ORIGINAL

Matilda Sanders

From: Barclay, Lynn [Lynn.Barclay@BELLSOUTH.COM]
Sent: Wednesday, September 01, 2004 4:02 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: RE: 030300-TP Letter requesting Commission take official notice of a Mississippi Order

a. Lynn Barclay
Legal Secretary to Meredith E. Mays
BellSouth Telecommunications, Inc.
c/o Nancy Sims
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0788
lynn.barclay@bellsouth.com

b. Docket No. 030300-TP (Petition of the Florida Public Telecommunications Association for Expedited Review of BellSouth

Telecommunications Inc.'s Tariffs With Respect to Rates for Payphone Line Access, Usage, and Features)

c. BellSouth Telecommunications, Inc.
on behalf of Meredith E. Mays

d. 8 pages total (including attachment)

e. BellSouth Telecommunications, Inc.'s Letter requesting Commission take official notice of a Mississippi Order denying a claim for refunds, issued today.

<<030300 MS Order.pdf>>

CMP _____
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OPC _____
MMS _____
RCA _____
SCR _____
SEC 1
OTH _____

Lynn Barclay
Legal Department
675 West Peachtree Street
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ORIGINAL

Legal Department

Meredith Mays
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0750

September 1, 2004

Ms. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 030300-TP (Petition of the 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. Bayó:

BellSouth respectfully requests that the Commission take official notice of the attached decision from the Mississippi Public Service Commission, which denied a claim for refunds sought by the Southern Public Communication Association that was issued today.

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

Sincerely,

Meredith Mays (JO)

Meredith Mays

Enclosure

cc: Parties of Record
Nancy White
Lee Fordham

549157

CERTIFICATE OF SERVICE
DOCKET NO. 030300-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 1st day of September, 2004 to the following:

Lee Fordham
Adam Teitzman
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Represents Davel Communications

Meredith Mays (FR)
Meredith E. Mays

(+) signed Protective Areement

BEFORE THE
MISSISSIPPI PUBLIC SERVICE COMMISSION

In Re: Complaint of the Southern Public Communication Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to its Rates for Payphone Line Access, Usage, And Features	)))))	**Docket No. 2003-AD-927**

ORDER

COMES NOW, the Mississippi Public Service Commission ("Commission"), being fully apprised of the facts and matters raised herein, including a full review of the pleadings filed and upon hearing oral argument of legal counsel for the parties on the Motion to Dismiss, finds and rules as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On December 19, 2003, the Southern Public Communication Association ("SPCA") filed a Formal Complaint seeking refunds for alleged overcharges in connection with pay telephone access service ("PTAS") purchased from BellSouth Telecommunications, Inc. ("BellSouth"). SPCA sought two types of refunds in its Complaint: (a) the amount of the federally tariffed end user common line charge ("EUCL") or subscriber line charge ("SLC") paid since April 15, 1997 through October 1, 2003[1]; and (b) the amounts paid for intrastate pay telephone access service that SPCA believes represents an "overcharge". SPCA asserts that its claims for refunds arise out of Section 276 of the Telecommunications Act of 1996 ("TA 96") as well as the various orders issued by the Federal Communications Commission ("FCC") implementing the provisions

[1] Effective on October 1, 2003, BellSouth's PTAS tariff rates were modified pursuant to agreement between the payphone service provider members of SPCA and BellSouth. (BellSouth's Motion to Dismiss at p. 5). SPCA's claim for refunds ends on this date. (SPCA's Complaint at pp. 3, 7-11).

of TA 96 as they relate to payphone services. SPCA relies in particular upon the FCC's *Wisconsin Order*[2]. (Complaint at pp. 1-3).

The Commission had previously approved BellSouth's tariffed rates for PTAS, effective as of April 15, 1997, by Order dated July 14, 1997, in Docket No. 97-UN-0302. The Commission takes administrative notice of its prior proceedings and orders in Docket No. 97-UN-0302. Significantly, the Commission notes that its July 14, 1997, Order approving BellSouth's tariffed PTAS rates was never appealed or contested by any party, despite the fact that SPCA's predecessor entity, the Gulf States Public Communications Council ("GSPCC"), was a party to that proceeding and had been furnished with the proprietary cost studies and underlying cost data filed by BellSouth in support of its PTAS rates as being in compliance with the FCC's "new services test". (Motion to Dismiss at pp.3-5). In 2003, BellSouth reduced its tariffed rates for PTAS service through a tariff that became effective October 1, 2003.

On February 5, 2004, BellSouth filed both an Answer and a separate Motion to Dismiss. BellSouth raised a number of grounds for dismissal, including: (1) the FCC did not require or contemplate refunds in the *Wisconsin Order*; (2) during the appeal of the *Wisconsin Order* to the District of Columbia Circuit, the FCC argued its *Wisconsin Order* applied to the ILECs in that state only, which further demonstrates refunds are not appropriate in this proceeding; (3) the filed rate doctrine precludes any refunds in this proceeding; (4) the prohibition against retroactive ratemaking precludes any refunds in this proceeding; (5) refunds are not authorized by any other payphone orders; (6) similar requests for refunds after the issuance of the *Wisconsin Order* have been denied in other states; and, finally, (7) SPCA's claims are time-barred.

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[2] Memorandum Opinion and Order, *In the Matter of Wisconsin Public Service Commission*, 17 FCC Rcd. 2051 (Jan. 31, 2002) (the "*Wisconsin Order*"); affirmed, 334 F. 3d 69, 357 U.S. App. D.C. 231 (D.C. Cir. 2003).

On February 27, 2004, SPCA responded to BellSouth's Motion to Dismiss, claiming that BellSouth's tariff filings did not satisfy Section 276 of the Telecommunications Act of 1996 and the FCC's orders implementing Section 276 until October 1, 2003. SPCA primarily relies upon the FCC's January 31, 2002 *Memorandum Opinion and Order* in Docket No. 00-01 ("*Wisconsin Order*"); in its Complaint, SPCA states "[t]he *Wisconsin Order* . . . provided a basis for this Petition." (Complaint, pp. 2 and 5).

Subsequent to the filing of the Motion to Dismiss and the Response in Opposition thereto, the parties have each filed numerous legal memoranda supporting their respective positions. **In addition, BellSouth** filed a Motion to Strike portions of SPCA's Third Supplemental Response in Opposition.

The legal standard applicable to a motion to dismiss requires the Commission to accept the allegations in the complaint as true and consider whether the facts state a cause of action. *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss. 1999).

On June 29, 2004, the Commission conducted a Hearing on BellSouth's Motion to Dismiss. At the Hearing, SPCA and BellSouth were each represented by legal counsel. Additionally, legal counsel for the Commission and the Mississippi Public Utilities Staff ("MPUS") were present.

Following the Hearing, the Commission requested that the parties submit Proposed Orders for consideration by the Commission. Both SPCA and BellSouth submitted Proposed Orders on July 30, 2004.

II. COMMISSION JURISDICTION

Pursuant to Miss. Code Ann., § 77-3-5, this Commission has exclusive original jurisdiction over the intrastate business and property of public utilities. Also, Miss. Code Ann., §

77-2-3, as amended, provides that the function of this Commission shall be regulatory and quasi-judicial in nature. This Commission is empowered to make investigations and determinations, prescribe rules and issue orders regarding the control and conduct of the businesses coming within its jurisdiction.

III. FINDINGS OF THE COMMISSION

It is clear that SPCA seeks an order from this Commission that would violate both the prohibition against retroactive ratemaking (*United Gas Corp. v. Mississippi Public Service Commission*, 127 So. 2d 1355 (Miss. 1988)) as well as the filed rate doctrine (*United Gas Pipe Line Co. v. Wilmut Gas & Oil Co.*, 97 So. 2d 530 (Miss. 1957)). This Commission cannot grant such a request. Furthermore, SPCA's Response in Opposition to BellSouth's Motion to Dismiss states, in relevant part, that this Commission's July 14, 1997, Order was issued "without the benefit of the FCC's [January 31, 2002] *Wisconsin Order*" and that this Commission should "review prior actions." In essence, the SPCA claims that the FCC's 2002 *Wisconsin Order*, which was clearly issued after this Commission's July 14, 1997 Order, is preemptive. SPCA's claims in this regard cannot even withstand scrutiny based upon the FCC's *Wisconsin Order* itself, in which the FCC acknowledged that "disparate applications of the new services test in various state proceedings" would occur and the FCC never directed or even discussed the issuance of refunds. Moreover, although SPCA contends that the *Wisconsin Order* preempted this Commission's 1997 Order, the Commission can find no language in the *Wisconsin Order* that supports SPCA's claim.

SPCA also cannot support its statement that BellSouth was under a continuing duty to revise its rates by any clear or express statutory language. Furthermore, SPCA has not supported its claim that BellSouth was under any continuing filing obligation.

Accordingly, the Commission finds that SPCA cannot demonstrate any legal basis that justifies the relief it requests. SPCA cannot circumvent this Commission's lawful authority and the previously approved tariff rates. BellSouth's PTAS tariff was duly approved by this Commission in 1997. Further, there is no language contained within the FCC's *Wisconsin Order* that justifies such extraordinary relief.

Finally, the Commission notes that both parties have provided orders from other state commissions to support their positions in this proceeding. The Commission finds, however, that allowing the complaint to continue would effectively excuse SPCA's failure to raise any concern regarding Commission approved tariff rates in Mississippi from July 1997 to October 2003. Although SPCA cites to decisions from Georgia, Kentucky, Louisiana, North Carolina, South Carolina, and Tennessee, the Commission notes that all of these orders were issued after this Commission's July 1997 Order. Had SPCA believed such orders supported its position, SPCA could have raised its concerns in 1999, 2001, or 2002 after any of these decisions had been issued. SPCA, however, did not file its complaint here until December, 2003. Both federal and state statutes of limitation, as well as BellSouth's approved tariffs, require complaining parties to proactively seek relief. Consequently, the Commission makes the additional finding that SPCA's failure to file its complaint until some six (6) years after this Commission approved BellSouth's PTAS tariffs bars its Complaint under both federal and state statutes of limitation.

IT IS THEREFORE ORDERED THAT:

(1) The Commission grants BellSouth's Motion to Dismiss and, accordingly, SPCA's Complaint is hereby dismissed with prejudice.

(2) The Commission denies as moot BellSouth's Motion to Strike Portions of SPCA's Motion to Strike.

(3) **This Order is effective** upon execution.

Chairman Bo Robinson voted Aye; Vice Chairman Nielsen Cochran voted Aye; and Commissioner Michael Callahan voted Aye.

SO ORDERED by the Commission on this the 1st day of September, 2004.

MISSISSIPPI PUBLIC SERVICE COMMISSION

BO ROBINSON, CHAIRMAN

NIELSEN COCHRAN, VICE CHAIRMAN

MICHAEL CALLAHAN, COMMISSIONER

Attest: A True Copy

Brian U. Ray, Executive Secretary