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 ORDER NO. PSC-03-0828-FOF-TP ISSUED: July 16, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

I. Background

On March 26, 2003, the Florida Public Telecommunications Association (FPTA) filed a Petition for Expedited Review of BellSouth Telecommunications, Inc.'s (BellSouth) Tariffs with Respect to Rates for Payphone Line Access, Usage, and Features.

On April 15, 2003 BellSouth filed its Answer and a Partial Motion to Dismiss FPTA's Petition. On the same date, FPTA filed a Motion for Extension of Time in which to Respond to the Motion to Dismiss filed by BellSouth, requesting the filing date be extended until May 9, 2003. By Order No. PSC-03-0538-PCO-TP, issued April 25, 2003, the filing date was extended, and FPTA filed its response on May 9, 2003.

By Order No. PSC-03-0622-PCO-TP. issued May 23, 2003, FPTA's Request for Expedited Review was denied.

II. Discussion of the Issues

FPTA's Petition

In its petition, FPTA requests that we review BellSouth's intrastate tariffs for pay telephone access services (PTAS) for compliance with Chapter 364, Florida Statutes, Section 276 of the Telecommunications Act of 1996 (the Act), and orders of the Federal Communications Commission (FCC) which implement Section 276 of the Act.

At the time of the implementation of the Act, the FCC required Incumbent Local Exchange Companies (ILECs) to file tariffs at the state level, on or before April 15, 1997, establishing cost-based, non-discriminatory rates for basic payphone access lines, related usage, and ancillary services. FPTA states that in order to be "non-discriminatory," the FCC required that these rates satisfy the "new services test." The "new services test," FPTA contends, establishes pricing based upon the direct cost of providing the services, plus a reasonable amount of common overhead loadings.

FPTA states that on August 11, 1998, in Docket No. 970281-TL, we issued Order No. PSC-98-1088-FOF-TL (*PTAS Order*) concluding that "[e]xisting incumbent local exchange tariffs for smart and dumb line payphone services are cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and nondiscriminatory." FPTA filed a protest, which was later withdrawn. Therefore, on March 9, 1999, we issued Order No. PSC-99-0493-FOF-TL (*Final PTAS Order*) closing the docket and reinstating Order No. PSC-98-1088-FOF-TL by establishing a new effective date of January 19, 1999.

FPTA asserts that the rates found to be cost-based and consistent with the Act in Docket No. 970281-TL included a federally tariffed monthly subscriber line charge (SLC). However, on January 31, 2002, the FCC issued In the Matter of Wisconsin Public Service Commission: Order Directing Filings, FCC Memorandum Opinion and Order Bureau, 17 FCC Rcd. 2051 (January 31, 2002) (*Wisconsin Order*) finding that all RBOCs must reduce the monthly per line payphone rate by the amount of the SLC to prevent the

double recovery of costs associated with facilities providing PTAS to payphone service providers (PSPs).

FPTA further alleges that since January 19, 1999, BellSouth's costs to provide PTAS have consistently decreased. Despite this decrease, FPTA contends, BellSouth has failed to correspondingly reduce the PTAS rates paid by PSPs, and has charged PSPs the SLC.

In addition, FPTA states that the RBOC Coalition counsel stated in a letter dated April 10, 1997, to the Deputy Chief of the FCC Common Carrier Bureau, that if a new tariff for PTAS was filed to comply with the "new services test" and it was lower than the previously tariffed rate, the LEC would provide a credit or other compensation to purchasers back to April 15, 1997. The Common Carrier Bureau then issued the *Waiver Order*[1]. The *Waiver Order* granted LECs a limited waiver of the tariffing deadline, but stated that LECs must reimburse customers or provide credit from April 15, 1997, if the newly tariffed rates, when effective, were lower than the existing tariffed rates.

Of the requests made by FPTA in its Petition, only two items are the subject of BellSouth's Motion to Dismiss. FPTA requests that BellSouth be directed to (1) refund all amounts paid for SLCs since April 15, 1997, and (2) refund to PSPs the difference between (a) the PTAS rates, including rates for access lines, features, and usage paid by PSPs to BellSouth since January 20, 1999, and (b) the lawful PTAS rates which should have been charged by BellSouth since January 20, 1999 if the rates had been properly calculated using the "new services test."

We are vested with jurisdiction pursuant to Sections 364.27, 364.04, 364.08, Florida Statutes and the Act.

BellSouth's Motion to Dismiss

Under Florida law, the purpose of a Motion to Dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350

[1]In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, DA 97-805 (rel. Apr. 15, 1997) (*Waiver Order*).

(Fla. 1st DCA 1993). In order to sustain a Motion to Dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290- S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

BellSouth's Motion to Dismiss addresses only the two refund requests contained in FPTA's petition. BellSouth asserts that the request for a refund of subscriber line charges (SLC), and the request seeking a refund of PTAS, fail to state a claim for which we may grant relief.

BellSouth contends that it is clear from FPTA's petition that it has never sought any regulatory or judicial review of BellSouth's Florida PTAS rates since January 20, 1999, nor did it lodge any formal request for a refund until nearly a year after the FCC's *Wisconsin Order*.

BellSouth further argues that FPTA is not entitled to refunds because we have no authority to make retroactive ratemaking orders. In City of Miami v. Florida Public Service Commission, 208 So.2d 249, 259 (Fla. 1968), BellSouth states, the Florida Supreme Court held that the statutory language of Section 364.14, Florida Statutes, limits rates to be fixed prospectively only. Id. at 260, and Section 364.14(1)(c) states ("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.")

Further, BellSouth states, the doctrine of retroactive ratemaking was addressed by us in Order No. PSC-98-1583-FOF-WS, issued November 25, 1998, in Docket No. 971663-WS. In that Order we explained that:

> 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.)

BellSouth argues that it has been charging for payphone access lines in compliance with the *PTAS Order* and *Final PTAS Order*, which have not been appealed, revoked, or modified by us.

Additionally, BellSouth argues that the filed rate doctrine prohibits FPTA's claims for refunds. BellSouth states 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). BellSouth argues that any other rule would lead to constant reconsideration and to confusion regarding our orders, and to companies "in constant jeopardy of refunding monies even though they had complied with their filed rates." See, Idaho Sugar v. Intermountain Gas Co.,597 P.2d 1058, 1063-64 (1979); AT&T v. Federal Communications Commission, 836 F.2d 1386, 1394 (D.C. Cir. 1987 (J. Starr, concurring).

BellSouth allows that there are limited circumstances where exceptions to the proscription against retroactive ratemaking or the filed rate doctrine have been made. But, BellSouth states, those unique circumstances do not apply in this case. BellSouth cites United Telephone Company of Florida v. Mann, 403 So.2d 962 (Fla. 1981), where interim rates were set, which were later modified. There, the court found refunds from the date of any interim rates were appropriate. When we were found on appeal to have improperly implemented the terms of the remand order in GTE Florida Inc. v. Clark, 668 So.2d 971 (Fla. 1996), the Florida Supreme Court distinguished rate changes dating from orders appealed from cases in which a new rate is requested and applied retroactively. BellSouth asserts, in contrast to FPTA, that BellSouth has never appealed the *Final PTAS Order*, nor are these interim rates which will be subject to final regulatory action at a later date.

Similarly, BellSouth states, the FCC has allowed refunds when a carrier has filed a new or revised charge with the FCC and the FCC decides to hold a hearing under Section 204(1)(a) of the Telecommunications Act. Then the FCC may suspend the new or revised charge and order the carrier to keep an account of the amounts collected. After the hearing, the FCC may then allow the charge to go into effect if the carrier refunds the amounts the FCC did not find justified. The FCC ordered such refunds in the *Physical Collocation Order*,[2] and in the *LIDB Order*.[3] However, BellSouth contends, the refunds ordered in the *Physical Collocation Order* and the *LIDB Order* were applied to new or revised rates before the FCC and were not applied to rates that had previously been in effect.

BellSouth states that since its ultimate rates were not lower than existing rates when the *Waiver Order* was issued, no refunds were due to FPTA members.

BellSouth adds that other states have rejected similar refund requests, citing Kansas and Ohio as examples. The Kansas Commission stated:

> [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.[4]

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[2]Second Report and Order, In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access Switched Transport, 12 FCC Rcd 18,730 (June 13, 1997). (*Physical Collocation Order*)

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

[4]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 FCC's "New services Test" Decision Issued January 31, 2002, Docket No. 02-KAPT-651-GIT (December 10, 2002) (BellSouth Petition, Attachment

Likewise, the Ohio Commission rejected retroactive ratemaking.[5]

In further support of its argument, BellSouth filed, on May 5, 2003, an order of the Kentucky Public Service Commission, dated May 1, 2003, stating that, while it finds the *Wisconsin Order* to require the reduction in the amount of payphone access rates by the amount of the SLC, it does not deem refunds necessary. The Kentucky Commission stated:

> The Commission made its 1999 decision based on the facts that were known at that time. The FCC had not provided any guidance with regard to the SLC in consideration of setting payphone access line rates. . . . If the KPA [Kentucky Payphone Association] believed that the Commission had erred in its decision, it should have contested the Order. Rates are final until this Commission modifies them. They may not lawfully be changed and refunded based upon issues that were unknown at the time they were set.[6]

FPTA's Response

In its Response, FPTA states that federal law preempts all state decisions conflicting with the FCC's implementation of Section 276 of the Act. FPTA asserts that the *Wisconsin Order* preempts any state requirements inconsistent with the FCC's regulations implemented pursuant to Section 276(b)(1).

FPTA further asserts that federal law requires us to order refunds to bring BellSouth into compliance with Section 276 of the Act. FPTA alleges that BellSouth has an affirmative obligation to conform its rates to the "new services test" and that by continuing to charge EUCL rates to PSPs, and not lowering its rates although

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1, p. 11).

[5]Order, In Re: the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 17996 Regarding Pay Telephone Services, Case No. 94-1310-TP-COI (November 26, 2002) (BellSouth Petition, Attachment 2, p. 11).

[6]In the Matter of: Deregulation of Local Exchange Companies' Payphone Service, Administrative Case No. 361, p. 3.

its costs have decreased, BellSouth is in violation of Section 276 of the Act. FPTA adds that the FCC has broad authority under the Act to issue refunds to correct over-compensation in violation of Section 276 to ensure fair competition. MCI Telecom Corp. v. FCC, 143 F.3d 606, 609 (D.C. 1998). Therefore, FPTA states:

> In its present capacity, the PSC is acting through the FCCs [sic] 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.

Lastly, FPTA states that even if we find that Florida law is preempted by federal law, we have discretion, under our equitable ratemaking power, to issue refunds.

FPTA contends that a fundamental principle of the general prohibition on retroactive ratemaking is the utility's reasonable reliance on the approved rate. Since the FCC's implementation of the Act has been ongoing and has evolved through multiple decisions, FPTA claims that BellSouth cannot claim detrimental reliance on our initial approval of its state tariffs as a final resolution. FPTA contends that BellSouth was well aware of the inconsistencies in application of Section 276 of the Act and that it was a member of the coalition involved in the Wisconsin matter that gave rise to the FCC's *Wisconsin Order*. Therefore, FPTA contends that BellSouth knew the FCC's final interpretation and implementation of the "new services test" could conflict with our prior approval, which would subject BellSouth to refund the amount of the SLC included in the monthly per line rate.

Furthermore, FPTA contends that BellSouth is estopped from claiming a refund cannot be awarded because the Bell operating companies promised the FCC that they would issue refunds for the difference, if the new tariffed rate filed to comply with the "new services test" was lower than the previously tariffed rate.

Finally, FPTA argues that to accept BellSouth's argument that we found BellSouth's rates to be in compliance with Section 276 of the Act and, therefore, PSPs are not entitled to refunds, would mean that BellSouth has no obligation to police its rates to ensure

compliance with Section 276, and to petition us for ratemaking proceedings when its rates are out of compliance. FPTA asserts that this means that BellSouth will never adjust its rates unless it is forced to do so.

FPTA contends that at the very least, BellSouth should be required to refund the EUCL fees it has charged since the *Wisconsin Order*, as well as the excess in rates since its costs decreased.

III. Conclusion

The standard to be applied in disposing of a Motion to Dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

As stated above, BellSouth's Motion to Dismiss addresses only the two refund requests contained in FPTA's petition. BellSouth asserts (1) that the request for a refund of subscriber line charges (SLC), and (2) the request seeking a refund of PTAS, fail to state a claim for which we may grant relief.

BellSouth argues that (1) FPTA has not sought regulatory or judicial review of the PTAS rates, nor lodged a formal request for a refund; (2) the prohibition against retroactive ratemaking prohibits us from granting the requested refunds; (3) the filed rate doctrine prohibits granting the requested refunds; and (4) other states have declined to grant such refunds. Under Varnes, FPTA is only required to state a cause of action; it is not required to prove the ultimate issues of fact. BellSouth's Motion to Dismiss goes beyond the four corners of the petition to the ultimate issues of fact and appears to raise affirmative defenses, which are inappropriate for us to consider in the context of a Motion to Dismiss. Therefore, viewed in the light most favorable to FPTA, it appears that FPTA has stated a cause of action for which we may grant relief. Accordingly, we hold that BellSouth's Motion to Dismiss is denied.

It is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc's Partial Motion to Dismiss is denied. It is further

ORDERED that this Docket shall remain open and shall be set for hearing.

By ORDER of the Florida Public Service Commission this 16th Day of July, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of

the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.