohibition against retroactive ratemaking.

B. 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 years its members have paid the rates that are set forth in BellSouth's filed tariffs (and that are consistent with the Commission's unchallenged orders). In seeking refunds, 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.

C. Neither Federal nor State Law Justifies the Refunds Sought by the FPTA

The FPTA attempts to escape the application of the retroactive ratemaking and filed rate doctrines, relying upon both federal preemption and equitable provisions of state law. Neither

claim is sustainable. The FPTA's convoluted logic is (1) the *PTAS Order and* the *Final PTAS Order* conflict with the *Wisconsin Order*; and (2) the *PTAS Order* and the *Final PTAS Order* must be corrected *ab initio*. *See* Hrg. Exh. 3.

As an initial matter, the FPTA cannot and has not shown that the premise underlying its argument – that the *PTAS Order* and the *Final PTAS Order* conflict with the *Wisconsin Order* – has any basis in reality. Even assuming the *PTAS Order* and the *Final PTAS Order* must comply with a legal standard that was set forth after their issuance (which is not the case) these decisions comply with the one of the approved overhead methodologies set forth in the *Wisconsin Order*. This calculation can be made by calculating the overhead loading factor using the *ONA Tariff Order* and adding that amount to BellSouth's 1997 direct costs, which results in total costs. Then, by comparing total costs to the sum of the average EUCL amount charged to PSPs in Florida and BellSouth's intrastate tariffed rates, the result shows the total rates charged *do not* exceed total costs. *See* Hrg. Exh. 1, at 60. Consequently, the FPTA cannot prove any error in the *PTAS Order* or the *Final PTAS Order,* much less any conflict with federal law.

Even assuming that the total rates to PSPs in Florida exceeded the maximum amount permissible under the *Wisconsin Order,* such facts would not justify the FPTA's requested relief. The only federal case that the FPTA cited previously in its *Response in Opposition to BellSouth's Motion to Dismiss* fails to support its claim for refunds. Specifically, the FPTA cited *MCI Telecom Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998) for the proposition that "[t]he FCC has broad authority to rectify over-compensation" and that this Commission, acting through such delegated authority, has similar authority. Hrg. Exh. 6, p. 5. However, *MCI Telecom Corp. v. FCC* does not support the FPTA's refund claim.

In *MCI Telecom Corp. v. FCC,* the D.C. Circuit remanded the FCC's per call

compensation rules, which rules had never become final and had, instead, always been under judicial review. The D.C. Circuit expressly stated that if, on remand, some different per call compensation rate applied, refunds could be ordered. The FCC subsequently established a different per call compensation rate, ordered refunds, and explained why its resulting refund orders did not violate the retroactive ratemaking doctrine in *In re: Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand (Oct. 23, 2002), 17 FCC Rcd 21274 ("Fifth Payphone Order"). In relevant part, the FCC explained:

> ITCDeltacom argues that if the Commission expands, on remand, the Interim Period compensation obligation beyond the 24 companies listed in the *First Report and Order* such an extension would constitute impermissible retroactive rulemaking. This argument fails because the regime of the *First Report and Order* did not become final due to pending judicial review, and the *Illinois* decision clearly put all carriers on notice of potential liability. Notice of small carriers' potential obligation to pay Interim Period compensation was likewise provided in the initial NPRM in this proceeding. Accordingly, nothing we do in this order constitutes impermissible retroactive ratemaking - it merely apportions an existing payment obligation among those entities to which we are required by the D.C. Circuit to apportion it.

Fifth Payphone Order, 17 FCC Rcd at 21294-21295.

In stark contrast to the per call compensation payphone rules, the FCC's new services test was *not* under unceasing legal challenge. Rather, the *Wisconsin Order* was issued as a direct result of the Wisconsin Public Service Commission's failure to act. That the FCC chose to change the new services test by (1) specifying precisely how to allocate overhead costs and (2) requiring EUCL reductions in the *Wisconsin Order* (neither of which had been previously articulated), does not mean that the FCC intended to invalidate work done by state commissions here and elsewhere that predated the *Wisconsin Order.* Notably, the FCC declined to require

any refunds either expressly or by implication, nor did the FCC provide any notice of any potential liability or obligation, which had occurred in the refunds ordered pursuant to *MCI Telecom Corp. v. FCC.* Most significantly, however, the FPTA cannot reconcile its argument with the FCC's position on appeal that the *Wisconsin Order* was limited to that state. Despite the federal appellate court's rejection of the FCC's position, the reality is that the FCC retreated from its broad pronouncements on appeal, which defeats any FPTA argument that the *Wisconsin Order* requires refunds. Moreover, when considering the history of the *Wisconsin Order,* together with the actual language contained therein, it is clear that refunds are neither required nor appropriate.

The other cases the FPTA relies upon, which are all Florida decisions -- *Sunshine Utilities v. FPSC,* 577 So.2d 663 (Fla. 1st DCA 1991), *United Tel. Co. v. Mann,* 403 So.2d 962 (Fla. 1981), *Reedy Creek Util. Co. v. FPSC,* 418 So.2d 249 (Fla. 1982), and *People Gas Sys. v. Mason,* 187 So. 2d 335 (Fla. 1966) – fare no better. The FPTA relies upon these cases for the proposition that this Commission has broad authority to correct its prior orders. In each of these cases, however, while this Commission made corrections to prior orders, such corrections were strictly limited in circumstances that vary dramatically from the facts presented here.[22]

For example, in *Sunshine Utilities v. FPSC,* the Commission staff discovered an error in 1987, which apparently related to a 1984 order. In 1988, the Commission initiated an investigation into the possible error, and ultimately corrected prospectively the rate base computation error. This Commission ordered the correction to the beginning of the 1988 investigation, not from the date of the 1984 order.

---

22 As indicated *infra*, the FPTA cannot identify any actual error in either the *PTAS Order* or the *Final PTAS Order,* thus there is nothing for this Commission to correct in any event.

Likewise, in *United Tel. Co. v. Mann,* 403 So.2d 962 (Fla. 1981) the Commission ordered United Telephone to refund excess revenue collected during the pendency of a ratemaking proceeding. In *Mann*, after rate making proceedings began the Commission entered an interim order, followed by a subsequent order that concluded the proceeding. Refunds were deemed appropriate from the date of the interim order.

Similarly, in *Reedy Creek Util. Co. v. FPSC,* 418 So.2d 249 (Fla. 1982), the Commission approved a stipulation, in which Reedy Creek voluntarily agreed to make a refund in a proscribed manner. Reedy Creek computed the refund amount, and the Commission approved the refund amount as calculated by Reedy Creek in an order dated July 21, 1980. Prior to Reedy Creek allocating the refund, and less than three months later, on October 3, 1980, the Commission issued a clarifying order, which corrected and increased the refund amount. The correcting order occurred two and one half months after the initial order. In addressing the Commission's authority to modify its orders pursuant to the doctrine of administrative finality, the Florida Supreme Court, quoting *Peoples Gas Sys. v. Mason,* 187 So.2d 335 (Fla. 1966), explained that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein."

Finally, in *People Gas Sys. v. Mason,* 187 So. 2d 335 (Fla. 1966), the FPSC sought to "correct" an earlier order. In that case, the Commission had approved a territorial service agreement between gas distributors by order dated November 9, 1960. On June 24, 1965, almost five years later, the Commission rescinded and withdrew the approval it had previously granted in 1960. In reversing the Commission's 1965 order, the Supreme Court of Florida criticized the

Commission for "second-guessing" its original order. The Court explained that the Commission's power to modify its orders is limited and can only occur "upon a specific finding based on adequate proof that such modification is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified."

Ultimately, all of the cases cited by the FPTA stand simply for the proposition that there are unique factual circumstances in which this Commission may legally order refunds. Stated differently, there are exceptions to the general legal precepts that prohibit refunds, a broad concept that BellSouth has not contested. BellSouth contests the FPTA's refund claims because the relief the FPTA seeks does not fall within any cognizable exception to applicable law prohibiting refunds, nor has the FPTA presented evidence of unique facts that would compel such extraordinary relief. As the Florida Supreme Court has explained, there is a clear distinction between rate changes dating back to orders that were appealed as compared to cases "where a new rate is requested and then applied retroactively" which is what the FPTA is trying to do in this case. *See GTE Florida Inc. v. Clark,* 668 So.2d 971, 973 (Fla. 1996).

Here, the FPTA never appealed the *Final PTAS Order.* Moreover, the *Wisconsin Order* did not result from challenges to the original payphone cases – instead, it was issued due to a state commission's failure to act. There was no notice of proposed rulemaking or notice of a generic docket. This Commission did not establish interim PTAS rates that would be subject to final regulatory action at a later date. The FPTA's refund request does not fall within any recognized exceptions to the prohibition against retroactive ratemaking or the doctrine of administrative finality.

In addition to the fact that the applicable law does not justify its requested relief, the

FPTA has likewise failed to demonstrate any public interest need that would be satisfied by granting the relief it requests. The evidence shows that telephone subscriber levels in Florida have increased almost 10% from 1983 to 2003. *See* **Hrg. Exh. 4, Tab 9.** Moreover, subscribership levels have increased in all income levels, including households with annual income of *less than $10,000*, the segment of the population that the FPTA suggests is most in need of payphones. *Id.* (80.2% of Florida households with annual income of $9,999 or less subscribed to telephone service in 1984, this number rose to 89.8% of similar households by 2003). At the same time, the number of payphones has declined in every state in the nation. Hrg. Exhs. 9 and 10. The FPTA cannot show that refunds will have either an impact on the declining number of payphones or that the general public, particularly those with lower incomes, are actually demanding payphones. The reality is that while the FPTA couches its request as one that would benefit the general public, the evidence demonstrates the FPTA really seeks a windfall for its members.[23]

D. 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 also suggests that BellSouth's position before the FCC when it sought a waiver of the intrastate tariff filing requirements justifies its refund claim. Tr. at 46. This 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

[23] In discovery, the FPTA admitted that it had not conducted any analysis, study, or evaluation that would support its claim that without the relief it requests PSPs would be forced to remove payphones or that rate reductions or refunds that have a direct impact on the number of installed payphones in Florida. Hrg. Exh. 3, at 224-225.

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.

In an analogous case, *In the Matter of Independent Payphone Ass'n of New York, Inc. v. Public Service Commission of the State of New York*, 2004 WL 587624 (N.Y. App. Div., 3d Dep't, March 25, 2004), the appellate court addressed the waiver letter upon which the FPTA relies. That court found that "[t]he fact that the PSC's prior approval of preexisting rates has now been judicially called into question and the matter remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997." The New York court also recognized that the *Wisconsin Order* established "new and substantive changes or additions" to the new services test rather than simply providing an interpretation of the existing test and, therefore, giving that decision retroactive effect would be wholly inappropriate. *Id.* Finally, the appellate court rejected the petitioners' refund arguments. *Id.* at 3-4.

As the *New York* decision makes clear, the FPTA's reliance upon the 1997 waiver letter cannot stand. The FPTA suggests 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 its refund claim should be rejected.

E. State Commissions with Similar Refund Requests Have Rejected Such Claims

In cases analogous to the FPTA's Complaint, state commissions in Alabama, Missouri, Ohio, and Kansas have all denied refund claims. For example, 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). 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 PayTelephone Services,* Case No. 96-1310-TP-COI (November 26, 2002). *See also* Order (April, 13, 2004), *Southern Public Communication* ***Association*** *v. BellSouth Telecommunications, Inc.*, Docket No. 29172 (Ala. Pub. Serv. Comm'n) (the Alabama Public Service Commission dismissed an SPCA Complaint seeking refunds for the period before BellSouth made a tariff filing reducing its rates; the Alabama Commission found BellSouth's arguments "very persuasive") *and Tari Christ d/b/a ANJ Communications, et al. v. Southwestern Bell Telephone Co., L.P, et al.*, Case No. TC-2003-0066 (Jan. 9, 2003) (the Missouri Public Service Commission granted motions to dismiss based upon the fact that the Complainants failed to state a claim upon which relief could be granted under the authorizing state statutes).

F. The FPTA's Reliance Upon Orders from Other Jurisdictions is Meritless

The FPTA will undoubtedly seek to discount the growing body of caselaw that demonstrates the fallacy of its refund claims by citing to a decision of the Michigan Public Service Commission. BellSouth anticipates that the FPTA will also cite to decisions in other states within BellSouth's serving territory. Any such reliance cannot stand in the face of scrutiny.

For example, the FPTA's reliance on a March 16, 2004 Michigan decision is misplaced. In Michigan, a series of appeals occurred after the Commission addressed the ILEC's PTAS rates. Ultimately, after years of litigation, the Michigan commission approved lower tariff rates and ordered refunds. To suggest the Michigan decision has any bearing on this case borders on ridiculous; the Michigan decision could only shed light on this matter if the *Final PTAS Order* had been subjected to successive appeals and was never finalized. The situation in Michigan is analogous to the situation in North Carolina (not Florida), insofar as the payphone associations in both Michigan and North Carolina appealed pre-*Wisconsin Order* commission rulings on PTAS rates. In Florida, the FPTA elected not to exercise its rights to pursue an appeal and its reliance on the Michigan decision is unreasonable.

In other states in BellSouth's territory, state commissions approved stipulations that included refunds. For example, the Louisiana Commission approved a Joint Stipulation between BellSouth and the Louisiana Payphone Association by Order No. U-22632 on August 3, 2001. The North Carolina Commission approved a settlement agreement dated December 4, 2002 between BellSouth and the North Carolina Payphone association in Docket No. P-100, Sub 84b.[24] In each of these states, BellSouth voluntarily agreed to reduce its tariffed PTAS

[24] North Carolina is the only state in BellSouth's region in which a payphone association appealed a state commission's decision concerning PTAS rates prior to the issuance of the *Wisconsin Order*.

rates and to provide certain refunds.[25] The approval of such voluntary settlements by these state commissions does not remotely resemble nor authorize the type of refunds the FPTA seeks here.

In other states in BellSouth's territory, contested case proceedings concerning BellSouth's PTAS rates took place. Consequently, state commissions in South Carolina, Tennessee, and Kentucky entered orders reducing BellSouth's PTAS rates and ordering corresponding refunds in connection with their reviews of BellSouth's PTAS rates.[26] These orders are equivalent to this Commission's *PTAS Order* and *Final PTAS Order,* and occurred prior to the *Wisconsin Order*. To imply that refunds ordered in connection with such reviews of PTAS rates bears any resemblance to the type of refunds the FPTA is seeking in this proceeding --- years after this Commission issued its *Final PTAS Order*, from which order no appeal was ever taken --- is convoluted logic that should be rejected out of hand.[27]

The only order in which refunds were ordered *after* the issuance of the *Wisconsin Order* remotely analogous to the instant case was issued by the Kentucky Commission last year, which order is currently on appeal in court. Because that decision has been appealed, it is non-final, and this Commission should disregard it.[28]

---

[25] The Georgia Commission also approved a stipulation between BellSouth and the Georgia Payphone Association in Docket No. 7422-U on August 13, 1999 which included refunds by agreement.

[26] Interim Order, Tennessee Regulatory Authority Docket No. 97-00409 (Feb. 1, 2001); Order Setting Rates for Payphone Access Lines and Associated Features, SC Docket No. 97-124-C, Order No. 1999-285 (Apr. 19, 1999); Order, KY Admin. Case No. 361 (Jan. 5, 1999).

[27] BellSouth includes this discussion because the FPTA, in its supplemental response to Staff's Interrogatory No. 23, cited to these decisions as "similar" to what the FPTA is asking of this Commission. The only "similar" decision in BellSouth's territory is a 2003 Order from the Kentucky Public Service Commission, which decision has been appealed. The Alabama Public Service Commission declined to follow the 2003 Kentucky decision when it rejected refund claims of the Southern Public Communications Association this year.

[28] In any event, even if this Commission were to rely upon the non-final decision of the Kentucky Commission (which it should not), refunds were ordered from the date of the *Wisconsin Order* and not back to April 15, 1997.

G. BellSouth's Affirmative Defenses Preclude Any Refunds

The FPTA's refund claims are also legally infirm based upon BellSouth's affirmative defenses. For example, BellSouth has provided copies of its relevant tariffs, GSST Sections A2.5.5 and A.2.4.3, which tariffs require claims to be presented within sixty days of any alleged delinquency and require customers to "promptly report" objections to billed charges. The FPTA's members have not complied with either tariff, and the Commission should strictly enforce such tariff provisions.

The FPTA's claims also fail based upon the applicable two-year statute of limitations. The federal appellate court in *Communications Vending Corp. v. FCC,* 365 F.3d 1064 (D.C. Cir. 2004), addressed thirteen complaints filed by independent payphone providers ("IPPs") in late 1997 and early 1998, contesting the application of the End User Common Line ("EUCL") charges being assessed beginning in 1984 through 1997.[29] The appellate court affirmed the decision of the FCC which had applied the two-year limitation period set forth in Section 415 of the Communications Act, and, therefore, limited the IPP's recovery to the two-year period preceding the filing of the complaints filed by the IPPs.

Of particular relevance here, the D.C. Circuit affirmed the FCC's decision that the cause of action accrued when the IPP's received their first bill containing EUCL charges. Applying the *Communications Vending Corp.* decision to this proceeding means that any cause of action on the part of the FPTA's members arose in 1997 – immediately after FPTA member companies first received their bills containing the EUCL charges and PTAS rates which they are

[29] As noted *infra,* in 1997, the FCC's Access Rules changed and required the prospective application of EUCL charges to both independent and LEC-owned payphones. The prior federal rules exempted public payphone service from EUCL charges, but imposed EUCL charges upon semi-public payphone service. The IPPs had been assessed EUCL charges on all IPP payphones, which assessment the FCC originally ruled was proper; however, after subsequent litigation and appeals, the FCC reversed its original ruling.

complaining of in this proceeding. The FPTA members did not timely file a complaint after receiving bills containing the EUCL charges; therefore, their claims are time-barred as a matter of law.

The D.C. Circuit Court also affirmed the FCC's decision that the two (2) year statute of limitations period was *not tolled* because the IPP's had failed to act with due diligence. Notably, the D.C. Circuit rejected the IPP's claim that a cause of action does not accrue "until uncertain law becomes settled." This means that the FPTA's claim that the statute of limitations was tolled (*see* Exh. 3 at 34) cannot stand – the FPTA had no basis to wait for the issuance of the *Wisconsin Order* before asserting a claim relating to charges that have been billed since 1997. Applying *Communications Vending* to the facts of this docket leads to the inescapable conclusion that the FPTA's refund claims should be rejected due to the FPTA's failure to timely pursue this matter.

Issue No. 2: In Docket No. 9702810TL, PAA Order No. PSC-98-1088-FOF-TL, issued on August 11, 1998, this Commission determined BellSouth's intrastate payphone rates to be in compliance with the FCC's "new services" test.

(a) Are BellSouth's intrastate payphone rates no longer compliant with the new services test? If so, when did they become noncompliant?

(b) If BellSouth's intrastate payphone rates are not compliant with the new services test, at what rate levels will BellSouth's intrastate payphone rates comply with the new services test?

(c) Can this Commission order BellSouth to revise its intrastate payphone rates? If so, as of what date should any rate changes be effective?

(d) If BellSouth's payphone rates become noncompliant with the new services test, can the FPSC order refunds to Florida's Payphone Service Providers for the time period from when they became noncompliant to the date identified in Issue 2(c)? If so, what is the amount of any required refunds, and how should any refunds be effected?

SUMMARY OF BELLSOUTH'S POSITION

*** BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test. This Commission can order BellSouth to revise prospectively its intrastate payphone rates; if it does so the appropriate, new services complaint, statewide rate would be $17.23, which accounts for the EUCL of $7.13, and results in a total rate of $24.36. Refunds are not appropriate under any circumstance. ***

DISCUSSION

A. The FPTA's Contention that Florida PTAS Rates Require Retroactive Adjustment Is Misplaced

The FPTA's claims relating to BellSouth's PTAS rates are legally without foundation, as explained more fully in response to Issue 1 and its related subparts. For administrative ease, BellSouth incorporates by reference its prior discussion which applies equally to Issues 2(a), 2(d), and 2(b) (in part). To summarize, the FPTA's claims relating to BellSouth's PTAS rates are based upon the *Wisconsin Order* (just like their claims relating to the EUCL), which was issued three years *after* the *Final PTAS Order,* and which does not require any refunds nor mandate automatic or self-effectuating rate adjustments. As such, the FPTA has no basis for claiming BellSouth's PTAS rates are not compliant with the new services test, much less noncompliant immediately after this Commission issued the *Final PTAS Order,* which remains valid and effective. Nor can the FPTA legitimately seek refunds based upon the difference between any unknown and future PTAS rates and the rates that were found to be effective in the *PTAS Order* and in the *Final PTAS Order.*[30]

The FPTA raises two assertions that are unique to the PTAS rates, both of which are misplaced. These assertions are that (1) that BellSouth's PTAS rates became non-compliant,

[30] The FPTA's position on the precise date that BellSouth's PTAS rates allegedly became noncompliant is inconsistent. Mr. Renard suggests that refunds are due "since January 20, 1999" (Tr. at 51), while Mr. Wood claims BellSouth's PTAS rates "probably were not in compliance as of August 11, 1998". Tr. at 86. In its prehearing statement the FPTA asserts BellSouth's PTAS rates were not compliant "shortly after the effective date of" the *PTAS Order.* FPTA's Prehearing Statement, p. 3. Neither of the FPTA's witnesses is correct in any event, but the fact that the FPTA cannot reconcile the testimony of its two witnesses demonstrates the absurdity of its position.

immediately after the PTAS Order was issued; and (2) that because this Commission has modified BellSouth's UNE rates over time, any such adjustments prove automatically that BellSouth's direct costs incurred in providing PTAS must have declined over time. *See* Tr. at 87. Neither assertion has any basis in reality.

With respect to the timing of rate decisions, this Commission routinely enters orders setting rates, which rates remain in place for some period of time after issuance. The Commission typically reviews BellSouth's cost studies as part of its consideration of rates and when BellSouth conducts a cost study the study period is longer than one year. Tr. at 246. Moreover, study periods account for changes over time, because the reality is that cost inputs are in constant flux. *Id.* For this Commission to even entertain the FPTA's assertion that lower PTAS rates should have been in place one day after its *Final PTAS Order* was issued would be to open a Pandora's box of never-ending, constant cost proceedings, which is a result that would serve no useful purpose. *E.g.,* Tr. at 205-206.

Concerning BellSouth's UNE rates, there is no record evidence that supports the FPTA's wishful thinking that lower UNE rates translate into lower PTAS costs. The evidence in this proceeding consists of BellSouth's 1997 cost study, which sets forth BellSouth's direct costs at that time, and BellSouth's 2003 cost study. Florida law does not require BellSouth to continually study its costs and it is not BellSouth's practice to do so. Instead, costs are studied when the circumstances warrant, and the results of BellSouth's current cost study have been presented to the Commission. Tr. at 251.

Moreover, the fact that this Commission set BellSouth's UNE rates in 2000, May 2001, October 2001, and September 2002 hinders, rather than helps, the FPTA's claims. The FPTA – which holds a CLEC certificate that has been in place since 1996 – has full rights to obtain UNEs

from BellSouth at the Commission ordered rates, rights held also by the FPTA's members. If the FPTA, its members, or any other PSP had any actual concern with BellSouth's PTAS rates, such concerns could have been communicated at any time, either to BellSouth or this Commission on a formal or on an informal basis. The FPTA did not need to wait until the issuance of the *Wisconsin Order* to initiate a proceeding to review BellSouth's PTAS rates; proceedings may have even been consolidated with other UNE cost proceedings, had anyone thought such action was warranted. Given that the FPTA's witness testified that "many" of its members transferred service from BellSouth to CLECs to take advantage of lower rates (Tr. at 65), the logical conclusion is that Commission action was not deemed necessary by either the FPTA or its members.

B. If this Commission Adjusts Florida PTAS Rates, it should adopt a Statewide Rate Structure

Currently, PTAS rates vary by rate group; there are twelve distinct PTAS rate groups, which mirror BellSouth's retail rate structure. *See* Tr. at 204 *and* Hrg. Exh. 12. The parties are in agreement that, if this Commission chooses to modify the current PTAS rate structure, such modification should result in one statewide rate. Tr. at 124, 200. If the Commission adopts a statewide rate structure, there will continue to be a separate EUCL charge reflected on PSPs' bills, a practice the FPTA does not contest. Tr. at 53-54.

C. The Appropriate Statewide Rate Structure Results in a Rate of $17.23

As reflected in BellSouth's filed PTAS cost study, BellSouth's total costs incurred to provide PTAS service in Florida, on a statewide average, are $24.36. These costs include direct costs, plus overhead costs calculated pursuant to the methodology set forth in the FCC's *ONA Tariff Order.* Tr. at 240. By taking into account the current federal EUCL of $7.13, the resulting

statewide rate should be $17.23 ($24.36 - $7.13 = $17.23), which is the rate this Commission should adopt if it elects to modify the tariffed PTAS rates prospectively.

The FPTA does not challenge BellSouth's direct costs – FPTA witness Wood concedes BellSouth incurs direct costs of $16.40 to provide PTAS. Tr. at 151 (corrected at the hearing). Calculating direct costs can be derived by taking Hrg. Exh. 13, removing the overhead factor from BellSouth's costs, and utilizing actual usage cost numbers. *See* Hrg. Exh. 13, DDC-1 at 4, 11, 12.

The parties diverge significantly concerning the appropriate overhead allocation. Overhead costs must be added to the direct costs incurred to provide services to derive total costs. Overhead costs capture items such as product management, advertising, executive costs, accounting costs, and human resources expenses – expenses that companies incur as a cost of doing business but that are not tied specifically to a particular service offering. *See* Hrg. Exh. 13 at 91 (lists all ARMIS accounts from which BellSouth calculated overhead). The *Wisconsin Order* sets out three methods to allocate overhead; (1) the UNE overhead factor methodology; (2) the methodology outlined in the FCC's *Physical Collocation Tariff Order;* and (3) the *ONA Tariff Methodology.* Hrg. Exh. 1 at 309. BellSouth relies upon the *ONA Tariff Methodology,* while the FPTA advocates using the UNE overhead factor methodology; no party has suggested the Commission should utilize the methodology contained in the *Physical Collocation Tariff Order.*

While the FPTA takes issue with BellSouth's proposed methodology, it cannot dispute that the UNE approach fails to include costs associated with retail services. *See* Hrg. Exh. 1. Because retail costs are not considered under the UNE approach, relying upon it would understate BellSouth's costs. *Id.* Moreover, the TELRIC foundation of the UNE methodology is

based upon a forward-looking approach using a hypothetical network, which also understates costs. *Id.* Given that the FCC recently issued a Notice of Proposed Rulemaking, in Docket No. 03-173, *In Re: Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers,* (rel. Sept. 15, 2003) in which it tentatively concludes that TELRIC rules should more accurately account for real world attributes of an ILEC's network in the deployment of forward-looking costs the result is that there could be a significant impact upon UNE pricing in the not too distant future. Accordingly, this Commission should reject the UNE approach.

As Mr. Shell testified, BellSouth calculated its overhead allocation using the methodology contained in the FCC's *ONA Tariff Order.* Tr. at 247. Using the *ONA Tariff Order* recognizes that PSPs are *not* akin to telecommunications carriers and that PSPs have historically received service at retail rates. *See* Tr. at 265. Following the methodology proscribed in the *ONA Tariff Order,* BellSouth developed an overhead percentage of 50.42%, which follows precisely the detailed methodology specified in Attachment C of the *ONA Tariff Order;* BellSouth made no changes to that approach. *Id.* BellSouth has fully documented its overhead proposal by providing its cost studies and supporting work papers, and by responding to discovery propounded by the FPTA and the Commission staff. *See* Hrg. Exhs. 1 and 13; *and* Hrg. Exh. 3 (the FPTA concedes BellSouth has identified the documents on which it relies to yield its overhead loading).

The FPTA's primary objections to the *ONA Tariff Methodology Approach* are inconsistent and without basis. On the one hand, Mr. Wood accepts BellSouth's proposed overhead loading factor when it comes to features (Tr. at 151), yet he proposes a 10% overhead loading factor to loops, ports, and usage *(Id.)*, which he claims is based on the UNE approach.

As Mr. Shell testified, however, the UNE methodology actually gives rise to an overhead percentage of "17 percent or more, *plus retail.*" Tr. at 254. To correctly capture the retail costs associated with PTAS service, therefore, the UNE methodology should be doubled (Tr. at 263), which results in a total overhead percentage of approximately 34% under the UNE approach. Consequently, even if this Commission were inclined to accept the FPTA's proposal and use the UNE approach to overhead (which it should not), the result would far exceed the 10% overhead proposal Mr. Wood suggests. When this Commission factors in Mr. Wood's proclivity to take liberties in describing his professional experience (Tr. at 155-157), his testimony is unreliable and should be rejected. As a result, this Commission should adopt BellSouth's overhead proposal, find that the total costs incurred to provide PTAS service are $24.36, and set the prospective statewide PTAS rate at $17.23.

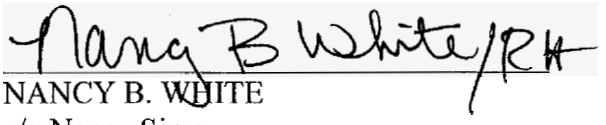
V. CONCLUSION

This Commission should resoundingly reject the FPTA's claim for refunds of both the EUCL and PTAS rates, based upon its unchallenged and effective orders. If the Commission chooses to modify prospective PTAS rates, the only reliable evidence demonstrates that

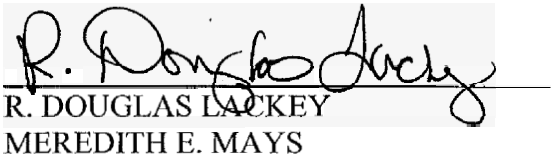
BellSouth's total costs to provide PTAS service are $24.36, and after accounting for the EUCL, the resulting statewide PTAS rate should be set at $17.23 on a going forward basis.

Respectfully submitted this 15th day of June, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, Florida 32301
(305) 347-5558



R. DOUGLAS LACKEY
MEREDITH E. MAYS
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404) 335-0750

539196