State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: September 9, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (T. Brown)
Office of the General Counsel (Fordham) L.S.F. PAC 9/9/04

RE: Docket No. 030300-TP – 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.

AGENDA: 09/21/04 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\030300.RCM.DOC

Summary

At its essence, the Florida Public Telecommunications Association's (FPTA) complaint asks the Commission to determine: (1) whether BellSouth's payphone line rates are in compliance with the FCC's requirements; (2) if not, how long BellSouth's rates have been out of compliance with FCC requirements; and (3) if the rates have been out of compliance with Federal Communication Commission (FCC) requirements, are FPTA members, as well as other payphone providers, entitled to a refund. Upon review of the record and the pertinent FCC, Court, and Commission orders, staff recommends that:

1. BellSouth's payphone line rates are in compliance with FCC requirements;

2. The FCC's requirements at issue here were not automatically effective on a date certain, but instead were to be implemented in conjunction with a state commission's review of an ILEC's payphone line rates. Throughout the period at issue here, BellSouth continued to provide service pursuant to a tariff that met with current Florida Commission requirements. No further review was initiated by any party to implement the new FCC requirements, as subsequently clarified. As such, BellSouth's tariff, which complied with state law, remained valid throughout the period. BellSouth's revised tariff, filed on October 27, 2003, and after this proceeding was initiated, properly implemented the FCC requirement to remove the cost of the end-user common line charge (EUCL). As such, staff believes that BellSouth's rates have been, and continue to be, in compliance with applicable law.

3. Because staff believes that BellSouth's rates have been in compliance with applicable law throughout the pertinent period, staff recommends that a refund is not necessary. Furthermore, staff believes that even if it appeared that BellSouth's payphone line rates were out of compliance for some period prior to October 27, 2003, requiring a refund would likely raise concerns of retroactive ratemaking.

The recommendation that follows addresses the above questions in greater detail and as framed and presented by the parties at hearing.

Case Background

Procedural History: FCC

Beginning in the fall of 1996, the FCC issued a series of payphone orders[1] implementing Section 276 of the Telecommunications Act (the Act).[2] Among other things, the *Payphone Orders* established that intrastate rates for pay telephone access service (PTAS) lines must comply with the new services test (NST). The NST was developed to prevent LECs from setting excessively high prices and to protect against discriminatory pricing. As such, the NST requires a LEC to provide cost data to establish that the rate for a service will not recover more than a just and reasonable portion of the carrier's overhead costs and the service's direct costs. The *Payphone Orders* 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.*[3] The FCC required all local exchange carriers (LECs) to file intrastate tariffs by April 15, 1997 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.[4]

On April 10, 1997, the regional Bell operating companies (RBOCs or BOCs), including BellSouth Telecommunications, Inc. (BellSouth), acknowledged the FCC's requirement that PTAS rates comply with Section 276 and the *Payphone Orders,* but asked the FCC for a waiver indicating that more time was necessary to comply with that requirement. In making this request for a waiver, the RBOCs stated "that they voluntarily commit 'to reimburse or provide credit to those purchasing the services back to April 15, 1997' . . . 'to the extent that the new tariff rates are lower than the existing ones.'" (*Second Waiver Order*, ¶13) The FCC granted a limited waiver until May 19, 1997, thus enabling the BOCs to collect dial-around compensation, contingent upon the BOCs' intrastate PTAS rates being in compliance with Section 276 of the Act. (Id., ¶25)

In March of 2000, the FCC's Common Carrier Bureau (the Bureau) issued the *First Wisconsin Order*,[5] after the Wisconsin Public Service Commission decided that it had no

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[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,* 11 FCC Rcd. 21233 (1996), *aff'd in 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) (unless individually referred to, collectively hereinafter the *"Payphone Orders"*).

[2] §276 applies only to the BOCs.

[3] *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec. 20, 1991)(*Computer III*).

[4] *Payphone Clarification Order*, 13 FCC Rcd at 1780 ¶2, citing *Payphone Reconsideration Order*, 11 FCC Rcd at 21308.

[5] *In the Matter of Wisconsin Public Service Commission Order Directing Filings,* 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) (*"First Wisconsin Order"*)(BellSouth refers to this order as the *"Bureau Order"*).

jurisdiction under state law to review LECs' PTAS rates. The Bureau found that total element long run incremental cost (TELRIC) was the presumptive measure of NST- compliant rates. The Bureau's order, by its express terms, applied only "to the LECs in Wisconsin specifically identified herein." (*First Wisconsin Order,* ¶13) The Bureau's order was appealed to the FCC, and on January 31, 2002, the FCC issued the *Second Wisconsin Order.*[6]

The FCC issued the *Second Wisconsin Order* 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,* ¶72) In its *Second Wisconsin Order,* the FCC clarified and further interpreted the requirements of Section 276 of the Act and the application of the new services test specifically to pay telephone access rates. In that order, the FCC found that: (i) Section 276 requires Regional Bell Operating Companies (BOCs) to set their intrastate payphone line rates, including usage rates, in compliance with the new services test; (ii) intrastate payphone service rates must be calculated using a forward-looking, direct cost methodology such as TELRIC or TSLRIC; (iii) overhead loading rates for payphone lines must be cost-based, may be calculated using unbundled network element (UNE) overhead loading factors, and may not be set artificially high in order to subsidize or contribute to other local exchange services; additionally, any overhead allocations for payphone services that represent a significant departure from overhead allocations for UNE services must be justified by the local exchange company; and (iv) in establishing its cost-based, state-tariffed rates, a BOC must reduce the monthly per line rate determined under the new services test by the amount of the federally tariffed subscriber line charge or end user common line charge (EUCL). (Id., ¶68)

Prior Commission Activity Regarding BellSouth's PTAS Rates

On August 11, 1998, in Docket No. 970281-TL, the Florida Commission issued a Notice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs For Basic Payphone Service.[7] In that order, the Commission found that the existing incumbent local exchange company tariffs for payphone line services were cost-based, consistent with Section 276 of the Telecommunications Act of 1996, and non-discriminatory. The Commission noted that Florida was unique relative to other states, as it had long had payphone tariffs in place. Moreover, the Commission referred to three prior evidentiary hearings and two stipulations, rate reductions, and other actions it had taken to ensure an open pay telephone market. The FPTA protested the PAA order but subsequently withdrew its protest, and the Order became final on January 19, 1999.[8]

Procedural History: Current Docket

The FPTA filed its Petition for Expedited Review of BellSouth's Tariffs with Respect to Rates for Payphone Line Access, Usage, and Features on March 26, 2003. In doing so, the

[6] *In the Matter of Wisconsin Public Service Commission Order Directing Filings, Memorandum Opinion and Order,* 17 FCC Rcd. 2051 (2002) (*"Second Wisconsin Order"*)(BellSouth refers to this order as the *"Wisconsin Order"*).
[7] Order No. PSC-98-1088-FOF-TL (*"PTAS Order"*).
[8] Order No. PSC-99-0493-FOF-TL (*"Final PTAS Order"*).

FPTA sought both refunds and new PTAS rates. At the time the FPTA filed its petition, the *Second Wisconsin Order* was on appeal. On July 11, 2003, the United States Court of Appeals, District of Columbia Circuit, affirmed the FCC's *Second Wisconsin Order*, which it found "establishes a rule that affects payphone line rates in every state."[9] The FCC's original *Payphone Orders* and the implementation of those orders through the *Wisconsin Orders*[10] form the basis of this proceeding.

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 was set for an administrative hearing on May 12, 2004, with a Prehearing on April 19, 2004. Both parties filed their post-hearing briefs on June 15, 2004.

Requested Relief

In FPTA's petition, the FPTA requested that this Commission implement the national policy mandates set forth in Section 276 of the Act and the standards established by the FCC in its original *Payphone Orders* and the *Wisconsin Orders.* As part of this proceeding, this Commission is asked to determine whether BellSouth's current PTAS rates are compliant with the NST. If BellSouth's current PTAS rates do not meet the new services test, or if the Commission requires that revisions be made to the PTAS rates, the Commission will also need to establish a prospective BellSouth monthly PTAS rate. In addition, this recommendation also addresses whether BellSouth should refund to payphone service providers (PSPs): (i) the amount of the EUCL collected from PSPs between April 15, 1997 and November 10, 2003; and (ii) the difference between the PTAS rates BellSouth actually charged and collected from PSPs and PTAS rates which are compliant with Section 276 of the Act.

[9] *New England Public Comm. Council, Inc. v. FCC,* 334 F.3d 69, 75 (D.C. Cir. 2003), *cert. denied* April 26, 2004 (*"Appellate Order"*).

[10] The *First Wisconsin Order* and the *Second Wisconsin Order* may be collectively referred to as the *"Wisconsin Orders."*

Discussion of Issues

Issue 1(a): Has BellSouth reduced its intrastate payphone line rates by the amount of the interstate end user common line charge (EUCL)? If not, has BellSouth ceased charging the EUCL on payphone lines?

Recommendation: Yes. BellSouth reduced its intrastate payphone line rates by the amount of the interstate EUCL with the filing of a revision to its General Subscriber Services Tariff (GSST), Section A7.4, on October 27, 2003. This reduction became effective on November 10, 2003. **(T. Brown)**

Position of the Parties[11]

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 10, 2003. FPTA contends that although BellSouth filed its tariff, it continues to include EUCL on its invoices for PTAS.

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

Staff Analysis: Although the parties have not formally settled this issue, staff believes that this issue is no longer a matter of controversy between the parties. BellSouth filed a revision to its General Subscriber Services Tariff (GSST), Section A7.4, to reduce its approved and effective PTAS rates by the amount of the federal end-user common line charge (EUCL) on October 27, 2003. (Blake TR 195-196, Renard TR 44, 50) This reduction became effective on November 10, 2003. (Id.) Moreover, both parties were asked whether BellSouth's revised tariff eliminated the need for this issue. Both parties answered "yes" in response. (EXH 1, p.10; EXH 3, p.14) Staff notes that FPTA witness Renard also admits the same in his rebuttal testimony. (TR 44) As such, staff believes that BellSouth's intrastate payphone line rates have been reduced by the amount of the interstate EUCL. Staff notes that this does not eliminate the need to address Issues 1(b) or 1(c).

[11] FPTA did not provide positions in its post-hearing brief. The FPTA positions provided throughout this recommendation come from its pre-hearing brief.

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

Recommendation: There was no date-specific requirement for BellSouth to reduce its intrastate payphone line rates by the amount of the interstate end-user common line charge (EUCL). Any reductions must occur on a going-forward basis when the Commission reviews a BOC's payphone line rates for NST compliance, as it is doing here for BellSouth. **(T. Brown)**

Position of the Parties

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

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

Staff Analysis: This issue will specifically address whether BellSouth was required to reduce its intrastate payphone line rates by the interstate EUCL on a certain date, and whether such a reduction should be applied on a prospective or retrospective basis. Staff notes that the parties' arguments touched on several additional areas which are not germane to this issue; therefore, they are not addressed here.[12]

FPTA's Argument

FPTA witnesses Renard and Wood contend that BellSouth should have reduced its intrastate payphone line rates by the amount of the interstate end-user common line charge (EUCL) on or before April 15, 1997, the date provided in the FCC's *Payphone Clarification Order* for filing of payphone access services tariffs that complied with the NST. Supra fn. 4. (TR 42, 45, 86; FPTA BR at 19) Witness Renard argues that BellSouth was required to reduce its intrastate payphone line rates by the amount of the interstate EUCL, based on the FCC's *Second Wisconsin Order*. (TR 32-33) Moreover, FPTA witness Wood asserts

> [t]here is no basis whatsoever for a conclusion that the requirements set forth in the *Wisconsin Orders* – requirements that the FCC itself plainly characterizes as either clarifications to, or reaffirmations of, existing policy - represent a new set of requirements . . . .(TR 134)

[12] Most notably, the parties' discussion regarding the timing of BellSouth's revised tariff filing, albeit brief, is not addressed within staff's recommendation. (Blake TR 217-219; Renard TR 40; EXH 1, p.315; BellSouth BR at 12; FPTA BR at 19) Staff notes only that the record reflects that BellSouth's revised tariff was filed October 27, 2003, with an effective date of November 10, 2003. (Blake TR 195-196; Renard TR 44, 50) Staff does not believe that any additional discussion is warranted, as it is clear that a revised tariff was filed by BellSouth, and it was filed after this docket was opened. Furthermore, the "timing" of the filing is not specifically addressed in any of the issues as set forth by the parties.

As such, FPTA contends that BellSouth was obligated to reduce the monthly line charge determined under the new services test (NST) by the amount of the applicable federally tariffed EUCL on or before April 15, 1997.[13] (Renard TR 45; Wood TR 86)

Witness Renard contends that " . . . the FCC's *Second Wisconsin Order* was specifically intended to provide the states with clear guidance on the implementation of Section 276 of the Telecom Act in this area, and did not create 'new law.'" (TR 42) According to witness Renard, " . . . the *Second Wisconsin Order* was not intended to implement a new requirement prospectively." (TR 45) In fact, the witness states, "[t]the FCC made it very clear that the *Second Wisconsin Order,* which essentially affirmed all aspects of the *First Wisconsin Order,* only clarified existing law and the requirements of Section 276 of the Telecom Act as originally intended for application by Congress and the FCC." (Id.) Accordingly, witness Renard asserts that charging and collecting the EUCL, on top of an intrastate payphone line charge that had not "backed out" the EUCL costs any time after April 15, 1997, is a *per se* violation of applicable federal law. (Id.)

Next, witness Renard argues that BellSouth's position, regarding its obligation to voluntarily reduce its pay telephone access services (PTAS) rates, turns the goals of Section 276 "completely on their heads." (TR 46) Witness Renard contends that BellSouth had an affirmative obligation to reduce its rates by the EUCL charge from the "get go." (TR 50) He argues that by assuming BellSouth's position, BellSouth would never be required to comply with the NST " . . . unless and until challenged by a third party . . . ." (TR 46) Even then, the witness asserts that BellSouth's compliance would only be prospective. (Id.) Furthermore, witness Renard argues that BellSouth's "voluntary" tariff reduction reveals that even BellSouth doubted that its tariffs in place prior to October 26, 2003, were compliant with the NST. (Id.) As such, witness Renard asserts that BellSouth's tariff filing in October 2003, which removed the EUCL, does not somehow "cleanse" the past double charging of EUCL. (Renard TR 50)

BellSouth's Argument

BellSouth witness Blake argues that BellSouth was not required to reduce its payphone line rates by the amount of the EUCL on a specified date. (TR 196, 218) She asserts that "[a]t all times, BellSouth's rates have been charged pursuant to binding FPSC Orders and FCC Tariffs that have not been challenged, appealed or modified." (TR 196) As such, witness Blake contends that a Commission order remains in effect until modified. (Id.) Rates are changed only upon a proper review of all necessary evidence and documentation by the Commission. (Blake TR 206, 218) According to witness Blake, these are the rates that were in effect and the rates that BellSouth was authorized and required to charge. (Id.)

Witness Blake argues that FPTA's arguments are flawed for several reasons. First, fluctuations in costs (up or down) do not automatically trigger a requirement that BellSouth change its rates. Witness Blake stated "[b]ecause PTAS rates were tied to basic business rates, BellSouth could have sought to raise its PTAS rates since 1999, although BellSouth has not done

[13] Although there was limited discussion related to the New Services Test (NST) in this issue, a more detailed discussion takes place in Issues 2(a) and 2(b). Accordingly, any discussion by staff of the NST in this issue will be in passing only.

so." (TR 197) According to the witness, the FPTA, or any other party, can petition the Commission to re-examine rates assuming that requirements or conditions have changed necessitating resetting tariffed rates. (Blake TR 197) Witness Blake asserts that BellSouth complied with the FCC's Payphone Orders when issued, and complied with this Commission's order issued on August 11, 1998, in Docket No. 970281-TL, setting rates in accordance with the FCC's NST. (TR 205) The witness also contends that the mere fact that the FCC issued additional clarification in its *Wisconsin Order,* does not require Bell Operating Companies (BOCs) to automatically change their payphone rates. (Id.) According to witness Blake,

> [t]o follow the FPTA's logic, any time costs change, a BOC should immediately revise its tariff rates. This would lead to an absurd situation. For example, any time a state commission issues an order in a generic cost docket, under the FPTA's reasoning, such an order would be obsolete the very next day if any of the BOC'S cost study inputs had changed. (TR 205-206)

Second, the witness emphasizes that the *Wisconsin Order* itself was appealed, not becoming final until July 11, 2003. (Blake TR 197; EXH 1, p.12) Third, PTAS rates in Florida were tied to basic business rates (1FB), which witness Blake asserts have increased over time. Finally, witness Blake contends that the FPTA has ignored the fact that it chose not to pursue additional regulatory or legal action after the Commission approved BellSouth's PTAS rates, nor did FPTA seek any review of BellSouth's rates until the opening of this docket.[14] (TR 205)

Analysis and Conclusion

Staff believes that there is no FCC requirement obligating BellSouth to "voluntarily" or automatically change its payphone rates upon a change in costs absent Commission review. Staff agrees with BellSouth witness Blake that fluctuations in costs (up or down) do not automatically trigger a requirement that BellSouth amend its rates. (TR 197; EXH 1, p.11) To require BellSouth (or any other ILEC) to do so, creates "an absurd situation" which would require BellSouth to revise its payphone rates every time one of its costs changed. (Blake TR 205) Moreover, staff agrees that "[a]t all times, BellSouth's rates have been charged pursuant to binding FPSC Orders and FCC Tariffs that have not been challenged, appealed or modified." (TR 196) See also staff's recommendation in Issue 1(c). Accordingly, staff agrees that BellSouth's rates remain in effect until modified, and are changed on a prospective basis only upon a proper review of all necessary evidence and documentation by this Commission. (Blake TR 206, 218) Absent some challenge, appeal, or modification, the tariffed rates that BellSouth had in place at that time were the rates that were in effect and the rates that BellSouth was authorized and required to charge.

Specifically, staff agrees with the FPTA's witness that the *Wisconsin Orders* reaffirmed and clarified existing FCC requirements and did not "change" those requirements. (Wood TR 131-136; EXH 3, p.230) However, staff also agrees with BellSouth that " . . . the language of the *Wisconsin Orders* suggests that a state commission's review and implementation . . . should be prospective in nature." (EXH 1, p.11) Staff believes that the parties' discussion as to the

[14] On September 1, 1998, the FPTA filed its petition protesting Order No. PSC-98-1088-FOF-TP, but it was withdrawn by the FPTA on December 31, 1998.

prospective or retroactive application of the *Wisconsin Orders* is of limited value here, for the reasons discussed above and in Issue 1(c) which follows. Moreover, it appears that the *Second Wisconsin Order* does not address the prospective or retroactive application of the order, stating only that

> . . . in establishing cost-based, state-tariffed charges for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federally tariffed SLC[15]. . . .

and,

> [a]t whatever point in time a state reviews a BOC's payphone line rates for compliance with the new services test, it must apply an offset for the SLC that is then in effect. (¶61)

Based on the record in this proceeding and the discussion above, staff believes that there was no "date certain" that BellSouth was required to reduce its intrastate payphone rates by the amount of the intrastate EUCL. Any reductions must occur on a going-forward basis when the Commission reviews a BOC's payphone line rates for NST compliance, as it is doing here for BellSouth.

[15] SLC is also referred to as EUCL.

Issue 1(c): Can the FPSC order refunds to FPTA's members 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?

Recommendation: Staff recommends that between April 15, 1997 and November 10, 2003, the rates charged by BellSouth to the PSPs were legally sustainable and were consistent with BellSouth's tariffs and controlling orders of this Commission. Further, staff believes that ordering refunds would be the equivalent of retroactive rate making, a practice prohibited by prevailing law. Accordingly, staff believes this Commission should not order refunds to PSPs for that time period. Therefore, this Commission need not determine amounts or how any refunds should be effected. **(Fordham)**

Position of the Parties

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.

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

Staff Analysis:

FPTA's Argument

FPTA argues that the FCC has preempted state commissions in this subject area and, pursuant to the series of orders issued implementing Section 276 of the 1996 Act (*Payphone Orders*), as ultimately clarified by In the Matter of Wisconsin Public Service Commission, U.S. LEXIS 3066 (April 26, 2004), (*Wisconsin Orders*), this Commission must order refunds. According to FPTA, BellSouth did not reduce its PTAS rate by the amount of the federally tariffed EUCL during the period beginning April 15, 1997 and ending November 10, 2003, when BellSouth filed new tariffs correcting the error. (FPTA BR at 20)

According to FPTA, the inception of the problem was this Commission's Order No. PSC-98-1088-FOF-TL, entered in Docket No. 970281-TL. FPTA alleges that in that Order this Commission incorrectly determined that BellSouth's intrastate PTAS rates satisfied the new services test, despite the fact that BellSouth failed to reduce its intrastate PTAS rates by the amount of the federally tariffed EUCL. Therefore, urges FPTA, BellSouth over-recovered its costs from April 15, 1997 until November 10, 2003. FPTA thus argues that this Commission should correct its prior decision and order BellSouth to refund to PSPs the unlawful profits collected during that time frame. (BR at 21)

FPTA cites to 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); and Sunshine Util. v.

Florida Pub. Serv. Comm'n, 577 So. 2d. 663 (Fla. 1st DCA 1991) as sources of this Commission's authority to alter previously entered final orders as an exception to the doctrine of administrative finality. According to Reedy Creek, "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." (Id. at 249) Additionally, claims FPTA, 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. at 665.

FPTA notes that BellSouth was a member of the coalition involved in the Wisconsin matter that gave rise to the *Wisconsin Orders*. Therefore, argues FPTA, BellSouth cannot now claim 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. Additionally, because BellSouth fought this issue throughout its region, it should be well aware of the inconsistent and disparate applications of Section 276. Indeed, argues FPTA, BellSouth knew that the FCC's final interpretation and implementation of the new services test and this Commission's prior order could conflict. (BR at 24)

FPTA argues that BellSouth promised to refund excess revenues when its agent sought and obtained a waiver of the statutory requirements. Accordingly, BellSouth is now estopped from claiming a refund cannot be awarded. FPTA notes that Michael K. Kellogg, as counsel to the RBOC Coalition of which BellSouth was and is a member, promised the FCC that the Bell Operating Companies would issue refunds if the new statutory rate was lower than the existing rate. Therefore, BellSouth cannot claim it is prejudiced because the FPTA now asks the Commission to hold BellSouth to its promise. For the same reason, FPTA argues the statute of limitations does not apply in this particular matter. Additionally, FPTA notes that BellSouth continued to challenge the PTAS rate structure guidelines provided in Section 276 until July 11, 2003, the date on which the D.C. 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. (BR at 24)

Citing GTE Florida, Inc. v. Clark, 668 So. 2d 971 (Fla. 1996), FPTA argues that it is clear that a refund is not automatically barred as retroactive ratemaking under Florida law. The cornerstone to the general prohibition on retroactive ratemaking is lack of notice and reliance. FPTA argues that BellSouth always had notice of the complicated and inconsistent application of the new services test across the nation, particularly because BellSouth was the root cause of that inconsistent application. (BR at 25)

FPTA urges that, 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. FPTA notes 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. MCI Telecom Corp. v. FCC, 143 F.3d 606, 609 (D.C. 1998).

BellSouth's Argument

BellSouth argues that refunds are not required, would not be appropriate in this case, and this Commission has no authority to order any refunds. According to BellSouth, well-established legal doctrines including, but not limited to, the prohibition against retroactive ratemaking, the filed-rate doctrine, and the doctrine of administrative finality, prohibit such relief. In addition to these well-established legal doctrines, BellSouth argues, the FPTA's claimed bases for refunds -- (1) federal preemption requires refunds; (2) federal law requires refunds; and (3) equitable ratemaking considerations under Florida law requires refunds -- cannot stand.

BellSouth urges that in City of Miami v. Florida Public Service Commission, 208 So.2d 249, 259 (Fla. 1968), the Florida Supreme Court clearly prohibited retroactive ratemaking.

> Petitioner contends that in both orders the Commission departed from essential requirements of law by allowing both companies involved herein to retain those past charges deemed excessive rather than making said reduction orders retroactive.
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> * * * *
>
> It is Petitioner's contention that said rate reductions should be made retroactive to October 1, 1963 with appropriate refunds to the ratepayers. We do not agree with the petitioner's contention on this point. An examination of pertinent statutes leads us to conclude that the Commission would have no authority to make retroactive ratemaking orders.

The Court further explained that this Commission's statutory authority to set rates in Section 364.14 is prospective only since the authorizing statute limits rates to be fixed "thereafter." City of Miami at 260; and Section 364.14 (1)(c) ("the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force and fix the same by order"). Thus, argues BellSouth, this Commission simply cannot revise rates established years past, and order corresponding refunds. (BST BR at 13)

BellSouth notes that the doctrine of retroactive ratemaking was addressed in detail in our Docket No. 971663-WS, In re Petition of Florida Cities Water Company. In Order No. PSC-98-1583-FOF-WS, November 25, 1998, this Commission explained:

> This Commission has consistently recognized that ratemaking is prospective and that retroactive ratemaking is prohibited . . . . The general principle of retroactive ratemaking is that new rates are not to be applied to past consumptions. The Courts have interpreted retroactive ratemaking to occur when an attempt is made to recover either past losses (under earnings) or over earnings in prospective rates . . . In City of Miami, the petitioner argued that rates should have been reduced for prior period over earnings and that the excess earnings should be refunded.

> Both of these attempts were deemed to be retroactive ratemaking and thus were prohibited. (citations omitted).

BellSouth argues that this Commission's *PTAS Order*[16] and *Final PTAS Order*[17] have not been appealed, they have not been revoked or modified by the Commission, and they have not been suspended or vacated by any court. These Orders direct the manner in which BellSouth is to charge for payphone access lines in Florida, and BellSouth has been charging for payphone access lines in compliance with these Orders. BellSouth states it simply cannot be required to issue refunds for charging rates that comply with valid and effective Orders of the Commission. Any such refunds would violate the prohibition against retroactive ratemaking. (BR at 14)

BellSouth argues the filed rate doctrine also prohibits the FPTA's claims for a refund. The "filed rate doctrine holds that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged." Global Access Limited v. AT&T Corp., 978 F. Supp. 1068 (S.D. Fla. 1997); citing Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 615 (11th Cir. 1995). Simply, BellSouth states, the filed rate doctrine precludes a party from disputing a filed rate. "Application of the filed rate doctrine can at times be harsh, but its justification lies in the principle that carriers should not be able to discriminate against customers in the setting of service rates; one rate – the filed rate – is the applicable rate for all . . . ." Global Access Limited, 978 F. Supp. at 1073; see also MCI Telecomm. Corp. v. Best Tel. Co., 898 F. Supp. 868, 872 (S.D. Fla. 1994).

Further emphasizing the filed rate doctrine, BellSouth notes that in Arizona Grocery Co. v. Atchison, T&SF Ry. Co., 284 U.S. 370, 390 (1932), the Supreme Court declared that

> Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to the reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Since then, BellSouth states, federal appellate decisions consistently have held that a federal commission may not order refunds when it determines that a rate that it previously allowed to become effective is not appropriate. This principle is firmly grounded in sound public policy, argues BellSouth. Any other rule "would lead to endless consideration of matters previously presented to the Commission and the confusion about the effectiveness of Commission orders." Idaho Sugar v. Intermountain Gas Co., 100 Idaho 368, 373-74, 597 P.2d 1058, 1063-64 (1979). (BR at 15)

BellSouth also argues that its position before the FCC when it sought a waiver of the intrastate tariff filing requirements does not justify a refund claim. After considering BellSouth's

[16] Order No. PSC-98-1088-FOF-TP, issued August 11, 1998, in Docket No. 970281-TL.
[17] Order No. PSC-99-0493-FOF-TP, issued January 19, 1999, in Docket No. 970281-TL.

request for a waiver, the FCC issued an Order plainly stating that "[a] LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." (*Second Waiver Order,* ¶¶2, 25) Because BellSouth's tariffed rates, which rates met the new services test and were effective January 19, 1999, were not lower than existing rates, no refunds were due to FPTA members then and no refunds are due now. BellSouth maintains its actions are entirely consistent with its position in seeking a waiver from the FCC.

In cases analogous to the FPTA's Complaint, BellSouth observes state commissions in Alabama, Missouri, Ohio, and Kansas have all denied refund claims. For example, the Kansas Commission noted:

> [a]ll Kansas local exchange companies have approved payphone line tariffs in place and there is no evidence they have not been billing payphone providers in accordance with those tariffs. Telephone companies are required to charge the rates set out in their approved tariffs. There is no basis for retroactive implementation of new tariffs, if we find the current tariffs must be revised.

Order, In Re: Matter of the Application of the Kansas Payphone Association Requesting the Commission Investigate and Revise the Dockets Concerning the Resale of Local Telephone Service by Independent Payphone Operators and Tariffs Pursuant to the FCC's "New services Test" Decision Issued January 31, 2002, Docket No. 02-KAPT-651-GIT (December 10, 2002).

Likewise, the Ohio Commission "rejects the PAO's request for refunds. Such refunds would constitute unlawful, retroactive ratemaking." Order, In Re: the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services, Case No. 96-1310-TP-COI (November 26, 2002). See also Order (April, 13, 2004), Southern Public Communication Association v. BellSouth Telecommunications, Inc., Docket No. 29172 (Ala. Pub. Serv. Comm'n) (the Alabama Public Service Commission dismissed an SPCA Complaint seeking refunds for the period before BellSouth made a tariff filing reducing its rates; the Alabama Commission found BellSouth's arguments "very persuasive") and Tari Christ d/b/a ANJ Communications, et al. v. Southwestern Bell Telephone Co., L.P., et al., Case No. TC-2003-0066 (Jan. 9, 2003) (the Missouri Public Service Commission granted motions to dismiss based upon the fact that the Complainants failed to state a claim upon which relief could be granted under the authorizing state statutes). (BR at 24)

BellSouth also argues the FPTA's reliance on a March 16, 2004 Michigan decision is misplaced. In Michigan, a series of appeals occurred after the Commission addressed the ILEC's PTAS rates. Ultimately, after years of litigation, the Michigan commission approved lower tariff rates and ordered refunds. BellSouth notes the Michigan decision could only shed light on this matter if Florida's *Final PTAS Order* had been subjected to successive appeals and was never finalized. BellSouth argues the situation in Michigan is analogous to the situation in North Carolina (not Florida), insofar as the payphone associations in both Michigan and North Carolina appealed pre-*Wisconsin Order* commission rulings on PTAS rates. In Florida, the FPTA elected

not to exercise its rights to pursue an appeal, and thus, according to BellSouth, its reliance on the Michigan decision is unreasonable.

BellSouth notes that in other states in its territory state commissions approved stipulations that included refunds. For example, the Louisiana Commission approved a Joint Stipulation between BellSouth and the Louisiana Payphone Association by Order No. U-22632 on August 3, 2001. The North Carolina Commission approved a settlement agreement dated December 4, 2002, between BellSouth and the North Carolina Payphone association in Docket No. P-100, Sub 84b. In each of these states, BellSouth argues, it voluntarily agreed to reduce its tariffed PTAS rates and to provide certain refunds. The approval of such voluntary settlements by these state commissions does not remotely resemble nor authorize the type of refunds the FPTA seeks here, contends BellSouth.

BellSouth urges that the only proceeding in which refunds were ordered after the issuance of the *Wisconsin Order* that is analogous to the instant case is the Kentucky Commission's decision last year, which is currently on appeal. Because that decision has been appealed, it is not final, and this Commission should disregard it. However, even if this Commission were to rely upon the non-final decision of the Kentucky Commission, refunds were ordered from the date of the *Wisconsin Order*, not back to April 15, 1997. (BR at 26)

Analysis

Staff believes the most significant factor in the determination of whether refunds may be ordered is the fact that the Commission's *Final PTAS Order* was protested, but the protest was subsequently withdrawn and the Order went into effect as a final Order. The FPTA was a party to the proceedings and had the opportunity to challenge the *PTAS Order* and the *Final PTAS Order*. The FPTA, however, decided not to challenge the Commission's orders in any forum, and for years its members have paid the rates that are set forth in BellSouth's filed tariffs (and that are consistent with the Commission's unchallenged orders). In seeking refunds, the FPTA indisputably is seeking relief for the payment of rates that were (and are) on file with this Commission. Moreover, the rates were (and are) consistent with unchallenged orders entered by the Commission.

For example, in Sunshine Utilities v. FPSC, the Commission staff discovered an error in rates in 1987, which related to rates set in a 1984 order. In 1988, the Commission initiated an investigation into the possible error, and ultimately corrected prospectively the rate base computation error. This Commission ordered the correction to the beginning of the 1988 investigation, not from the date of the 1984 order. In so ordering, the First District Court of Appeals ruled that the FPSC did not abuse its discretion.

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

Similarly, in Reedy Creek Util. Co. v. FPSC, 418 So.2d 249 (Fla. 1982), the Commission approved a stipulation, in which Reedy Creek voluntarily agreed to make a refund in a prescribed manner. Reedy Creek computed the refund amount, and the Commission approved the refund amount as calculated by Reedy Creek in an order dated July 21, 1980. Prior to Reedy Creek allocating the refund, and less than three months later, on October 3, 1980, the Commission issued a clarifying order, which corrected and increased the refund amount. The correcting order occurred two and one half months after the initial order. In addressing the Commission's authority to modify its orders pursuant to the doctrine of administrative finality, the Florida Supreme Court, quoting Peoples Gas Sys. v. Mason, 187 So.2d 335 (Fla. 1966), explained that

> orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein.

Finally, in Peoples Gas Sys. v. Mason, the FPSC sought to "correct" an earlier order. In that case, the Commission had approved a territorial service agreement between gas distributors by order dated November 9, 1960. On June 24, 1965, almost five years later, the Commission rescinded and withdrew the approval it had previously granted in 1960. In reversing the Commission's 1965 order, the Supreme Court of Florida criticized the Commission for "second-guessing" its original order. The Court explained that the Commission's power to modify its orders is limited and can only occur "upon a specific finding based on adequate proof that such modification is necessary in the public interest because of changed conditions or other circumstances not present in the proceedings which led to the order being modified."

Additionally, the FPTA's reliance upon the 1997 waiver letter is inconsistent with the decision in In the Matter of Independent Payphone Ass'n of New York, Inc. v. Public Service Commission of the State of New York, 2004 WL 587624 (N.Y. App. Div., 3d Dep't, March 25, 2004). The FPTA suggests that what BellSouth and the FCC really meant was that even after the rates the Commission established in the *PTAS Order* and the *Final PTAS Order* became effective, and even after all parties declined to seek reconsideration or appeal such orders, BellSouth would agree to pay refunds, all the way back to April 15, 1997, if any person or entity could, at any unspecified time in the future, convince any commission or court that the Florida Commission really should have established different rates way back in 1999. The FPTA's argument defies the controlling legal principles discussed above and its refund claim should therefore be rejected.

Conclusion

Staff recommends that between April 15, 1997 and November 10, 2003, the rates charged by BellSouth to the PSPs were legally sustainable, and were consistent with BellSouth's tariffs and controlling orders of this Commission. Accordingly, staff believes this Commission should not order refunds to PSPs for that time period. Therefore, this Commission need not determine amounts or how any refunds should be effected.

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.

(a) Are BellSouth's intrastate payphone rates no longer compliant with the new services test? If so, when did they become noncompliant?
(b) If BellSouth's intrastate payphone rates are not compliant with the new services test, at what rate levels will BellSouth's intrastate payphone rates comply with the new services test?

Recommendation: BellSouth's rates remain compliant with the new services test; however, staff recommends that BellSouth's overhead factor be reduced to 30.21%. A revised tariff, and all supporting documentation demonstrating the changes made, should be filed within 30 days of the issuance of the order. **(T. Brown)**

Position of the Parties

FPTA:

2(a): 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.

2(b): 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.

BellSouth 2(a) and (b): BellSouth's intrastate payphone rates have been and continue to be compliant with the new services test. This Commission can order BellSouth to revise prospectively its intrastate payphone rates; if it does so the appropriate, new services complaint[sic], statewide rate would be $17.23, which accounts for the EUCL of $7.13, and results in a total rate of $24.36. Refunds are not appropriate under any circumstance.

Staff Analysis: As discussed in detail in Issue 1(c), staff recommends that between April 15, 1997 and November 10, 2003, BellSouth's intrastate payphone rates were legally sustainable and consistent with BellSouth's tariffs and controlling orders of this Commission. Staff also recommends that this Commission should not order refunds to payphone service providers (PSPs) for that same time period.

On August 11, 1998, the Commission issued its *PTAS Order*[18] setting forth its decision on the FCC's new services test. The Commission recognized that BellSouth's filed PTAS rates were " . . . cost-based and thus meet the 'new services' test." (*PTAS Order,* p.5) In the same order, the Commission stated " . . . we find that the existing LEC tariffs for payphone services are cost-based, consistent with Section 276 of the Act, and nondiscriminatory; therefore, no further filings are necessary to modify existing tariffs." (Id., p.7) Staff believes that BellSouth has charged Commission-approved intrastate payphone rates plus the applicable federal end-user common line charge (EUCL), in compliance with the *PTAS Order,* the *Final PTAS Order,*[19] and its approved tariffs.

In regards to this Commission's *PTAS Order* and the *Final PTAS Order*, the parties appear to agree with staff, at least in part, that the Commission based its decision on the information that it had before it at that point in time. (EXH 1, pp.13, 15; EXH 3, pp.19-20, 22) Absent the FCC's recent clarifications, FPTA witness Wood states, "[t]he most that the Commission could have concluded was that, based on its understanding of the FCC requirements at that time, BellSouth's rates appeared to be in compliance at that time." (TR 137) Based on the aforementioned arguments and staff's recommendations in other issues, instead of looking at BellSouth's previous tariff(s), staff only addresses whether BellSouth's revised tariff is compliant with the new services test (NST).[20]

Staff also takes this opportunity to acknowledge that the parties appear to agree on several other points as well. BellSouth and FPTA agree that if this Commission chooses to modify the current PTAS rate structure, such a modification should result in one uniform rate throughout all of BellSouth's Florida territory.[21] (Wood TR 124; Blake TR 200-201, 213) If a statewide rate structure is adopted, the parties also agree that a separate EUCL charge will continue to be placed on the PSPs' bills. (Renard TR 53-54; BellSouth BR at 31) The parties are also in agreement with BellSouth's calculation of direct costs and the use of the total service long-run incremental cost (TSLRIC) analysis. (Wood TR 140; FPTA BR at 30; Shell TR 236-239) As such, staff shifts its attention to the basis of the remaining disagreement and focuses its efforts on the overhead loading factor and the methodology utilized by BellSouth to justify that overhead loading. Because much of the testimony in Issues 2(a) and 2(b) overlapped or combined these issues, staff has combined its recommendation relating to these issues.

FPTA's Arguments

FPTA witness Wood argues that BellSouth's rates are not currently in compliance and probably were not in compliance as of August 11, 1998. (TR 86) He argues that all available evidence suggests that BellSouth's costs have trended downward over time and asserts that this Commission's orders regarding UNE rates are consistent with such an observation. (TR 86-87)

[18] Order No. PSC-98-1088-FOF-TP, in Docket No. 970281-TL.
[19] Order No. PSC-99-0493-FOF-TL, issued January 19, 1999, in Docket No. 970281-TL.
[20] BellSouth filed a revision to its General Subscriber Services Tariff (GSST), Section A7.4, to reduce its approved and effective PTAS rates by the amount of the federal end-user common line charge (EUCL) on October 27, 2003, with an effective date of November 10, 2003.
[21] PTAS rates currently vary by rate group. There are 12 distinct PTAS rate groups which mirror BellSouth's retail rate structure. (BellSouth BR at 31; TR 204; EXH 12)

Furthermore, the witness asserts " . . . at a minimum BellSouth's rates became out of compliance immediately after the August 11, 1998 order was issued." (TR 87)

Witness Wood also contends that "the New Services Test is a dynamic and ongoing process that recognizes changes in cost levels over time." (TR 87) As such, he suggests that " . . . BellSouth's rates exceed a cost-based level by a significant margin." (Id.) The witness asserts that his analysis of BellSouth's current rates seeks to answer four questions:

> (1) Are BellSouth's rates *cost based?*
> (2) Are BellSouth's rates *consistent with the requirements of section 276 of the Act?*
> (3) Are BellSouth's rates *nondiscriminatory?*
> (4) Are BellSouth's rates consistent *with the FCC's Computer III tariffing guidelines (i.e., in compliance with the so-called 'new services test)?* (TR 88-89)(emphasis in original)

He contends that each question is a distinct and independent area of inquiry. According to the witness, "[t]he FCC's "new services test" is one, but only one, of these four independent criteria." (TR 89) In order for this Commission to determine if BellSouth's rates meet each of these requirements, witness Wood asserts that any cost data "must be specific to the elements of payphone access service (including access lines, usage, and features) and must be fully documented."[22] (TR 104)

Witness Wood contends that this Commission will need to examine three categories of costs: direct, shared, and common. (TR 105) Specifically, he asserts that the rates " . . . should equal – and should under no circumstances be greater than - the total of the direct, shared, and common costs that the ILECs *demonstrate* are reasonable and appropriate." (Id.)(emphasis in original) Witness Wood asserts that this Commission must review the reported direct cost of providing the rate element, and the level of overhead loadings (BellSouth's calculation of shared and common costs) in order to determine if the ILEC has met its burden of demonstrating that the reported cost is reasonable. (TR 106, 121-123) According to witness Wood, "a rate that exceeds the level of direct cost plus overhead (i.e., direct + shared + common costs) that an ILEC has demonstrated to be reasonable *cannot* meet the FCC requirements that such a rate be both cost based and compliant with the new services test." (TR 106-107)(emphasis in original) In the absence of adequate cost documentation, witness Wood asserts that this Commission should rely on its experience in arbitrations pursuant to §251 and establishing rates for UNEs when determining cost-based rates for payphone access services. (TR 107)

Witness Wood argues that BellSouth has relied upon a broad application of the methodology set forth in the *ONA Tariff Order*[23] to arrive at its overhead loading for PTAS rates. Based on that application, he addresses three fundamental problems with BellSouth's approach:

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[22] Witness Wood provides additional discussion related to access lines, usage, and features in his rebuttal testimony. (TR 116-118)

[23] *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440 (Dec. 15, 1993)(*ONA Tariff Order*).

> (1) BellSouth did not actually apply the methodology contained in the *ONA Tariff Order,*
> (2) the methodology is for the purpose of developing a ceiling for overhead loadings, rather than for developing the level of a reasonable overhead loading, and
> (3) BellSouth has not demonstrated that it is reasonable to use a methodology developed and adopted specifically for the very low rates associated with non-essential switching features and to apply this methodology broadly to all rate elements, including the monthly access line rate. (TR 141)

He asserts "[t]he flexibility . . . clearly has limits: not all benchmarks are meaningful, and not all overhead loadings are applicable to all rates (specifically, unusually high overhead loadings are limited to rates that, because of very low direct costs, will still be low if a large overhead loading is added)." (TR 143) He goes on to argue that " . . . the BOCs bear the burden of justifying their overhead allocations and demonstrating compliance with our standards." (Id.)

Witness Wood contends that as a result, this Commission should not accept BellSouth's broad conclusion that all of the FCC's requirements are infinitely flexible in their application. (TR 143-144) The witness contends that the FCC concluded that to determine the appropriate level of overhead loadings, states can use UNE overhead loadings (with an adjustment to include retail costs, if the LEC demonstrates that such costs exist), the methodology set forth in the *Physical Collocation Tariff Order,*[24] or the methodology set forth in the *ONA Tariff Order*. (TR 144, 152) He asserts, however, that the FCC did *not* conclude that the methodologies could be altered to a LEC's liking, or that state regulators could rely upon the LEC's versions of these methodologies in order to ascertain whether existing or proposed rates are reasonable, or that all methodologies are applicable for all rates. (Id.) As such, FPTA witnesses Renard and Wood both propose this Commission adopt a prospective PTAS rate of $18.04. (TR 51-53, 151, 153) That amount includes a EUCL of $7.13 and an intrastate rate of $10.91.[25] An additional $0.22 per month would be required if the blocking and screening feature is added.[26] (Id.)

BellSouth's Arguments

Proposed Rate

BellSouth witness Blake asserts that "BellSouth's PTAS rates have been, and are currently, in compliance with the FCC's new services test." (TR 199) She contends that BellSouth revised its PTAS tariff based on additional guidance provided by the FCC in the *Wisconsin Order* and the fact that the parties were unable to reach a mutually acceptable resolution of this matter. (Id.; TR 204) Witness Blake argues that in the event that this

[24] *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 (June 13, 1997)(*Physical Collocation Tariff Order*).
[25] FPTA's proposed rates use an overhead loading of 10%. (Wood TR 151)
[26] The blocking and screening feature charge was determined using BellSouth's proposed overhead loading of 50.42%. (Wood TR 151) The blocking and screening feature helps prevent unauthorized calls from being placed or received at payphones.

Commission decides to revisit BellSouth's rates, two aspects of the *Wisconsin Order's* clarification of the NST may be considered going-forward. First, " . . . a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federal tariffed SLC [now EUCL]."[27] (TR 200) Second, the witness contends that the FCC provided additional guidelines on the calculation of overhead loadings, even though the underlying cost methodology in support of payphone rates remained unchanged. (Id.)

If this Commission decides to revisit BellSouth's PTAS costs, witness Blake asserts that the cost study sponsored by witness Shell shows that BellSouth's cost to provide PTAS is $24.36 including overhead loadings, on a statewide average basis. (TR 200, 219-220) The average cost of $24.36, less the federal EUCL charge of $7.13,[28] results in a rate of $17.23. (Id.) The witness argues that "[t]his revised statewide average rate is appropriate considering that the current Florida statewide UNE-P rate is $15.12." (TR 200-201) Witness Blake also argues that FPTA witness Wood did not take into account the fact that BellSouth has already reduced its tariffed PTAS rates by the EUCL in his analysis. Furthermore, the witness contends that witness Wood also used a EUCL of $7.84, instead of the current EUCL, which is $7.13. Moreover, she contends that BellSouth's tariffed rates are not "well in excess of cost" for almost all rate groups and zones as FPTA witness Wood alleges. (Blake TR 213) Despite claiming that UNE rates and costs are not an appropriate benchmark, the witness goes on to argue that BellSouth's proposed new monthly base rate[29] is comparable to the rate computed using witness Wood's analysis.[30] In any event, witness Blake asserts that BellSouth's rate of $17.23 is not out of line with the PTAS rates in the other BellSouth states. (TR 200-201, 213)

Likewise, BellSouth witness Shell asserts that UNE costs and rates are not an appropriate benchmark because the Total Element Long-Run Incremental Cost (TELRIC) methodology used in setting rates for unbundled network elements (UNEs) is encumbered by additional constraints not required for a TSLRIC-analysis. (TR 248-249) He argues that the TELRIC results are distorted " . . . and understate the true forward-looking costs of the incumbents." (Shell TR 248-249) Moreover, the witness contends that changes made by this Commission (e.g., to the cost of capital, depreciation, placing, and splicing inputs) further understate the actual costs BellSouth incurs. According to the witness, FPTA witness Wood's comparison of current rates to UNE rates "is meaningless." (TR 249)

Methodology

BellSouth witness Shell asserts that BellSouth incurs substantial costs in addition to those that the TSLRIC methodology recognizes. According to the witness, the other costs are shared and common costs, or "overheads." (TR 239) The witness states that

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[27] BellSouth filed a revision to its General Subscriber Services Tariff (GSST), Section A7.4, to reduce its approved and effective PTAS rates by the amount of the federal end-user common line charge (EUCL) on October 27, 2003, with an effective date of November 10, 2003. The revised tariff filing has been addressed in Issue 1(a).

[28] Tariff FCC No. 1, pp.4-7, EUCL for Multiline Business Subscriber, per individual line or trunk.

[29] Based on BellSouth's cost study filed with the testimony of Bernard Shell, the new statewide average monthly base rate would be $17.23. (Blake TR 213)

[30] Witness Blake asserts that by taking the statewide average UNE-P rate of $15.12, plus local usage of $1.93 as used by Mr. Wood, $17.05 is the resulting rate. (Id.)

> [a] shared cost is incurred when producing two or more services but is not a direct cost caused uniquely by any one of those services. Common costs are costs that are incurred by a firm to produce all of its services, but cannot be directly attributed to (i.e., are not caused uniquely by) any single service or service combination that includes fewer than all of the services provided. (TR 239-240)

He offers several examples of such costs, including executive, accounting, vendor licensing fees, and legal costs. He adds that these costs are not included at the individual service level since only direct costs are considered in a TSLRIC analysis. (TR 240) Witness Shell argues that shared and common costs are "true costs" that should not be ignored. (Id.) He goes on to state " . . . if a company were to consistently set their rates at TSLRIC, the company would soon fail." (Id.)

The witness contends that consideration must be given to a reasonable level of contribution toward the overhead costs of the corporation. (TR 240) Moreover, the FCC described several options with respect to the development of an overhead factor.[31] According to witness Shell, "BellSouth chose to 'use ARMIS data relating to the plant categories used to provide payphone services in calculating an upper limit on overhead loadings.'" (TR 240, 247) He asserts that BellSouth's decision is consistent with the FCC's evaluation of the reasonableness of Open Network Architecture (ONA) tariffs.[32] (Id.) Using the ONA methodology, he asserts that BellSouth's overhead loading percentage is 50.42%. (TR 265; EXH 1, pp.60-62) Moreover, the witness asserts that BellSouth's cost study " . . . is fully documented and demonstrates the calculation of the overhead factor." (TR 249)

Analysis and Conclusion

Staff believes that BellSouth's rates remain compliant with the NST and were legally sustainable and consistent with BellSouth's tariffs and controlling orders of this Commission between April 15, 1997 and November 10, 2003. Staff acknowledges that the FCC's *Payphone Orders* set forth a four-part test for PTAS rates requiring that state tariffs for payphone services be: (1) cost based; (2) consistent with Section 276; (3) nondiscriminatory; and (4) consistent with *Computer III* tariffing guidelines. As alluded to by FPTA witness Wood, "[t]he new services test is one, but only one, of the four applicable requirements." (TR 88-89, 128) Staff agrees, noting that these were the same standards this Commission previously used to determine BellSouth's compliance with the NST in the *PTAS Order* and the *Final PTAS Order*. (EXH 1, pp.8, 21, 60-61; EXH 3, pp.46-47) Since the Commission issued those prior orders, BellSouth has updated and revised inputs to its underlying models which are reflected in the PTAS Study in this proceeding. (TR 237-238; EXH 13) Staff has found no persuasive evidence which would lead it to believe that BellSouth's PTAS rates are somehow not compliant now. No new evidence has been presented here to lead staff to any other conclusion than that BellSouth's PTAS rates remain compliant with the NST. (EXH 1, pp.307-308; EXH 13; TR 199)

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[31] The *Wisconsin Order* defines three methods of calculating overhead: (1) the UNE overhead factor methodology; (2) the methodology outlined in the FCC's *Physical Collocation Tariff Order*; and (3) the *ONA Tariff Methodology*. (EXH 1, p.309; BST BR at 32)

[32] BellSouth's overhead calculations are contained in Exhibit DDC- 1.

However, BellSouth witness Blake asserts that should this Commission decide to revisit BellSouth's rates, " . . . there are two aspects of the *Wisconsin Order's* clarification of the new services test that may be considered on a prospective basis." (TR 200) Staff notes that BellSouth has already effected the first, by reducing the monthly per line charge determined under the new services test by the amount of the EUCL in its tariff filing. (Id.) The second, addressed by staff in this recommendation, relates to the "additional guidelines" associated with the calculation of the overhead loadings. (Id.) Staff believes that a modification to the overhead loading percentage is warranted based on the record in this proceeding.

Staff agrees that BellSouth's use of the *ONA Tariff Order* methodology is permissible to determine overhead loadings. (TR 247, 265) At the same time, staff also acknowledges that the *ONA Tariff Order* methodology is but one of three methodologies that may be used. (TR 254, 263; EXH 1, pp.62, 309) BellSouth could have chosen to use the UNE overhead loadings methodology or those put forth in the *Physical Collocation Tariff Order* for its cost study, but did not. Staff believes that BellSouth was free to choose whichever methodology it desired in order to determine its overhead loading factor. Even FPTA witness Wood appears to realize this, citing to the *Second Wisconsin Order* (¶¶53-54) stating, "[t]he 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.*" (TR 98) In addition, the Second Wisconsin Order added that in calculating an "upper limit on overhead loadings" for payphone services, " . . . any or all of these methods . . ." could be used. (Id.) Accordingly, staff believes that there is no "preferred" methodology. If there was, staff believes that at the very least, the FCC would have specifically outlined which was the FCC-preferred method. In fact, staff notes that in Order FCC 02-25, ¶58, the FCC " . . . established a flexible approach to calculating the BOCs' overhead allocation for intrastate payphone line rates."

Even though BellSouth used one of the three acceptable methodologies to determine overhead loadings, staff recognizes that BellSouth still had an obligation to demonstrate the "reasonableness" of the resulting overhead loading. Staff does not prefer one method over another, but notes that the *Physical Collocation Tariff Order* and the *ONA Tariff Order* methodologies outlined by the FCC create "a ceiling" that must still be justified. (Order FCC 02-25, ¶¶56-58; EXH 4) Staff does not believe that BellSouth has met its burden here.

Staff notes that FPTA witness Wood has suggested using a 10% overhead loading factor, while BellSouth has proposed using 50.42%. (TR 151; EXH 1, pp.60-62; EXH 13) Despite his proposal, witness Wood still accepts BellSouth's 50.42% for the blocking and screening feature, stating "[w]hile I do not believe that BellSouth has in fact applied this methodology correctly in their analysis, I am giving them the benefit of the doubt and accepting the 50.42% . . .." (TR 151) Staff believes that witness Wood's proposal seems unreasonably low and is not sufficiently supported in the record here. Moreover, even though he proposed an overhead loading factor of 10%, he appears unsure of that proposal, stating "I think it would be reasonable to go back to the UNE case and actually put just BellSouth's common factor in . . . which is well less than 10%." (TR 178) He also appears to acknowledge that some percentage above his proposal may be appropriate, stating " . . . the actual markup would be a little higher than 10 percent." (Id.)

On the other hand, staff believes that BellSouth's proposed overhead loading percentage suggests an upper limit, or ceiling, for an "appropriate" overhead loading. As such, the overhead loading that results from using the *ONA Tariff Order* approach does not necessarily represent a "per se reasonable level." (Wood TR 146-148) Staff agrees with FPTA that BellSouth's proposed overhead factor "is well beyond reasonable." (TR 148) The allowance of such an overhead loading requires adequate justification and fact-specific evidence beyond the degree provided here. (Order FCC 02-25, ¶¶56-58; TR 147; EXH 4)

Staff notes that BellSouth witness Shell asserted that "[t]here is a small percentage of overlap in the category labeled 'direct and overhead' simply because the way the ONA methodology is set up . . ." (TR 272)(emphasis added) He went on to state, " . . . we feel like that was really insignificant because what we were trying to do is develop a reasonable overhead factor that would apply." (Shell TR 273) Staff agrees in part, but notes that in determining a reasonable overhead factor, consideration should be given to avoiding any overlap. BellSouth knew there was an overlap of approximately 8%, yet made no adjustments in its proposed overhead loading to account for the overlap. Staff believes that BellSouth should have adjusted its proposed overhead loading by at least the amount of known overlap. (TR 272-273) Thus, one possible option would be to reduce BellSouth's proposed overhead loading by 8% (the overlap referenced by witness Shell), resulting in an overhead loading of 42.42%. However, because the 8% overlap was an approximate figure, staff believes that additional modifications, or other options may be more appropriate.

Instead, staff believes that the parties' proposals bracket a "range of reasonableness," within which a more appropriate overhead loading may be found. Staff is not comfortable recommending either party's proposed overhead factor, believing that BellSouth's proposed overhead factor is too high, while FPTA's factor is too low. Absent more persuasive options, staff recommends an overhead loading which represents the mid point between the parties' proposed overhead factors, using the parties' proposals as "upper" and "lower" limits. Given the lack of support proffered by the parties for their respective proposals, staff believes its recommendation is a reasonable compromise. As such, staff recommends that BellSouth use 30.21% as its overhead loading percentage. Once BellSouth has made the change in its model and revised its tariff, staff believes that the resulting total statewide average cost would be approximately $21.07.[33] After taking the EUCL out, the resulting rate would be approximately $13.94. A revised tariff, and all supporting documentation demonstrating the changes made, should be filed within 30 days of the issuance of the order and approved administratively.

[33] BellSouth and the FPTA agree that a statewide rate is preferable to multiple zone rates. (Wood TR 45; Blake TR 213)

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?

Recommendation: Yes. This Commission can order BellSouth to revise its intrastate payphone rates. If it does order BellSouth to revise its intrastate payphone rates, any revised tariffs, and all supporting documentation should be filed within 30 days of the issuance of the order. Those changes would be non-basic rate changes and would go into effect on 15 days' notice per Section 364.051(5), Florida Statutes. **(T. Brown)**

Position of the Parties

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.

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

Staff Analysis: Staff notes that there appears to be no dispute that this Commission can order BellSouth to revise its intrastate payphone rates, if deemed necessary. Both parties agree that this Commission has the authority to order BellSouth to revise its intrastate payphone rates. (Blake TR 201; Wood TR 87-88; BellSouth BR at 29; FPTA BR at 36-37) Staff does not address here whether a revised intrastate payphone rate is required in this docket. Instead, staff believes it has addressed those concerns elsewhere in its recommendation.

Although there was little discussion on the issue, the only remaining point of contention concerns the effective date of any rate changes that this Commission may order. BellSouth witness Blake argues "[t]he effective date of any revisions can only be prospective." (TR 201) FPTA witness Wood asserts that "[c]ompliant rates should be required to be in place as soon as reasonably practicable after the Commission's decision in this proceeding, but no later than fifteen days." (TR 88) **He also states, "[g]oing-forward rates should be established . . .** immediately." (TR 153)

As noted in prior issues, staff recommends that this Commission decline to revise BellSouth's rates retrospectively. Staff agrees with BellSouth that any Commission order requiring BellSouth to revise its intrastate payphone rates should be prospective. (Blake TR 201; BellSouth BR at 29, 34-35) If revised intrastate payphone rates are required by this Commission, staff believes that they should be effectuated "as soon as reasonably practicable," consistent with the Commission's current tariff filing procedures.[34] (Wood TR 88; FPTA BR at 36-37) In any event, any revised tariffs, and all supporting documentation should be filed within 30 days of the issuance of the order.

[34] These would be non-basic rate changes and would go into effect on 15 days' notice per Section 364.051(5), Florida Statutes.

Conclusion

This Commission can order BellSouth to revise its intrastate payphone rates. If it does order BellSouth to revise its intrastate payphone rates, any revised tariffs, and all supporting documentation should be filed within 30 days of the issuance of the order. These would be non-basic rate changes and would go into effect on 15 days' notice per Section 364.051(5), Florida Statutes.

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

Recommendation: Staff recommends that BellSouth's rates never became noncompliant during the subject time period. Accordingly, staff believes this Commission should not order refunds to PSPs for that time period. As such, this Commission need not determine amounts or how any refunds should be effected. **(Fordham)**

Position of the Parties

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.

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

Staff Analysis:

FPTA's Argument

FPTA argues that for the reasons set forth in its response to Issue l(c) in FPTA's 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. FPTA urges that, based upon the evidence presented during the course of these proceedings, BellSouth's rates are not, and have never been compliant with Section 276.

According to FPTA, 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. Therefore, FPTA urges this Commission to find that BellSouth has an affirmative and continuing obligation to offer PTAS rates in compliance with Section 276 of the Act. According to FPTA, neither 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 their heads. (FPTA BR at 37)

FPTA argues that this Commission cannot permit BellSouth to retain the unlawful profits it has collected by illegally overcharging payphone service providers. FPTA claims 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. (BR at 37)

BellSouth's Argument

BellSouth argues that its intrastate payphone rates have been and continue to be compliant with the new services test. Further, FPTA has no basis for claiming BellSouth's PTAS rates are not compliant with the new services test, much less noncompliant immediately after this Commission issued the *Final PTAS Order*, which remains valid and effective. Nor can the FPTA, according to BellSouth, legitimately seek refunds based upon the difference between any unknown and future PTAS rates and the rates that were found to be effective in the *PTAS Order* and in the *Final PTAS Order*. Accordingly, argues BellSouth, though this Commission could order rate revisions prospectively, there is no basis upon which refunds could be justified. (BST BR at 29)

Analysis

Staff believes that the question of whether BellSouth's rates became noncompliant was thoroughly discussed above in Issue 1(c), and additional discussion of that issue would only be redundant. Accordingly, staff simply reaffirms that it believes BellSouth's PTAS rates to have been compliant at all times during the pertinent time periods, between April 15, 1997 and November 10, 2003. Therefore, amounts of refunds and methods of refunds need not be considered.

Conclusion

Staff recommends that between April 15, 1997 and November 10, 2003, the rates charged by BellSouth to the PSPs were legally sustainable, and were consistent with BellSouth's tariffs and controlling orders of this Commission. Therefore, BellSouth's rates never became noncompliant during the subject time period. Accordingly, staff believes this Commission should not order refunds to PSPs for that time period. As such, this Commission need not determine amounts or how any refunds should be effected.

Issue 3: Should this docket be closed?

Recommendation: If BellSouth is ordered to make staff's recommended changes in Issues 2(a) and (b), this docket should remain open until BellSouth files a revised tariff and provides staff with documentation demonstrating the changes made. Any revised tariffs, and all supporting documentation should be filed within 30 days of the issuance of the order and the docket closed administratively. If the Commission disagrees with staff's recommendation in Issues 2(a) and (b), this docket may be closed. **(Fordham)**

Staff Analysis: If BellSouth is ordered to make staff's recommended changes in Issues 2(a) and (b), this docket should remain open until BellSouth files a revised tariff and provides staff with documentation demonstrating the changes made. Any revised tariffs, and all supporting documentation should be filed within 30 days of the issuance of the order and the docket closed administratively. If the Commission disagrees with staff's recommendation in Issues 2(a) and (b), this docket may be closed.