

BEFORE THE 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-04-0470-PHO-TP
ISSUED: May 5, 2004

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on April 19, 2004, in Tallahassee, Florida, before Commissioner Charles M. Davidson, as Prehearing Officer.

APPEARANCES:

DAVID S. TOBIN, Esquire, Tobin & Reyes, P.A., 7251 West Palmetto Park Road, Suite 205, Boca Raton, Florida 33433
On behalf of the Florida Public Telecommunications Association (FPTA).

NANCY B. WHITE, Esquire, and JAMES MEZA, III, Esquire, c/o Nancy Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301; and R. DOUGLAS LACKEY, Esquire, and MEREDITH E. MAYS, Esquire, Suite 4300, 675 W. Peachtree Street, NE, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc. (BST).

LEE FORDHAM, Esquire, and ADAM J. TEITZMAN, Esquire, Office of the General Counsel, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399
On behalf of the Florida Public Service Commission (STAFF).

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Formal hearing proceedings before the Florida Public Service Commission are governed by Chapter 120, Florida Statutes, and Chapters 25-22, 25-40, and 28-106, Florida Administrative Code. To the extent provided by Section 120.569(2)(g), Florida Statutes, the Florida Evidence Code (Chapter 90, Florida Statutes) shall apply. To the extent provided by Section 120.569(2)(f), Florida Statutes, the Florida Rules of Civil Procedure shall apply.

DOCUMENT NUMBER DATE

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FPSC-COMMISSION CLERK

Rule 28-106.211, Florida Administrative Code, specifically provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of this case. This Order is issued pursuant to that authority. The scope of this proceeding shall be based upon the issues raised by the parties up to and during the prehearing conference, unless modified by the Commission or Prehearing Officer.

II. CASE 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. On July 16, 2003, by Order No. PSC-03-0828-FOF-TP, BellSouth's Partial Motion to Dismiss was denied, and the matter is now set for administrative hearing.

III. ATTENDANCE AT HEARING: PARTIES AND WITNESSES

Unless excused by the Presiding Officer for good cause shown, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date that:

- (i) all parties agree that the witness will not be needed for cross examination; and
- (ii) all Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness' testimony.

IV. PENDING MOTIONS

None presently pending.

V. PROPOSED STIPULATIONS

None at this time.

VI. OPEN PROCEEDINGS AND PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

- A. Confidential information should be treated in accordance with the provisions of the Order Establishing Procedure previously issued in this docket.
- B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.
 - 1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing by the Commission.
 - 2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:
 - a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing, unless approved by the Prehearing Officer for good cause shown. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
 - b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services' confidential files.

VII. PENDING CONFIDENTIALITY MATTERS

The only confidentiality request filed in this Docket has been previously addressed by Order No. PSC-04-0055-CFO-TP.

VIII. OPENING STATEMENTS

Opening Statements, if any, shall not exceed 20 minutes per party.

IX. WITNESSES: OATH, PREFILED TESTIMONY, EXHIBITS, AND CROSS-EXAMINATION

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read. However, all testimony remains subject to appropriate objections. Upon insertion of a witness' testimony into the record, exhibits appended thereto may be marked for identification.

Following affirmation that the witness has been sworn, the witness shall then be tendered for cross-examination by all parties and staff. Commissioners may also pose questions as they deem appropriate. Witnesses are reminded that, on cross examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and staff have had the opportunity to object and cross-examine, exhibits may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

X. ORDER OF WITNESSES

Witnesses will be heard in the following order except that where a witness has submitted both direct and rebuttal testimony, his or her direct and rebuttal testimony will be heard at the same time.

<u>Witness</u>	<u>Proffered By</u>	<u>Issue Nos.</u>
<u>Direct and Rebuttal</u>		
Bruce W. Renard	FPTA	All
Don J. Wood *	FPTA	1A *, 1B, 2A, 2B
Kathy K. Blake	BST	All
W. Bernard Shell (adopting prefiled testimony of D. Daonne Caldwell)	BST	2B

* Witness Wood's Direct Testimony addresses Issue 1A

XI. EXHIBIT LIST

The following lists the exhibits proffered by parties and staff prior to the hearing. However, parties and staff reserve the right to identify additional exhibits for the purpose of cross-examination during the hearing.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Renard	FPTA	<u>BWR-1</u>	Letters from Michael K. Kellog to Mary Beth Richards dated April 10, 1997, and April 11, 1997, regarding request for a limited waiver of the Federal Communications Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions
Renard	FPTA	<u>BWR-2</u>	FPTA's Response to BellSouth's Motion to Dismiss
Wood	FPTA	<u>DJW-1</u>	Vita of Don J. Wood
Wood	FPTA	<u>DJW-2</u>	Analysis of Current BellSouth Access Rates
Blake	BST	<u>KKB-1</u>	Revised BellSouth PTAS Tariff, GSST Section A7.4
Blake	BST	<u>KKB-2</u>	BellSouth's Motion to Dismiss, filed April 15, 2003
Blake	BST	<u>KKB-3</u>	Analysis of BellSouth Rates for Payphone Access Lines
Shell	BST	<u>DDC-1</u>	PROPRIETARY - BellSouth's PTAS Cost Study
Shell	BST	<u>DDC-2</u>	PROPRIETARY -- Summary of Cost Results

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Shell	BST	<hr/> DDC-3	Basic Network Components considered in PTAS cost study

XII. BASIC POSITIONS

FPTA: In Docket No. 970281-TL, PAA Order No. PSC-98-1088-FOF-TL (the “1998 Order”), issued on August 11, 1998, this Commission determined BellSouth’s intrastate payphone rates to be in compliance with the FCC’s “new services test.” However, this Commission issued that order without the benefit of the FCC’s *Wisconsin Order* and the FCC’s many orders interpreting Section 276 of the Act. As a result, the Commission’s 1998 Order is in direct conflict with the FCC’s *Wisconsin Order*. The *Wisconsin Order* preempts any state requirements inconsistent with the FCC’s regulations implemented pursuant to Section 276(b)(1).

BellSouth continued to charge and collect EUCL from PSPs despite clear orders by the FCC that charging and collecting EUCL from PSPs constitutes a violation of Section 276 of the Telecom Act. Additionally, notwithstanding the FCC’s many orders implementing Section 276 of the Act, BellSouth continues to charge illegal PTAS rates. In her direct testimony filed in this proceeding, Ms. Kathy Blake of BellSouth testifies that “BellSouth’s costs to provide PTAS service, including overhead loadings, on a statewide average basis is \$24.63.” Although FPTA believes that rate to be excessive, BellSouth’s current rates, which are as high as \$36.23, or \$11.60 more than BellSouth’s admitted cost, are not cost based in compliance with the new services test.

The 1998 Order does not forever relieve BellSouth of its obligations under Federal law to offer cost-based PTAS rates in compliance with Section 276 of the Telecom Act. The Commission must find that BellSouth has an affirmative and continuing obligation to offer cost based PTAS rates in compliance with the new services test. Neither the FPTA, Commission Staff, nor any other third party should be burdened with the obligation to police BellSouth’s PTAS rates to ensure that BellSouth’s PTAS rates comply with Federal law. Any other finding would turn Section 276 of the Telecommunications Act and the FCC’s many subsequent orders interpreting Section 276 of the Act, particularly the *Wisconsin Order*, directly on its head.

Finally, this Commission cannot permit BellSouth to retain the unlawful profits it has collected since April 15, 1997 by illegally overcharging payphone service providers. There can be no doubt that BellSouth has overcharged PSPs by charging and collecting

EUCL charges and excessive rates. To allow BellSouth to retain those unlawful profits to the detriment of the payphone industry would continue to negatively impact the widespread deployment of payphones in the State of Florida in violation of Section 276 of the Telecom Act.

BST: BellSouth has and continues to charge payphone service providers (PSPs) in Florida lawful PTAS rates that comply with all applicable legal requirements. In the event that this Commission chooses to prospectively set new PTAS rates, the appropriate statewide rate would be \$17.23.

The FPTA's claims for a refund are legally deficient and seek a remedy that this Commission is without authority to order. Notwithstanding the lack of authority, the FPTA's claims are also barred by a number of legal and regulatory doctrines, including, but not limited to, the prohibition against retroactive ratemaking as well as the filed tariff doctrine, applicable statutes of limitation and BellSouth's tariff provisions (*see* General Subscriber Service Tariff (GSST) Sections A2.5.5 *and* A2.4.3) (BellSouth shall not be liable for any damages when a claim is not presented within sixty days after the alleged delinquency occurs *and* requirement that customers "promptly report" objections to billed charges).

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions stated herein.

XIII. ISSUES AND POSITIONS

ISSUE 1A: **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?**

FPTA: BellSouth claims that it filed a revision to its General Subscriber Service Tariff, Section A7.4 to reduce the Florida payphone rates by the EUCL amount on October 27, 2003, which, BellSouth claims, became effective November 19, 2003. FPTA contends that although BellSouth filed its tariff, it continues to include EUCL on its invoices for PTAS.

BST: BellSouth reduced its intrastate payphone line rates by the EUCL amount effective November 10, 2003, although it was not required to do so. This Commission has no authority to order refunds nor would refunds be appropriate in this case.

STAFF: Staff has no position at this time.

ISSUE 1B: **AS OF WHAT DATE WAS BELL SOUTH REQUIRED TO REDUCE ITS INTRASTATE PAYPHONE LINE RATES BY THE AMOUNT OF THE INTERSTATE EUCL?**

FPTA: BellSouth was required to reduce its intrastate payphone line rates by the amount of the interstate EUCL on or before April 15, 1997.

BST: BellSouth reduced its intrastate payphone line rates by the EUCL amount effective November 10, 2003, although it was not required to do so. This Commission has no authority to order refunds nor would refunds be appropriate in this case.

STAFF: Staff has no position at this time.

ISSUE 1C: **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 AMOUNT OF ANY REQUIRED REFUNDS AND HOW SHOULD ANY REFUNDS BE EFFECTED?**

FPTA: Yes, the Commission must order refunds. The amount of the refund should be the amount paid to BellSouth by payphone service providers for EUCL since April 15, 1997. A calculation of the refund due cannot be made until discovery in this matter is completed. The refunds should be effected by payment of the amount of EUCL as soon as reasonably practicable after the Commission's decision in this proceeding.

BST: BellSouth reduced its intrastate payphone line rates by the EUCL amount effective November 10, 2003, although it was not required to do so. This Commission has no authority to order refunds nor would refunds be appropriate in this case.

STAFF: Staff has no position at this time.

ISSUE 2: IN DOCKET NO. 970281-TL, 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.

ISSUE 2A: ARE BELLSOUTH'S INTRASTATE PAYPHONE RATES NO LONGER COMPLIANT WITH THE NEW SERVICES TEST? IF SO, WHEN DID THEY BECOME NONCOMPLIANT?

FPTA: BellSouth's rates are not currently in compliance with the new services test. Since the effective date of PAA Order No. PSC-98-1088-FOF-TL, BellSouth's costs have continuously trended downward (this Commission's orders regarding UNE rates are consistent with such an observation). A determination of the exact date that BellSouth's costs were reduced cannot be made until discovery in this matter is completed. However, FPTA believes that BellSouth's intrastate payphone rates were not compliant with the new services test shortly after the effective date of PAA Order No. PSC-98-1088-FOF-TL. As the FCC has made clear, the application of the new services test is a dynamic and ongoing process that recognizes changes in cost levels over time.

BST: BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test; as such, no rate modification is required. This Commission can order BellSouth to prospectively revise its intrastate payphone rates if it so chooses; if it does so the appropriate statewide rate would be \$17.23, which rate would likewise comply with the new services test. Because BellSouth's intrastate payphone rates have never been noncompliant with the new services test, there is no basis for any refunds. Moreover, this Commission has no authority to order refunds based upon well-settled legal and regulatory principles, and if the Commission considered a refund claim (which it should not) such a claim would be barred by the applicable statute of limitations as well as BellSouth's filed tariffs.

STAFF: Staff has no position at this time.

ISSUE 2B: 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?

FPTA: Based upon the cost study attached to Ms. Caldwell's direct testimony filed by BellSouth in these proceedings, BellSouth's monthly intrastate PTAS line rate should be \$10.91 to be compliant with the new services test. That rate does not include the monthly \$7.13 EUCL charge that BellSouth continues to charge and collect on each PTAS line.

BST: BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test; as such, no rate modification is required. This Commission can order BellSouth to prospectively revise its intrastate payphone rates if it so chooses; if it does so the appropriate statewide rate would be \$17.23, which rate would likewise comply with the new services test. Because BellSouth's intrastate payphone rates have never been noncompliant with the new services test, there is no basis for any refunds. Moreover, this Commission has no authority to order refunds based upon well-settled legal and regulatory principles, and if the Commission considered a refund claim (which it should not) such a claim would be barred by the applicable statute of limitations as well as BellSouth's filed tariffs.

STAFF: Staff has no position at this time.

ISSUE 2C: CAN THIS COMMISSION ORDER BELLSOUTH TO REVISE ITS INTRASTATE PAYPHONE RATES? IF SO, AS OF WHAT DATE SHOULD ANY SUCH RATE CHANGES BE EFFECTIVE?

FPTA: Yes. This Commission has the authority and must require BellSouth to reduce its intrastate rates for payphone access services. Compliant rates should be required to be in place as soon as reasonably practicable after the Commission's decision in this proceeding.

BST: BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test; as such, no rate modification is required. This Commission can order BellSouth to prospectively revise its intrastate payphone rates if it so chooses; if it does so the appropriate statewide rate would be \$17.23, which rate would likewise comply with the new services test. Because BellSouth's intrastate payphone rates have never been noncompliant with the new services test, there is no basis for any refunds. Moreover, this Commission has no authority to order refunds based upon well-settled legal and regulatory principles, and if the Commission considered a refund claim (which

it should not) such a claim would be barred by the applicable statute of limitations as well as BellSouth's filed tariffs.

STAFF: Staff has no position at this time.

ISSUE 2D: IF BELLSOUTH'S PAYPHONE RATES BECAME 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?

FPTA: Yes. This Commission must require BellSouth to refund the difference between compliant rates and the rates actually charged to FPTA members. A calculation of the refund due for each time period cannot be calculated until discovery in this matter is completed.

BST: BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test; as such, no rate modification is required. This Commission can order BellSouth to prospectively revise its intrastate payphone rates if it so chooses; if it does so the appropriate statewide rate would be \$17.23, which rate would likewise comply with the new services test. Because BellSouth's intrastate payphone rates have never been noncompliant with the new services test, there is no basis for any refunds. Moreover, this Commission has no authority to order refunds based upon well-settled legal and regulatory principles, and if the Commission considered a refund claim (which it should not) such a claim would be barred by the applicable statute of limitations as well as BellSouth's filed tariffs.

STAFF: Staff has no position at this time.

XIV. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

The parties have submitted the following decisions:

Alabama Public Service Commission's Order No. 2 in Docket No. 29172, issued April 13, 2004

Michigan Public Service Commission's Order in Docket No. U-11756, issued March 16, 2004

XV. POST-HEARING PROCEDURES

The Commission has the authority and discretion to render a bench decision at the time of the hearing or to render a decision without any post hearing submissions by the parties. Such a determination may be with or without the oral or written recommendation of the Commission staff, at the Commission's discretion.

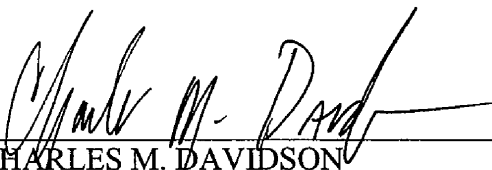
If the Commission does not make a bench decision at the hearing, each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 50 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time, unless modified by the Presiding Officer.

It is therefore,

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 5th day of May, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(S E A L)

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.