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June 15, 2004

Via Hand Delivery

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

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

Dear Ms. Bayo:

Enclosed please find the Florida Public Telecommunications Association, Inc.'s Post-Hearing Brief, which we ask that you file in the above referenced docket.

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.

Very truly yours,

TOBIN & REYES, P.A.

David S. Tobin

CMP ____
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Enclosure

Cc: All Parties of Record

ORIGINAL

BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Public Telecommunications Association for Expedited Review of BellSouth Telecommunications, Inc.'s Tariffs with respect Rates for Payphone Line Access, Usage, and Features.	)	Docket No.: DN 030300-TD Filed: June 15, 2004

POST-HEARING BRIEF OF
THE FLORIDA PUBLIC TELECOMMUNICATIONS ASSOCIATION, INC.

The Florida Public Telecommunications Association, Inc. ("FPTA") respectfully submits this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

On February 2, 1996, the Telecommunications Act of 1996 (the "Act") became law. The Telecommunications Act of 1996 was an unusually important legislative enactment that changed the landscape of telecommunications regulation in our country. Through this comprehensive amendment to the Communications Act of 1934, Congress sought to establish a pro-competitive national telecommunications policy. Congress' express purpose for passing Section 276 of the Act was "... to promote competition among payphone service providers and promote the widespread deployment of payphone services to benefit the general public."

Also in 1996, the FCC passed a series of *Payphone Orders* that provided specific standards for the implementation of Section 276 of the Act, many of which were not new standards but had been in place for many years, including the *Computer III Guidelines*. In

the 1996 *Payphone Orders*, the FCC required all LECs file intrastate tariffs for payphone access services that: (a) were cost-based, (b) consistent with Section 276 of the Act, (c) non-discriminatory and (d) in compliance with the FCC's new services test. Notwithstanding those long-standing requirements, BellSouth's PTAS rates have to date never complied with those requirements. BellSouth's recent "voluntary" reduction of its PTAS rates by the amount of the federal EUCL charges and proposed rate reductions in these proceedings concede that to be true.

Through two letters from Michael Kellogg, as counsel to the RBOC Coalition of which BellSouth was and is a member, BellSouth acknowledged the FCC's requirement that it certify that its PTAS rates be compliant with Section 276 and the *Payphone Orders*, but requested a waiver indicating that it needed more time to comply with that requirement. The FCC granted BellSouth's waiver request that enabled BellSouth to collect significant amounts in dial around compensation. However, that waiver was contingent on BellSouth's intrastate PTAS rates being in compliance with Section 276 of the Act. Notwithstanding the commitment, BellSouth made no changes to its Florida intrastate payphone rates and, as a result, its rates have to date never complied with those requirements.

Subsequently, BellSouth and the other RBOCs utilized their significant resources to delay implementation of Section 276 of the Act. As a result, the many state payphone associations, including the FPTA, along with the national payphone association, the American Public Communications Council (the "APCC"), worked in concert to seek out the FCC's assistance to clarify the requirements of Section 276 of the Act.

The result of those efforts was the FCC's issuance of two orders. As early as March of 2000, the FCC's Common Carrier Bureau (the "Bureau") issued the *First Wisconsin Order*, and then in January of 2002, the FCC issued the *Second Wisconsin Order*. The FCC's original *Payphone Orders* and the implementation of those orders through the *Wisconsin Orders* form the basis of these proceedings and provide this Commission with the principles that must be applied to ensure that BellSouth's intrastate PTAS rates comply with Section 276 of the Act.

In the *Wisconsin Order*, the FCC specifically found that "payphones are an important part of the nation's telecommunications system. They are critical not only for emergency communications, but also for those Americans who cannot afford their own telephone services." Payphone service is on-demand dial tone/per use wireline, high quality service available twenty-four hours per day, seven days per week, 365 days per year. Users are not required to make an initial investment in equipment, await activation of the service or pay recurring monthly charges. Any member of the public can make calls with coins or by use of calling cards, prepaid cards or other access code arrangements. Emergency 911 calls are free of charge across Florida's payphone base – once again 24/7. Moreover, payphones provide vital access to this nation's telecommunications infrastructure for Florida's poorest citizens and tourists, two very important groups of citizens who deserve this Commission's protection.

FPTA has requested that this Commission implement the national policy mandates set forth in Section 276 of the Act and to implement the standards established by the FCC in its original *Payphone Orders* and the *Wisconsin Orders*. The FPTA is requesting that this Commission establish a prospective BellSouth monthly PTAS rate of

$18.04, which includes the federal EUCL charge and permits BellSouth to fully recover both its direct costs and a reasonable allocation of overhead. The FPTA is also requesting that this Commission require BellSouth to refund to PSPs: (i) the amount of the EUCL unlawfully collected from PSPs Between April 15, 1997 and November 10, 2003; and (ii) the difference between the excessive rates BellSouth actually charged and collected from PSPs and what would have been a proper intrastate PTAS rate compliant with Section 276 of the Act since this Commission's prior orders.

BACKGROUND

The 1996 Act generally "sought to promote competition and...secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid development of new telecommunications services." Specifically, in Section 276 Congress directed the FCC to issue new regulations designed "to promote competition among payphone service providers and promote the widespread deployment of payphones services to the benefit of the general public..." Moreover, Congress specifically provided that "[to] the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

In making its determination in these proceedings, this Commission's final decision must be based upon (a) the Act, particularly Section 276 of the Act; and (b) the FCC's orders implementing Section 276 of the Act. Commencing in the fall of 1996, the FCC issued a series of Orders implementing Section 276 of the Act[1]. The *Payphone*

[1] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecom Act of 1996,* CC Docket 96-128, *First Report and Order,* 11 FCC Rcd. 20541 (1996); *Order on Reconsideration,* 11FCC Rcd. 21233 (1996), *aff'd in*

Orders generally prescribe a four-part standard for determining whether local exchange carrier intrastate PTAS rates meet the requirements of Section 276 as implemented by the FCC: whether those rates are (1) cost based; (2) consistent with the requirements of Section 276 of the Act; (3) nondiscriminatory; and (4) consistent with the FCC's *Computer III* tariffing guidelines (i.e., in compliance with the so-called "new services test"). The FCC specifically relied "on the states to ensure that the basic payphone line service is tariffed in accordance with the requirements of Section 276." *Order on Reconsideration.*

The FCC's Common Carrier Bureau, in reinforcing that the requirements of Section 276 must be applied to existing, previously-tariffed, intrastate payphone services, reiterated the four part test as follows:

> "Tariffs for payphone services, including unbundled features and functions filed with the states, pursuant to the Payphone Reclassification proceeding, must be cost-based, consistent with Section 276, non-discriminatory and consistent with Computer III tariffing guidelines[(i.e., the new services test)]."

Essentially, this test requires that the charge for a rate element not exceed the direct cost plus a reasonable allocation of overhead (defined as joint and common costs).

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part and remanded in part sub nom., Ill. Public Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); *First Clarification Order,* 12 FCC Rcd. 20997 (Com. Car. Bur. 1997); *Second Clarification Order,* 12 FCC Rcd. 21370 (Com. Car. Bur. 1997); *Second Report and Order,* 13 FCC Rcd. 1778 (1997), *aff'd in part and remanded in part. Sub nom., MCI Telecoms Corp. v. FCC,* 143 F.3d 606 (D.C. Cir. 1998); *Third Report and Order on Reconsideration of the Second Report and Order,* 14 FCC Rcd. 2545 (1999), *aff'd, American Public Communications Council, Inc. v. FCC,* 215 F.3d 51 (D.C. Cir. 2000); *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) ("*First Wisconsin Order*"); *and Memorandum Opinion and Order,* 17 FCC Rcd. 2051 (2002) ("*Second Wisconsin Order*") (the *First Wisconsin Order* and the *Second Wisconsin Order* may be collectively referred to as the "*Wisconsin*

FPTA believes that there is no disagreement on the applicability of the foregoing four-part standard to the issues that are before this Commission.

THE QUID PRO QUO

Section 276 of the Act also required the FCC to prescribe regulations that, among other things, would "establish a per call compensation plan to ensure that payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone..." 47 U.S. C. §276(b)(1)(A). In implementing this requirement, the FCC made it clear that once the Regional Bell Operating Companies ("RBOC")(i.e., BellSouth) were able to certify that they had met the other requirements imposed on them by Section 276, as implemented by the FCC, the RBOCs could also receive such compensation. The burden was placed squarely on the RBOCs to show that that they met this burden.

> "Accordingly, we conclude that LECs will be eligible for compensation like the other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276." (*Order on Reconsideration* at paragraph 131)

The Bureau's clarification of this requirement prompted the RBOCs to request a waiver to meet the intrastate tariff compliance requirement, without delaying their receipt of dial around compensation. In doing so, the RBOCs conceded that the then *Payphone Orders* "mandate that the payphone services a LEC tariffs at the state level are subject to the new services test." *Second Clarification Order* at paragraph 18. As a further incentive for the FCC to provide them with additional time, the RBOCs voluntarily

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Orders") (unless individually referred to, collectively hereinafter the *"Payphone Orders"*).

committed "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 existing ones." *Second Clarification Order* at paragraph 18. Based upon those representations, the FCC granted all LECs an additional 45 days to bring their intrastate tariffs into compliance with the FCC's rules, but allowed them to begin to collect dial around compensation on April 15, 1997.

Those decisions established a clear *quid pro quo*. To be eligible to receive dial around compensation, BellSouth must have had in place intrastate tariffs that met the FCC's requirements for Section 276 of the Act, i.e., the four part test, by no later than May 19, 1997. In return for the right to collect dial around compensation, if an RBOC's intrastate PTAS rates subsequently were found not in compliance with the requirements of Section 276, the RBOC was obligated to refund or credit the difference.

Based upon that promise, BellSouth began collecting dial around compensation as of April 15, 1997. Based upon the number of payphones operated by BellSouth between April 15, 1997 and the date that BellSouth ceased providing payphone services, BellSouth has collected Millions of Dollars in dial around compensation (conservative estimates place this amount at more than $59 Million). Notwithstanding the fact that BellSouth has collected Millions of Dollars in dial around compensation, BellSouth's Florida intrastate PTAS rates have never been in compliance with Section 276 of the Act.

THE WISCONSIN ORDERS

In the aftermath of the 1996 *Payphone Orders*, proceedings were initiated by various state commissions, including this Commission, to apply the FCC's payphone requirements. Those states' applications of the FCC pricing requirements (including the

new services test) to PTAS were, in many instances, disparate and not in furtherance of Congress' and the FCC's initiative. As those decisions were issued, state regulators, PSPs and others sought advice and clarification from the FCC concerning the mandates of the agency's initial actions. Ultimately, the FCC adopted the two *Wisconsin Orders* in response to those efforts to provide guidance to PSPs, the local exchange companies and state regulators regarding the proper interpretation of the 1996 *Payphone Orders*.

The Bureau's *First Wisconsin Order* and the FCC's *Second Wisconsin Order* were both issued to address "unnecessary confusion and delay in the implementation of Payphone Order–compliant tariff filings" (*First Wisconsin Order* Paragraph 8) and "disparate applications of the new services test in various state proceedings" (*Second Wisconsin* Order paragraph 2). The FCC, in both cases, was responding to the RBOCS' many efforts to delay or otherwise prevent the implementation of the original 1996 *Payphone Orders*. Accordingly, the FCC gave clear direction in the *Second Wisconsin Order* that it issued that order for the specific purpose to "...assist states in 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." (*Second Wisconsin Order*, at Paragraph 2).

The *Wisconsin Orders* did not change or add to the original requirements. Rather, the FCC simply clarified what its long-standing polices and requirements had been. As the Michigan Public Service Commission recently held in its Section 276 proceedings:

> "The Commission finds that the Wisconsin Order did not change existing law. Rather, it is a reiteration of the requirements that the FCC set forth in its 1996 payphone orders, and merely restates and clarifies what the law according to the agency is and has been."

In the *First Wisconsin Order*, the Bureau provided state regulators with a framework for the application of the new services test to PTAS rates that simply reiterated "longstanding new services test policy." In that order, the Common Carrier Bureau relied upon the methodologies and principles the FCC had utilized in prior new services test cases. The principles of that order are as follows:

1. "Costs must be determined by the use of an appropriate forward looking, economic cost methodology that is consistent with the principles the Commission set forth in the *Local Competition First Report and Order*." (at paragraph 9).

2. "With respect to the calculation of direct costs, our longstanding new services test policy is to require the use of consistent methodologies in computing direct costs for related services. Cost study inputs and assumptions used to justify payphone line rates should, therefore, be consistent with the cost inputs used in computing rates for other services offered to competitors." (at paragraph 10).

3. "In determining a just and reasonable portion of overhead costs to be attributed to services offered to competitors, the LECS must justify the methodology used to determine such overhead costs." (at paragraph 11)

4. "Absent justification, LECs may not recover a greater share of overheads in rates for the service under review than they recover from comparable services...For the purpose of justifying overhead actions, UNEs appear to be "comparable services" to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a "cost based" pricing requirement. Thus, we expect incumbent LECs to explain any overhead allocations for their payphone line services that represent a significant departure from overhead allocations approved for UNE services." (at paragraph 11)

5. "Given that the new services test is a cost-based test, overhead allocations must be based on cost, and therefore may not be set artificially high in order to subsidize or contribute to other LEC services." (at paragraph 11). To

satisfy these requirements, an incumbent LEC must demonstrate that the proposed payphone line rates do not recover more than the direct costs of service, plus a "just and reasonable portion of the carrier's overhead costs." (at paragraph 9)

6. "In order to avoid a double of costs, therefore, the LEC must demonstrate that in setting its payphone rates, it has taken into account other sources of revenue (e.g. SLC/EUCL) that "are used to recover the costs of the facilities involved." (at paragraph 12)

In the *Second Wisconsin Order*, the FCC affirmed almost all of the conclusions of the Bureau's *First Wisconsin Order* and provided the following important clarifications:

1. "[In the *Reconsideration Order*], we confirmed that, even if LEC payphone tariffs were filed at the state level, they should nonetheless comply with Section 276 as implemented by the FCC and, as such should be cost-based, nondiscriminatory and consistent with both Section 276 and our own Computer III tariffing guidelines." (at paragraph 14)

2. "The Bureau Order confirmed our longstanding policy that the new services test requires the use of consistent methodologies in computing the direct costs for related services. As a result the Bureau Order stated, cost study inputs and assumptions used to justify payphone line rates should be consistent with the cost inputs used for computing rates for comparable services offered to competitors." (at paragraph 24)

3. "The Commission's longstanding precedent shows that we have used forward-looking cost methodologies where we have applied the new services test." (at paragraph 43)

4. "[T]he Bureau Order states that LECs should use a forward looking methodology that is "consistent" with the *Local Competition Order*. TELRIC is the specific forward-looking methodology 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." (at paragraph 49)

5. The FCC provided a specific example (and notably, only one example) of the difference between the pricing requirements for UNEs as set forth in the *Local Competition Order* and payphone services as set forth in the *Payphone Orders*: "while we have prohibited LECs from including certain "retail" costs in their prices for UNEs, no such prohibition applies to payphone line services." The LECs can include such "retail" costs if they can demonstrate that these costs are attributable to payphone line services." (emphasis added, at paragraph 50)

6. With regard to calculation of acceptable overhead loadings, the FCC confirmed that payphone access service rates developed using UNE overheads "are in full compliance" with both the Act and the *Payphone Orders*. The FCC explicitly added two additional methods for calculating acceptable overhead loadings: the method described in the *Physical Collocation Tariff Order* and the method described in the *ONA Tariff Order*. A state regulator may use any or all of these three methods in order to calculate an "upper limit on overhead loadings" for payphone services (at paragraphs 53-54)

7. The FCC specifically and directly rejected the Coalition's "any plausible benchmark" argument: "in our decisions applying the new services test to services offered to competitors, we have allowed BOCs some flexibility in calculating overhead allocations, but we have carefully reviewed the reasonableness of the BOC's overhead allocations. We have not simply accepted any "plausible benchmark" proffered by a BOC." (at paragraph 56)

8. The FCC specifically and directly rejected the Coalition's argument that ILECs are "free to apply to payphone service rates whatever markup over direct costs is incorporated in their business line rates." (at paragraph 55)

9. The FCC specifically and directly rejected the Coalition's argument that "the *Payphone Features Order* supports the proposition that any overhead allocation within a wide range is "reasonable" for purposes of the new services

> test." (at paragraph 57). The FCC rejected the argument that the rate to cost ratio of 4.8x adopted in that Order was applicable in the context of setting rates for any other payphone services, instead describing the allowance of such an overhead loading as "very fact specific", based on "adequate justification" provided in that investigation, and applicable only to "payphone features whose monthly costs did not exceed a few cents per line." (at paragraph 57).

In those instances in which it provided important clarifications, the FCC also utilized longstanding policies and methodologies included in the 1996 *Payphone Orders* and other orders in which it dealt with competitive services, such as the *Local Competition Order*, the *ONA Tariff Order* and the *Physical Collocation Tariff Order.* None of those clarifications introduced new principles or requirements. Rather, the clarifications included policies, precedents and methodologies that were previously included in the 1996 *Payphone Orders*, or other FCC orders which (i) dealt with the application of the new services test to other competitive services and (ii) predate the 1996 *Payphone Orders*. The ***Payphone Orders*** and the principles embodied therein provide the primary framework for this Commission's analysis of BellSouth's PTAS rates.

BellSouth would have this Commission believe that it did not understand how to apply the new services test to PTAS rates prior to the *Second Wisconsin Order*. In fact, at the hearing BellSouth argued that in the *Second Wisconsin Order*, the FCC "detailed how you go about implementing the new services test and included some specific guidelines on the overhead" (Hearing transcript, p. 19, lines 22-24*)*. BellSouth has at all times understood how to calculate a Section 276 compliant intrastate PTAS rate. However, it elected not to do so for its benefit, and to the detriment of the independent payphone industry in the State of Florida.

BellSouth participated in the proceedings that formed the basis of the FCC's *Second Wisconsin Order*. In fact, Mr. Shell testified that BellSouth "probably did participate in the *ONA Tariff Order* in the early 1990s." (Hearing Transcript, p. 256, lines 19-21). Despite (i) participating in those proceedings, (ii) creation of rates for competitive services utilizing the new services test (such as UNEs) and (iii) significant legal and cost expertise, BellSouth would like this Commission to believe it could not have created compliant intrastate PTAS rates without the "guidance" provided by the FCC in the *Second Wisconsin Order*. Such an argument is without merit.

PROCEDURAL HISTORY

On August 11, 1998, in Docket No. 970281-TL, this Commission issued an Order concluding that BellSouth's PTAS rates, which were and remain BellSouth's 1FB business line rates, are consistent with Section 276 of the Act. Unfortunately, this Commission was asked to consider those rates at a time when the RBOCs, including BellSouth, were using their considerable resources to prevent and otherwise delay the implementation of Section 276 of the Act. If fact, at the time of this Commission's prior decision, BellSouth was still arguing to the FCC that the new services test was not even applicable to pay telephones access rates.

During the time period in question, the independent payphone industry made a concerted decision to pursue clarification and guidance from the FCC through its partner, the APCC, the national payphone industry association that would allow state regulators, including Florida, to act consistent with the FCC's implementation of Section 276. State payphone associations and independent payphone providers simply could not afford to

present the question of unlawful PTAS rates simultaneously to federal regulators and public service commissions across the country, particularly given the RBOCs efforts to prevent implementation of Section 276 and their unlimited resources to combat those types of proceedings. In fact, Messrs. Renard and Wood participated extensively in the industry's efforts to cause the FCC to provide the necessary guidance to cause the RBOCs to comply with Section 276. As Mr. Wood stated at the hearing in response to BellSouth's question concerning the FCC's First *Wisconsin Order*:

> "...there were quite a few ex parte meetings at the bureau level prior to the bureau order or prior to this being taken up by the bureau in terms of deciding Wisconsin, and the discussion was whether the commission was going to, or the bureau was going to take up the issue to provide guidance independently of any state request such as Wisconsin. When the Wisconsin letter came in, the bureau took the opportunity to do both, and the FCC at the commission level in the next order was very clear it was taking the opportunity to do both. ...[H]aving been involved in all those meetings about how important it was to get clarification from the states, I'm not comfortable with the characterization that says this was just about, ever just about Wisconsin, because that's just not true." (Hearing Transcript, p. 169, lines 6-22)

Additionally, in those prior proceedings BellSouth failed to provide this Commission with a calculation of the overhead allocation included in the PTAS rates, failed to justify that overhead allocation and failed to provide this Commission with any methodology to determine that overhead allocation. Such a failure is no surprise when BellSouth was arguing to the FCC that any overhead allocation within an extremely wide range is "reasonable" for purposes of the new services test. (Second Wisconsin Order, at paragraph 57). In the *Second Wisconsin Order*, the FCC explicitly rejected BellSouth's argument. Since that time, the FPTA has provided this Commission with significant new

information in the form of FCC clarification with federal court confirmation on the precise issues in this docket that confirm the arguments made by the APCC and its partner state associations. Those clarifications are a reiteration of the requirements that the FCC set forth in its 1996 *Payphone Orders*, and merely restate and clarify "what the law according to the agency is and has been."

BellSouth will argue that the FPTA's failure to participate fully in those proceedings, file a motion for reconsideration or file an appeal of this Commission's prior decision should cause this Commission to deny the relief requested by the FPTA. BellSouth takes that position despite the undisputed evidence that BellSouth's PTAS rates at the time of this Commission's prior orders violated Section 276 of the Act. Such an argument is predictable because BellSouth has no other argument. BellSouth cannot argue that its rates are compliant with Section 276, because they were not compliant at the time those orders were issued and they remain non-compliant today.

IMPORTANCE OF PAYPHONES

In its *Second Wisconsin Order*, the FCC specifically found that "[P]ayphones are an important part of the nation's telecommunications system. They are critical not only for emergency communications, but also for those Americans who cannot afford their own telephone services." *Second Wisconsin Order* at paragraph 3.

Payphone service is "on demand dial tone/per use" wireline, high-quality service available twenty-four hours a day, seven days a week. Users are not required to make an initial investment in equipment, await activation of the service or pay recurring monthly charges. Any member of the public can place a call anywhere at any time. Users have

the option of paying for calls with coins or by use of calling cards, prepaid cards or other access code arrangements. Emergency 911 calls are free of charge across Florida's payphone base - once again 24/7. Users can also place calls to a wide range of 8XX numbers (both carrier and subscriber access) at no charge to the caller.

On January 30, 2004, the FCC issued its Telephone Subscribership Report providing that in July of 2003 only 95.2% of Florida households had telephone service; meaning that 4.8% of all Florida Households were without telephone service. Additionally, the FCC's February 26, 2004 Telephone Penetration Report found that that the percentage of households with telephone service in March of 2003 was significantly dependent on the total household income. The following chart shows that dependence:

Household income	Percentage of households With telephone service in March 2003
$9,999 or less	89.8%
$10,000 - $19,999	94.4%
$20,000 - $29,999	96.4%
$30,000 - $29,999	98.9%
$40,000 or more	98.9%

Based upon those reports, it can be concluded that the poorest of Florida households are those most likely to not have telephone service. It can be reasonably assumed, as well, that those Floridians cannot afford cellular or wireless services. For those who have neither a home phone nor a wireless phone, payphones provide a crucial "lifeline" service. This is true both for important day-to-day calls and for emergency communications. Those citizens rely on payphones as the primary means to meet their communication needs.

While BellSouth may argue that the telephone penetration rate for households with an annual income of less than $10,000 has increased somewhat in Florida since 1993, it remains at well less than one hundred percent. And as Mr. Wood noted during the hearing, those households are "... not 100[%], and times several million people, that leaves a lot of people without a telephone. (Hearing Transcript, p. 176, lines 15-18).

The State of Florida estimates that more than 59.3 million people visited Florida during 2003. Many of those visitors do not own wireless telephones and those that do may not have cellular service available for a myriad of reasons, i.e., dead battery, bad coverage or service, no service, technological compatibility such as international wireless users, etc. Or, they may not wish to pay long distance or "roaming charges" for calls made while visiting Florida. In those instances, these communications users continue to rely on public payphones for convenience, for emergencies and even for basic service. Particularly in some special cases, such as "911" emergency calls, payphones are critical for ensuring public safety for these individuals. Given the top prominence of tourism in Florida's economy, the continued need for widespread deployment of payphones in the state is especially critical.

In response to Commission Staff's First Request for Production of Documents, Item No. 3, FPTA provided this Commission with letters from various community service organizations urging the FCC to implement the new services test to ensure the continued widespread availability of payphones. Those community service organizations provided that encouragement to the FCC because of the importance communications link that payphones provide to their constituency

Messrs. Renard and Wood have testified that lowering the PTAS rate will help to ensure the widespread deployment of pay telephones in the State of Florida. In fact, it has been undisputed in these proceedings that, as Mr. Wood testified "... the line rate, by far and away [is] the greatest contributor to whether the provider can keep the phone in place or not. It matters more than, far more than anything else." (Hearing Transcript p. 178 at lines 4-7)

The relief requested by the FPTA in these proceedings will play a critical role in ensuring that Florida's citizens and tourists continue to have access to payphone services. That is particularly true based upon BellSouth's recent exit from the payphone industry. BellSouth, the single largest payphone provider in the State of Florida, completed its exit from the payphone business in its nine-state region, including Florida, earlier this year. Now, more than ever, the payphone industry is in need of action by this Commission. This Commission is acting under the authority granted by the FCC in furtherance of Congress' goal to "promote the widespread deployment of payphone services to the benefit of the general public." As Mr. Wood testified "Widespread deployment includes keeping as many phones as possible for the benefit of the general public." It does not necessarily mean adding payphones where none exist. Requiring BellSouth to provide the lowest possible rate will ensure that the declining payphone industry will continue to provide public communications to Florida's citizens.

ARGUMENTS

Issue 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?

BellSouth 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 became effective November 19, 2003. It is important for this Commission to understand that notwithstanding its tariff revision, BellSouth continues to charge and collect EUCL from payphone services providers in the State of Florida. It is also important to note that BellSouth filed its tariff revision on the eve of filing testimony in these proceedings. It is apparent that BellSouth did not desire to file testimony in this case in which it would have to admit that it so blatantly violated federal law. Moreover, BellSouth's "voluntary" reduction of the PTAS rates by the amount of the EUCL in effect concedes that BellSouth's PTAS rates were never in compliance with the requirements set by the FCC.

Issue 1(b): As of what date was BellSouth required to reduce its intrastate payphone line rates by the amount of the interstate EUCL?

BellSouth was required to reduce its intrastate payphone line rates by the amount of the interstate EUCL on or before April 15, 1997. Paragraph 12 of the *First Wisconsin Order* provides:

> We also note that the forward-looking cost studies required in the contexts described above produce cost estimates on an "unseparated" basis. In order to avoid double recovery of costs, therefore,, the LEC must demonstrate that in setting its payphone line rates it has taken into account other sources of revenue (e.g., SLC/EUCL, PICC, and CCL access charges) that are used to recover the costs of facilities involved."

The requirement that BellSouth reduce its intrastate payphone line rates by the amount of the interstate EUCL was affirmed by the FCC in the *Second Wisconsin Order*. The FCC confirmed that "...in establishing its cost based, state tariffed charge for payphone line service, a BOC must reduce the monthly line charge determined under the new services test by the amount of the applicable federally tariffed SLC." *(Second Wisconsin Order*, at paragraph 61). There can be no dispute that the new services test was applicable to intrastate PTAS rates on and after April 15, 1997. Therefore, BellSouth was obligated to "reduce the monthly line charge determined under the new services test by the amount of the applicable federally tariffed" EUCL on or before April 15, 1997.

Issue 1(c): Can the FPSC order refunds to PSPs 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?

Yes, the Commission must order refunds. This Commission is acting under Section 276 of the Telecommunications Act of 1996 and the FCC's delegation of authority to implement the new services test as required under the *Payphone Orders*, as ultimately clarified by the *Wisconsin Orders*. Section 276(c) of the Telecommunications Act of 1996 specifically provides that "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements."

There is no dispute that a Bell Operating Company must reduce the monthly PTAS line charge determined under the new services test by the amount of the federally tariffed EUCL (Direct Testimony of Kathy Blake, p. 8; Hearing Transcript, p. 216, lines 14-21). Despite the clear requirement that the intrastate PTAS rate must be reduced by

the amount of the federally tariffed EUCL, BellSouth failed to account for the amount of the EUCL from April 15, 1997 through November 10, 2003.

In Order Nos. PSC-98-1088-FOF-TL and PSC-99-0493-FOF-TL in Docket No. 970281-TL, this Commission incorrectly determined that BellSouth's intrastate PTAS rates satisfied the new services test. It did so, despite clear evidence that BellSouth failed to reduce its intrastate PTAS rates by the amount of the federally tariffed EUCL. As a result, BellSouth double-recovered or at least over recovered its costs from April 15, 1997 until November 10, 2004, a period of seven years, six months and 26 days.

This Commission's prior decision is in direct conflict with the FCC's *Wisconsin Orders*. This Commission must correct its prior decision and cause BellSouth to refund to PSPs the unlawful profits it collected since April 15, 1997, especially since BellSouth has been permitted to collect and keep millions of dollars in dial around compensation and in view of BellSouth's commitment to implement Section 276 compliant rates from April 15, 1997 forward. To allow BellSouth to retain those unlawful profits to the detriment of the payphone industry would only serve to negatively impact the widespread deployment of payphones in the State of Florida in violation of Section 276 of the Telecom Act. These dollars are a mere "blip" on BellSouth's financial radar, but will provide an extremely significant financial event for the remaining payphone providers in Florida.

In its present capacity, this Commission is acting through the FCC's delegation of power to implement the Act and to promote the widespread deployment of payphones to the benefit of the general public. The FCC has broad authority under the Act to rectify over-compensation in violation of Section 276 through refunds when necessary to ensure

fair compensation. *See MCI Telecom Corp. v. FCC*, 143 F3d 606, 609 (D.C. 1998). Accordingly this Commission 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 Section 276 of the Act.

Even if this Commission looks to Florida law, state law requires that this Commission correct its prior decisions. This Commission has the inherent power to modify its prior orders by the reason of the nature of the agency and the functions it is empowered to perform. *See Reedy Creek Util. Co. v. Florida Pub. Serv. Comm'n*, 418 So.2d 249 (Fla. 1982); *United Tele. Co. of Fla. v. Mann*, 403 So.2d 962 (Fla. 1981); *Sunshine Util. v. Florida Pub. Serv. Comm'n*, 577 So.2d 663 (Fla. 1st DCA 1991). For example, "Where a substantial change in circumstances, or fraud, surprise, mistake or inadvertence is shown...the PSC must have the power to alter previously entered final rate orders." *Reedy Creek Util. Co. v. Florida Pub. Serv. Comm'n*, 418 So.2d 249 (Fla. 1982). The Florida courts have long recognized an exception to the doctrine of administrative finality where there is a demonstrated public interest. *See Peoples Gas Systems, Inc. v. Mason*, 187 So2d 335 (Fla. 1966); *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679 (Fla. 1979). Where there is a demonstrated public interest, this Commission has the authority to determine whether its prior order contained such a mistake and "has a duty to correct such errors." *Sunshine Util. v. Florida Pub. Serv. Comm'n*, 577 So.2d 663, at 665 (Fla. 1st DCA 1991).

In these proceedings, this Commission is charged with furthering Congress' intent "to promote competition among payphone service providers and promote the widespread deployment of payphones services to the benefit of the general public..." In its efforts to

provide this Commission with the clear direction necessary to properly implement Section 276 of the Act in the *Wisconsin Order*, the FCC also found that payphones play a vital role in this country's telecommunications systems.

> "[P]ayphones are an important part of the nation's telecommunications system. They are critical not only for emergency communications, but also for those Americans who cannot afford their own telephone services. Thus, despite evidence that payphones are losing market share to wireless services, the basic pay telephone remains a vital telecommunications link for many Americans." *Wisconsin Order* at paragraph 3.

Ensuring that the citizens of Florida have access to public payphones in the BellSouth region of the State of Florida is clearly a "demonstrated public interest" as found by Congress and the FCC. Accordingly, this Commission must ensure that Florida's citizens and tourists have access to public payphones, despite BellSouth's decision to exit the payphone business and remove hundreds of thousands of payphones in the State of Florida.

BellSouth argues that it cannot be required to issue refunds in these proceedings because it has charged "rates that comply with valid and effective Orders of the Commission." BellSouth argues that it is not required to pay any refunds to PSPs based upon the prohibition against retroactive ratemaking and the filed rate doctrine. Those legal doctrines are based in equity, and in this case equity demands that this Commission grant FPTA's requested relief.

Florida law requires the Commission to determine rates based on equitable considerations. *GTE Florida Inc. v. Clark*, 668 So. 2d 971 (Fla. 1996). The cornerstone to the general prohibition on retroactive ratemaking is the utilities' reasonable reliance on the approved rate. BellSouth's twisted application of the retroactive ratemaking doctrine

in this instance is completely misplaced because it has not, and cannot demonstrate any reasonable reliance on the PSC's prior order.

It is undisputed that BellSouth was a member of the coalition involved in the Wisconsin matter that gave rise to the Bureau's adoption of the first *Wisconsin Order* and the FCC's *Second Wisconsin Order*. BellSouth cannot now claim that that it reasonably relied to its detriment on the PSC's initial approval of BellSouth's state tariffs as a final resolution of the implementation of Section 276 of the Act. BellSouth's coalition expended considerable effort and resources to prevent and delay the implementation of Section 276. BellSouth cannot now be permitted to rely on that delay. Moreover, BellSouth fought this issue throughout its region (and as a member of the RBOC coalition across the nation) and was, therefore, well aware of the inconsistent application of Section 276 to RBOCs' rates. Surely BellSouth knew the FCC had to resolve the disparate applications of Section 276 as it did in the *Wisconsin Orders*. Indeed, the lack of conformity in state approaches implementing Section 276 was an express foundation of the *Wisconsin Orders*. *See First Wisconsin Order* at paragraph 2 n.10. Accordingly, BellSouth knew the FCC's final interpretation and implementation of the new services test could conflict with this Commission's prior order and require it to refund any overcharges back to the PSPs.

BellSouth is estopped to now claim a refund cannot be awarded because it promised to refund excess revenues when its agent sought and obtained a waiver of the statutory requirements. The Bell Operating Companies Payphone Coalition counsel, Michael K. Kellogg, promised the FCC that the Bell Operating Companies would issue refunds if the new statutory rate was lower than the existing rate. Based upon that

promise, BellSouth collected millions of dollars in dial around compensation. BellSouth cannot claim it is prejudiced because the FPTA now asks the Commission to hold BellSouth to its promise.

Finally, BellSouth has misconstrued Florida law to absolutely bar a refund in this instance. It is clear that a refund is not automatically barred as retroactive rate making under Florida law. *See GTE Florida Inc. v. Clark*, 668 So. 2d 971 (Fla. 1996). The cornerstone to the general prohibition on retroactive ratemaking is lack of notice and reliance. Here, BellSouth always had notice of ongoing events involving the implementation of §276. Again, BellSouth can not reasonably argue it did not have notice of the complicated and inconsistent application of the new services test across the nation, particularly when it and its RBOC brethren were the cause and root of that inconsistent application.

BellSouth profited from its flagrant disregard of Section 276. BellSouth should not be permitted to retain the unlawful profits it derived from such blatant disregard for federal law and the FCC's many orders interpreting Section 276.

BellSouth may argue that FCC requirements limit the operative statute of limitations for a refund to a two-year period. Such an argument is without merit. First, the statute of limitations would only be applicable to proceedings based upon a complaint filed with the FCC, i.e., a company alleging that another took action that caused it damages. This is not such a proceeding. Rather, the FPTA is requesting that this Commission ensure that BellSouth has complied with Federal Law. Moreover, the RBOCs, including BellSouth, waived any applicable statue of limitations when it agreed to provide refunds or credits to payphone service providers as a part of the letters from

Michael K. Kellogg, counsel to the RBOC Coalition, to Mary Beth Richards. As a result of that promise, BellSouth collected millions of dollars in dial around compensation. BellSouth cannot be permitted to keep the millions of dollars in dial around compensation it collected without living up to the promise which permitted it to collect that compensation.

Additionally, the principles that this Commission must apply to BellSouth's intrastate PTAS rates to ensure that those rates comply with Section 276 of the Act have been the subject of administrative and judicial review since the adoption of the Act. In fact, BellSouth continued to challenge those long standing principles until July 11, 2003, the date on which the United States Court of Appeals for the District of Columbia Circuit, issued its decision in the appeal of the FCC's *Second Wisconsin Order*; a date that is more than three months after the FPTA filed its petition to establish these proceedings.

The amount of the refund should be the amount paid to BellSouth by payphone service providers for EUCL since April 15, 1997. Based upon the evidence utilized by BellSouth at the hearing in these proceedings, BellSouth has the information necessary to calculate the number of payphone lines it provided to PSPs in the State of Florida since April 15, 1997. The refund amount can be calculated as the product of (i) the number of PTAS lines provided to PSPs by BellSouth since April 15, 1997 and (ii) the amount of the EUCL charged by BellSouth during those periods as set forth in the record of these proceedings. (See BellSouth's responses to FPTA's 1st Set of Interrogatories, Item No 24)

The FPTA will cooperate with BellSouth to facilitate the refund and will utilize the same process as the refund most recently effected in the settlement of the new

services test case in North Carolina. In that settlement, the North Carolina Payphone Association and BellSouth cooperated to deliver the refund to the applicable payphone service providers. FPTA will work with BellSouth to obtain the information necessary to calculate the applicable refund and present an invoice to BellSouth. Ultimately, BellSouth can pay the refund amount to the FPTA which will then distribute the applicable amount to payphone service providers.

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

Based on the evidence presented by BellSouth and FPTA in this proceeding, the Commission must conclude that BellSouth's PTAS rates are not, and never have been, compliant with the FCC's pricing requirements, including the new services test. In fact, at no time during the course of these proceedings has BellSouth argued that its rates are in compliance with Section 276 of the Act. To the contrary, BellSouth has proposed a reduction in its existing rates; it now proposes a statewide average rate of $24.36 (which includes the federally tariffed $7.13 EUCL charge). BellSouth is currently charging intrastate PTAS rates that are significantly higher than this. BellSouth currently assesses a rate group-specific PTAS rate of between $26.93 and $36.23 (including a $7.13 EUCL charge). The current statewide average rate lies between $26.93 and $36.23 (based on FPTA's general knowledge of payphone locations, it is likely that the average is much

closer to the $36.23 end of the range), but must be significantly higher than BellSouth's new rate proposal.

BellSouth would have the Commission believe that its decision to (1) reduce the existing rates by the amount of the EUCL, and (2) propose a further reduction when converting to a statewide average rate structure, is purely magnanimous and in no way reflective of a need to reduce rates in order to be in compliance with the FCC requirements. FPTA suggests that BellSouth's actions indicate exactly the opposite: that BellSouth's proposed reduction of its PTAS rates represents a concession that its existing rates (and its rates in effect prior to the "voluntary" reduction in the rates by the amount of the EUCL) are not in compliance with Section 276 of the Act and the specific pricing requirements established by the FCC.

Since the effective date of PAA Order No. PSC-98-1088-FOF-TL, BellSouth's costs have continuously trended downward. Despite that trend, BellSouth has failed to reduce its PTAS rates. To see clear evidence of that trend, this Commission must only look to its decisions concerning UNE pricing. UNE pricing provides this Commission with analogous service element costs because (1) the network elements required for BellSouth to provide payphone services are identical to those required to provide UNE services, to wit: (i) a local loop, (ii) a switch line port and (iii) local usage, and (2) the pricing standard established by the Act and FCC rules is essentially identical: UNE prices must be "based on cost," and PTAS prices must be "cost based." BellSouth has offered no theory as to why this Commission should believe that "based on cost" and "cost based" should have completely different meanings when pricing an equivalent telecommunications functionality.

The following table provides the cost based UNE rates approved by this Commission which reinforces the downward trend for BellSouth's costs to provide PTAS services:

Date	Zone 1 Rate	Zone 2 Rate	Zone 3 Rate
02/22/2000	$13.75	$20.13	$44.40
05/24/2001	$11.74	$16.26	$30.75
10/18/2001	$12.79	$17.27	$33.36
09/27/2002	$10.69	$15.20	$26.97

The vast majority of payphones in Florida are located in either UNE Zone 1 or UNE Zone 2. Between February 22, 2000 and September 27, 2002, the UNE Zone 1 rate decreased 22%, while the UNE Zone 2 rate decreased 24%; all based upon cost studies filed by BellSouth and this Commission's application of the a cost-based pricing requirement (including the use of the TELRIC/TSLRIC methodology) to the results of those cost studies. Notwithstanding, BellSouth's intrastate PTAS rates have remained constant. In fact, BellSouth's intrastate PTAS rates, which are the equivalent of BellSouth's 1FB business line rates in Florida, have not been reduced since prior to April 15, 1997.

Because the network and operations costs incurred by BellSouth change on a continuous basis and at a discreet level, it is impossible for FPTA to provide the exact date on which BellSouth's PTAS rates became non-compliant. However, it is apparent from a review of the UNE rates that BellSouth's intrastate PTAS rates have not been compliant at least since the effective date of PAA Order No. PSC-98-1088-FOF-TL.

Issue 2(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?

Based upon the cost study attached to Ms. Caldwell's direct testimony filed by BellSouth in these proceedings, BellSouth's intrastate payphone rates must be $18.04, including the federal EUCL charge. FPTA and BellSouth cannot agree on the rate level at which BellSouth's rates will comply with the new services test in these proceedings. However, the basis of that disagreement is limited to the magnitude of the overhead loading factor and methodology utilized by BellSouth to justify that overhead loading.

FPTA does not dispute BellSouth's calculation of direct costs and its use of the TSLRIC analysis. The TSLRIC and TELRIC methodologies of computing the direct costs are one and the same and, as applied by BellSouth in this context, yield the same calculation of direct costs (BellSouth treats all non traffic-sensitive network costs as direct costs in its PTAS cost study, thereby eliminating the possibility that a TELRIC methodology will yield a different assignment of costs to the "direct" and "shared" categories than BellSouth's TSLRIC study does). As applied by BellSouth, the *only* difference between the TSLRIC and TELRIC methodologies is that its TELRIC analysis does not consider the retail costs of the service.

The parties' fundamental disagreement regarding cost-based pricing for the elements of PTAS service is based on BellSouth's purported use of the FCC's *ONA Tariff Order* methodology to compute the overhead loading factor utilized by BellSouth in calculating its proposed statewide average rate.

The burden for justifying any proposed overhead loading above a calculation of direct cost is clear: the FCC has repeatedly and consistently said that with respect to the

overhead loading factors, the BOCs, including BellSouth, must justify the methodology used. *See, e.g., the First Wisconsin Order* at paragraphs 51-52. In the *First Wisconsin Order,* at paragraph 11, the FCC stated with respect to use of UNE overhead loadings:

> "For purposes of justifying overhead allocations, UNEs appear to be "comparable" services to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a "cost-based" pricing requirement. Thus, we expect incumbent LECs to explain any overhead allocations for their payphone line services that represent a significant departure from overhead allocations approved for UNE services."

BellSouth has not explained or justified its departure from Commission-approved overheads for UNEs.

In the *Second Wisconsin Order*, the FCC reaffirmed this conclusion and sanctioned the use of two additional overhead allocation methodologies that "are also consistent with our precedent regarding overhead assignments to new services provided to competitors." *Second Wisconsin Order,* at paragraph 52. These two additional approved methodologies were employed in the FCC's *Physical Collocation Tariff Order* and the *ONA Tariff Order*. BellSouth did not attempt to apply the FCC's *Physical Collocation Tariff Order* methodology, but instead relied exclusively on its version of the *ONA Tariff Order* methodology.

BellSouth has not justified the extremely high (greater than 50% markup above its own measure of direct cost) overhead loading factor included in its proposed statewide average rate of $24.36 as required by the *Wisconsin Orders*. In fact, BellSouth has presented no evidence to support its assertion that a more than 50% overhead loading factor is reasonable.

BellSouth's overhead analysis, such as it is, fails to meet the applicable standard for several reasons: First, BellSouth does not actually apply the methodology approved by the FCC. Second, in direct contrast to the methodology relied upon to establish rates for UNEs, the methodology used by BellSouth to calculate an overhead loading in this proceeding has never been evaluated or approved by this Commission. Third, BellSouth chose a methodology that would be applicable to optional PTAS features, but is not applicable to the essential elements of PTAS (such as the monthly line charges) that FPTA members must purchase in order to operate. Fourth, BellSouth concedes that its approach will result in a double-counting of certain costs (and an overstatement of overhead costs), but fails to accurately quantify this overstatement and makes no corresponding adjustment to its rate proposal.

In the *Second Wisconsin Order*, at paragraph 54, the FCC permits the BOCs (and when reviewing these calculations, state regulators) to utilize "the same method" and "the methodology" for the calculation of overhead loadings previously relied upon by the FCC; notably absent from the FCC orders is any suggestion that a BOC can modify either of the FCC's methodologies to its own liking. BellSouth generally claims that it used the methodology approved by the FCC in its *ONA Tariff Order* to calculate the overhead costs allocated to PTAS services and included in its proposed $24.36 statewide average rate. A closer reading of Ms. Caldwell's testimony (direct at p. 7, rebuttal at p. 3) reveals that BellSouth claims simply to have chosen to "use ARMIS data relating to the plant categories used to provide payphone services in calculating an upper limit on overhead loadings." While the FCC's *ONA Tariff Order* methodology does rely on ARMIS data, it goes on to require a specific and detailed calculation based on this information that

BellSouth did not perform. Ms. Caldwell asserts that simply a choice to "use ARMIS data" is "consistent with the FCC's evaluation of the reasonableness of ONA tariffs," but provides no support whatsoever for the position that the detailed calculations contained in the FCC's *ONA Tariff Order* should simply be ignored.

Second, the *ONA Tariff Order* methodology is not one that has been approved by this Commission. In his testimony, Mr. Shell stated "The direct cost was based on models previously approved, but the overhead was not necessarily based on the models previously approved by the Commission." (emphasis added, Hearing Transcript, p. 262, lines 10-16) This Commission has never approved the use of the *ONA Tariff Order* methodology and should not attempt to utilize such a complex methodology for the first time in these proceedings; particularly when another previously approved and utilized methodology is available to the Commission.

Third, the *ONA Tariff Order* methodology is inappropriate for PTAS rates. The *ONA Tariff Order* dealt with the pricing of "Basic Service Elements" or "BSEs," as distinguished from "Basic Serving Arrangements" or "BSAs." In defining a BSE, Mr. Shell testified as follows: "BSEs denote an optional network capability associated with a BSA." (emphasis added, Hearing Transcript, p. 266). Mr. Shell also provided this Commission with examples of BSEs such as hunt group, uniform call distribution and simplified desk interface (Hearing Transcript, p. 266), all of which represent optional network capabilities in an ONA context. None of the elements utilized by BellSouth to provide PTAS are, by definition, optional BSEs. Rather, each of those service elements, a local loop, a switch line port, and local usage, are the equivalent to essential Basic Service Arrangements, or BSAs. (Hearing Transcript, pp. 266-267). Like BSAs, the

elements of PTAS service are not optional, and also like BSAs, should not be priced based on the FCC's *ONA Tariff Order* methodology.

Mr. Shell conceded in his testimony that the FCC "...didn't use [the *ONA Tariff Methodology*] for basic serving arrangements" and went on to argue that the FCC "...didn't tell us to look at it and see if it's appropriate. They said you can use it." (Hearing Transcript, pp. 267-268). A review of the FCC's orders indicates that there is no basis whatsoever for BellSouth's position that the FCC has concluded that all methodologies are equally applicable in all contexts (if it had done so, the FCC would not have developed and used different methodologies to develop overhead loadings in its own applications of the new services test) or that the FCC has precluded state regulators from determining whether a given methodology is reasonable, appropriate or even meaningful for a given application. It is apparent from Mr. Shell's own testimony regarding the optional nature of BSEs that it is inappropriate to utilize the *ONA Tariff Order* methodology in calculating the overhead allocations for a service that consists entirely of essential network functionality (the equivalent of BSAs). Ultimately, BellSouth utilized the overhead allocation methodology that it did to confuse this Commission and because it produced the highest overhead "ceiling" that BellSouth thought it could possibly justify.

Finally, BellSouth's concedes that its alternative version of the *ONA Tariff Order* methodology is flawed and results in the double-counting of certain costs. Mr. Shell testified that BellSouth double-counted certain costs in calculating the overhead allocation:

> "And we determined <u>about maybe</u> eight percent of the costs in the direct and overhead that may be in our direct study.

> But we feel like that was really insignificant because what we were trying to do is develop a reasonable overhead factor that would apply." (emphasis added, Hearing Transcript, pp. 272, 273)

While Mr. Shell considers double counting to the extent of "eight percent" of costs to be insignificant, the FPTA does not. Similarly, while BellSouth may consider a calculation that leads to a confidence level in the result best characterized as "about maybe" a given percentage, FPTA does not and does not believe that the FCC has ever permitted rates to be justified on the basis of an "about maybe" calculation. Based upon the testimony of Ms. Caldwell and Mr. Shell, this Commission must find that BellSouth has not justified the overhead loading factor proposed in these proceedings.

The FPTA has proposed an overhead loading factor of more than ten percent to be utilized in these proceedings. As Mr. Wood testified:

> "[The FPTA is] applying a ten percent to [BellSouth's} calculation of direct and shared cost. So it's essentially a ten percent common factor. But, of course, the FCC defines overhead as shared and common, so the actual markup would be a little higher than ten percent...It is consistent with what other states have done. It is higher than what ... this Commission authorized for UNEs, which it has characterized as it has with ... payphone service as a wholesale service. I think it would be reasonable to go back to the UNE case and actually put just BellSouth's common factor in from that case, which is well less than ten percent. I went higher to account for the possibility, as the FCC pointed out, that there might be some retail related costs. Now technically, BellSouth is supposed to demonstrate their existence and their association with payphone service, which it hasn't done here. But to go ahead and put something in for that, I took [BellSouth's] common cost, wholesale common cost factor and marked it up and increased it to ten percent." (Hearing Transcript, pp. 178-179)

Based upon all the evidence presented, this Commission must approve the more than ten percent overhead allocation percentage proposed by FPTA.

As previously stated, UNE pricing provides this Commission with the most analogous service costs because the network elements required for BellSouth to provide payphone services are identical to those required to provide UNE services. The FCC has approved the UNE method of allocating overhead for use by this Commission in calculating compliant PTAS rates. This Commission has utilized that method in the past and should utilize it calculate the overhead allocation in these proceedings. This Commission must simply look to its own UNE proceedings to establish a reasonable overhead allocation for use in these proceedings.

While the FCC has specifically found that BellSouth may include certain "retail" costs in its prices for PTAS, it can only do so if it demonstrates that these costs are attributable to payphone line services. BellSouth has not justified the inclusion of any retail costs that are "attributable to payphone lines services" in these proceedings. BellSouth is unable to identify any specific retail services it provides in connection with PTAS that it doesn't provide as a part of UNEs. (Hearing Transcript, pp. 271 and 272). Notwithstanding, FPTA has included an amount for BellSouth's retail services in its proposed statewide average intrastate rate of $18.04.

Issue 2 (c): Can this Commission order BellSouth to revise its intrastate payphone rates? If so, as of what date should any such rate changes be effective?

Yes. It is undisputed that 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.

Issue 2(d): If BellSouth's payphone rates became noncompliant with the new services test, can the FPSC order refunds to PSPs 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?

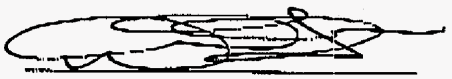
Yes. For the reasons set forth in response to Issue 1(c) in this post-hearing brief, this Commission can and must require BellSouth to refund the difference between compliant rates and the rates actually charged to PSPs in the state of Florida. Based upon the evidence presented during the course of these proceedings, BellSouth's rates are not, and have never been compliant with Section 276.

This Commission's prior 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 PTAS rates in compliance with Section 276 of the Act. Neither the FPTA, Commission Staff, nor any other third party should be burdened with the obligation to police BellSouth's PTAS rates to ensure compliance 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 Orders*, directly on its head.

This Commission cannot permit BellSouth to retain the unlawful profits it has collected 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.

Respectfully submitted this 15th day of June, 2004.



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BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Public Telecommunications Association for Expedited Review of BellSouth Telecommunications, Inc.'s Tariffs with respect Rates for Payphone Line Access, Usage, and Features.	)	Docket No.: DN 030300-TD June 15, 2004

I HEREBY CERTIFY that one copy of FPTA s Post-Hearing Brief has been furnished this 15th day of June, 2004, to the following:

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