**Timolyn Henry**

**From:** Joseph Gibson [jrg@tobinreyes.com]
**Sent:** Monday, November 22, 2004 4:17 PM
**To:** Filings@psc.state.fl.us
**Cc:** Lee Fordham; David Tobin
**Subject:** Docket Number 030300-TP; E-Filing

n-appeal.pdf (4

On behalf of the Florida Public Telecommunication Association, attached please find the FPTA's Notice of Appeal. The Notice of Appeal is filed in 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. 030300-TP. The attached pdf document is 26 pages in length and consists of the two page Notice of Appeal and attaches this Commission's Order Number PSC-04-0974-FOF-TP, which is 24 pages in length.

<<n-appeal.pdf>>

Joseph R. Gibson, Esq.
Tobin & Reyes, P.A.
7251 West Palmetto Park Road
Suite 205
Boca Raton, Florida 33433
Telephone (561) 620-0656
Facsimile (561) 620-0657
jrg@tobinreyes.com

CMP ______
COM ______
CTR ______
ECR ______
GCL ______
OPC ______
MMS ______
RCA ______
SCR ______
SEC 1
OTH Marguerite
org to kim P

ORIGINAL

RECEIVED-FPSC

04 NOV 22 PM 4:37

COMMISSION
CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Docket No.: 030300-TP

Florida Public Telecommunications
Association, Inc., a Florida non-profit
corporation,

Petitioner/Appellant,

vs.

The Florida Public Service Commission,
an administrative agency of the State of
Florida, and Bellsouth Telecommunications,
Inc., a foreign corporation,

Respondent/Appellees.

---

## NOTICE OF APPEAL

NOTICE IS GIVEN that Florida Public Telecommunications Association, Inc. Petitioner/Appellant, appeals to the Florida Supreme Court the order of the Commission rendered on October 22, 2004. The nature of the order is a final order regarding the Florida Public Telecommunications Association, Inc.'s Petition for Expedited Review of BellSouth Telecommunications, Inc.'s Tariffs with respect Rates for Payphone Line Access, Usage, and Features (a copy of said final order is attached hereto).



TOBIN & REYES, P.A. • 7251 WEST PALMETTO PARK ROAD • SUITE 205 • BOCA RATON, FLORIDA • 33433-3487

Docket No.: 030300-TP

WE HEREBY CERTIFY that a true and correct copy of the foregoing was this 22nd day of November, 2004, served by mail on: Meredith E. Mays, Regulatory Counsel, BellSouth Corporation Legal Department, 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001; Nancy White, General Counsel – Florida, BellSouth Telecommunications, Inc., 150 West Flagler Street, Suite 1910, Miami, Florida 33130; Lee Fordham, Staff Counsel Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

Respectfully submitted,

TOBIN & REYES, P.A.
Attorneys for Defendants
7251 W. Palmetto Park Rd., Suite 205
Boca Raton, Florida 33433
Phone: (561) 620-0656
Fax: (561) 620-0657

BY______________________
David S. Tobin
Fla. Bar No. 864277

S:\David Tobin\My Documents\FPTA\New Services Test\BellSouth Florida PSC Docket\n-appeal.wpd

BEFORE THE PUBLIC SERVICE COMMISSION

| | |
|---|---|
| In re: Petition for expedited review of BellSouth Telecommunications, Inc.'s intrastate tariffs for pay telephone access services (PTAS) rate with respect to rates for payphone line access, usage, and features, by Florida Public Telecommunications Association. | DOCKET NO. 030300-TP<br>ORDER NO. PSC-04-0974-FOF-TP<br>ISSUED: October 7, 2004 |

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

APPEARANCES:

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

NANCY B. WHITE, Esquire, and MEREDITH MAYS, Esquire, c/o Nancy Sims, 150 South Monroe Street, Suite 400; Tallahassee, Florida 32301; and R. Douglas Lackey, Esquire, and J. Phillip Carver, Esquire, 675 W. Peachtree Street, NE, Suite 4300, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc. (BST).

LEE FORDHAM, Esquire, and ADAM TEITZMAN, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

FINAL ORDER ON ARBITRATION OF COMPLAINT

I. Case Background

A. 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

[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 Telecomm. 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.

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 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 NST 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 NST specifically to pay telephone access rates. In that order, the FCC found that: (i) Section 276 requires BOCs to set their intrastate payphone line rates, including usage rates, in compliance with the NST; (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)

B. Prior Commission Activity Regarding BellSouth's PTAS Rates

On August 11, 1998, in Docket No. 970281-TL, we issued a <u>Notice of Proposed Agency Action Order Approving Federally Mandated Intrastate Tariffs For Basic Payphone Service</u>.[7] In

---

[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").

[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"*).

that order, we 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. We noted that Florida was unique relative to other states, as it had long had payphone tariffs in place. Moreover, we referred to three prior evidentiary hearings and two stipulations, rate reductions, and other actions we 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]

C. 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 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.

D. 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, we are asked to determine whether BellSouth's current PTAS rates are compliant with the NST. If BellSouth's current PTAS rates do not meet the NST, or if we require that revisions be made to the PTAS rates, we are also asked to establish a prospective BellSouth monthly PTAS rate. In addition, we are asked to address 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.

---

[8] Order No. PSC-99-0493-FOF-TL (*"Final PTAS Order"*).

[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."

II. Compliance with NST

It appears to this Commission 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. This reduction became effective on November 10, 2003. Id. Moreover, both parties specifically stated that BellSouth's revised tariff eliminated the need for us to address this issue. Accordingly, we find that BellSouth's intrastate payphone line rates have been reduced by the amount of the interstate EUCL.

III. Required Date for Reduction of Intrastate Payphone Line Rates by the Amount of Interstate EUCL

A. Arguments

FPTA:

FPTA witnesses Renard and Wood contend that BellSouth should have reduced its intrastate payphone line rates by the amount of the interstate 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. Moreover, 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.'" According to witness Renard, ". . . the *Second Wisconsin Order* was not intended to implement a new requirement prospectively." The witness further states, "[t]he 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 PTAS rates, turns the goals of Section 276 "completely on their heads." He contends that BellSouth had an affirmative obligation to reduce its rates by the EUCL charge from the "get go." Witness Renard 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 . . . ." 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, he asserts that BellSouth's tariff filing in October

2003, which removed the EUCL, does not somehow "cleanse" the past double charging of EUCL.

BellSouth:

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. 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." Witness Blake contends that a Commission order remains in effect until modified, and rates are changed only upon a proper review of all necessary evidence and documentation by the Commission. 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 so." 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. Witness Blake also 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. The witness also contends that the mere fact that the FCC issued additional clarification in its *Wisconsin Order*, does not require 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.

Second, the witness emphasizes that the *Wisconsin Order* itself was appealed, not becoming final until July 11, 2003. Third, PTAS rates in Florida were tied to basic business rates (1FB), which witness Blake asserts have increased over time. Finally, the witness 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.[11]

[11] 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.

B. Analysis

We find that there is no FCC requirement obligating BellSouth to "voluntarily" or automatically change its payphone rates upon a change in costs, absent Commission review. We agree with BellSouth witness Blake that fluctuations in costs (up or down) do not automatically trigger a requirement that BellSouth amend its rates. 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. Moreover, we agree 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." 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.

We also agree with FPTA witness Wood that the *Wisconsin Orders* reaffirmed and clarified existing FCC requirements and did not "change" those requirements. Additionally, we agree with BellSouth that " . . . the language of the *Wisconsin Orders* suggests that a state commission's review and implementation . . . should be prospective in nature." 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[12]. . . .

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)

C. Decision

Based on the record in this proceeding and the above discussion, we find 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 this Commission reviews a BOC's payphone line rates for NST compliance, as it is doing here for BellSouth.

[12] SLC is also referred to as EUCL.

## IV. Refunds

### A. Arguments

FPTA:

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.

According to FPTA, the inception of the problem was our Order No. PSC-98-1088-FOF-TL, entered in Docket No. 970281-TL. FPTA alleges that in that Order we 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 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 our 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.

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.

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 NST across the nation, particularly because BellSouth was the root cause of that inconsistent application. 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:

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 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.
>
> * * * *
>
> 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.

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***[13] and *Final PTAS **Order***[14] 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.

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

---

[13] Order No. PSC-98-1088-FOF-TP, issued August 11, 1998, in Docket No. 970281-TL.

[14] Order No. PSC-99-0493-FOF-TP, issued January 19, 1999, in Docket No. 970281-TL.

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).

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 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 NST 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).

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 BellSouth states this Commission should disregard it. However, even if we 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.

B. Analysis

We believe 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 our 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 this Commission.

For example, in Sunshine Utilities v. FPSC, the our staff discovered an error in rates in 1987, which related to rates set in a 1984 order. In 1988, we initiated an investigation into the possible error, and ultimately corrected prospectively the rate base computation error. We 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), we ordered United Telephone to refund excess revenue collected during the pendency of a ratemaking proceeding. In Mann, after rate making proceedings began, we 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., we approved a stipulation in which Reedy Creek voluntarily agreed to make a refund in a prescribed manner. Reedy Creek computed the refund amount, and we 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, we 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 our authority to modify our 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, the FPSC sought to "correct" an earlier order. In that case, we had approved a territorial service agreement between gas distributors by order dated November 9, 1960. On June 24, 1965, almost five years later, we rescinded and withdrew the approval we had previously granted in 1960. In reversing our 1965 order, the Supreme Court of Florida criticized us 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.

C. Decision

We find 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, we shall not order refunds to PSPs for that time period.

V. BellSouth's Compliance with New Services Test

A. Arguments

FPTA:

FPTA witness Wood argues that BellSouth's rates are not currently in compliance and probably were not in compliance as of August 11, 1998. 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. Furthermore, the witness asserts ". . . at a minimum BellSouth's rates became out of compliance immediately after the August 11, 1998 order was issued."

Witness Wood also contends that "the NST is a dynamic and ongoing process that recognizes changes in cost levels over time." 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)?*

He contends that each question is a distinct and independent area of inquiry. According to the witness, "[t]he FCC's NST is one, but only one, of these four independent criteria." In order for us 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."[15]

Witness Wood urges that we will need to examine three categories of costs: direct, shared, and common. 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 we 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. 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 NST." (emphasis in original) In the absence of adequate cost documentation, witness Wood asserts that we should rely on our experience in arbitrations pursuant to §251 and establishing rates for UNEs when determining cost-based rates for payphone access services.

[15] Witness Wood provides additional discussion related to access lines, usage, and features in his rebuttal testimony.

Witness Wood argues that BellSouth has relied upon a broad application of the methodology set forth in the *ONA Tariff Order*[16] to arrive at its overhead loading for PTAS rates. Based on that application, he addresses three fundamental problems with BellSouth's approach:

> (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.

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)." 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, we should not accept BellSouth's broad conclusion that all of the FCC's requirements are infinitely flexible in their application. 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*,[17] or the methodology set forth in the *ONA Tariff Order*. 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 that we adopt a prospective PTAS rate of $18.04. That amount includes a EUCL of $7.13 and an intrastate rate of $10.91.[18]

---

[16] 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).

[17] 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).

[18] FPTA's proposed rates use an overhead loading of 10%.

An additional $0.22 per month would be required if the blocking and screening feature is added.[19] Id.

BellSouth:

BellSouth witness Blake asserts that "BellSouth's PTAS rates have been, and are currently, in compliance with the FCC's NST." 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. Witness Blake argues that in the event we decide 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 NST by the amount of the applicable federal tariffed SLC [now EUCL]."[20] 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 we decide 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. The average cost of $24.36, less the federal EUCL charge of $7.13,[21] 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." 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. 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[22] is comparable to the rate computed

---

[19] The blocking and screening feature charge was determined using BellSouth's proposed overhead loading of 50.42%. The blocking and screening feature helps prevent unauthorized calls from being placed or received at payphones.

[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. The revised tariff filing has been addressed in Section II of this Order.

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

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

using witness Wood's analysis.[23] 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.

Likewise, BellSouth witness Shell asserts that UNE costs and rates are not an appropriate benchmark because the TELRIC methodology used in setting rates for unbundled network UNEs is encumbered by additional constraints not required for a TSLRIC-analysis. He argues that the TELRIC results are distorted " … and understate the true forward-looking costs of the incumbents." 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."

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." The witness states that

> [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.

… such costs, including executive, accounting, vendor licensing fees, and legal costs. … that these costs are not included at the individual service level since only direct costs are considered in a TSLRIC analysis. 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 … heir rates at TSLRIC, the company would soon fail." Id.

… consideration must be given to a reasonable level of contribution toward the overhead costs of the corporation. Moreover, the FCC described several options with respect to the development of an overhead factor.[24] 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.'" He asserts that BellSouth's decision is consistent with the FCC's evaluation of the reasonableness of Open Network Architecture (ONA) tariffs.[25] Id. Using the ONA methodology, he asserts that BellSouth's

---

[23] 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.

[24] 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*.

[25] BellSouth's overhead calculations are contained in Exhibit DDC- 1. (Hearing Exhibit 13)

overhead loading percentage is 50.42%. Moreover, the witness asserts that BellSouth's cost study "... is fully documented and demonstrates the calculation of the overhead factor."

B. Analysis

We find 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. We acknowledge 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." We agree, noting that these were the same standards we previously used to determine BellSouth's compliance with the NST in the *PTAS Order* and the *Final PTAS Order*. Since we issued those prior orders, BellSouth has updated and revised inputs to its underlying models which are reflected in the PTAS Study in this proceeding. We have found no persuasive evidence which would lead us to believe that BellSouth's PTAS rates are somehow not compliant with the NST.

However, BellSouth witness Blake asserts that should we 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." We note that BellSouth has already effected the first, by reducing the monthly per line charge determined under the NST by the amount of the EUCL in its tariff filing. Id. The second relates to the "additional guidelines" associated with the calculation of the overhead loadings. Id. We believe that a modification to the overhead loading percentage is warranted based on the record in this proceeding.

We agree that BellSouth's use of the *ONA Tariff Order* methodology is permissible to determine overhead loadings. At the same time, we acknowledge that the *ONA Tariff Order* methodology is but one of three methodologies that may be used. 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. We believe 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*." 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, there is no "preferred" methodology. If there was, we believe that at the very least, the FCC would have specifically outlined which was the FCC-preferred method. In fact, we note 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, we recognize that BellSouth still had an obligation to demonstrate the "reasonableness" of the resulting overhead loading. We note that the *Physical Collocation Tariff Order* and the *ONA Tariff Order* methodologies outlined by the FCC create "a ceiling" that must still be justified, and do not believe that BellSouth has met its burden here.

We note that FPTA witness Wood has suggested using a 10% overhead loading factor, while BellSouth has proposed using 50.42%. 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% . . .." We believe 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%." 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, 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." We agree with FPTA that BellSouth's proposed overhead factor "is well beyond reasonable." The allowance of such an overhead loading requires adequate justification and fact-specific evidence beyond the degree provided here.

We note 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 . . ." (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." We agree in part, but note 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. BellSouth should have adjusted its proposed overhead loading by at least the amount of known overlap. 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, additional modifications, or other options may be more appropriate. Instead, the parties' proposals bracket a "range of reasonableness," within which a more appropriate overhead loading may be found.

C. Decision

We did not find either party's proposed overhead factor to be adequately supported by the record, and find that BellSouth's proposed overhead factor is too high, while FPTA's factor is too low. Based on our analysis of the record, we adopt 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, that is a reasonable compromise. Accordingly, BellSouth shall use 30.21% as its overhead loading percentage. Once BellSouth has made the change in its model and revised its tariff, the resulting total statewide average cost would be approximately $21.07.[26] After taking the EUCL out, the resulting rate would be approximately $13.94. A revised tariff, and all supporting documentation demonstrating the changes made, shall be filed within 30 days of the issuance of the order and approved administratively.

VI. Effective Date of Revisions

A. Arguments

<u>FPTA:</u>

FPTA argues that this Commission has the authority and must require BellSouth to reduce its intrastate rates for payphone access services. FPTA urges that compliant rates should be required to be in place as soon as reasonably practicable after our decision in this proceeding.

<u>BellSouth:</u>

BellSouth urges that its intrastate payphone rates have been and continue to be compliant with the NST. It argues that we can order it to revise prospectively its intrastate payphone rates and, 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. However, BellSouth contends that refunds are not appropriate under any circumstance.

B. Analysis

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 we have the authority to order BellSouth to revise its intrastate payphone rates. Nor do we address here whether a revised intrastate payphone rate is required in this docket because, as we have addressed earlier in this Order, BellSouth's rates are now compliant. The only remaining point of contention concerns the effective date of any rate changes that we may order.

---

[26] BellSouth and the FPTA agree that a statewide rate is preferable to multiple zone rates.

C. Decision

We have declined to revise BellSouth's rates retrospectively. Though this Commission has the authority to order BellSouth to revise its intrastate payphone rates, we have found that BellSouth's rates are now compliant, and, accordingly, an effective date need not be established.

VII. Refund Authority

A. Arguments

FPTA:

FPTA argues that for the reasons set forth in its post-hearing brief, we 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 of the Act.

According to FPTA, our 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 us 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 argues that we 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.

BellSouth:

BellSouth argues that its intrastate payphone rates have been and continue to be compliant with the NST. Further, FPTA has no basis for claiming BellSouth's PTAS rates are not compliant with the new services test, much less noncompliant immediately after we 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.

B. Analysis

The question of whether BellSouth's rates became noncompliant was thoroughly discussed earlier in this Order and additional discussion of that issue would only be redundant. Accordingly, we simply reaffirm that we believe BellSouth's PTAS rates to have been compliant at all times during the pertinent time periods, between April 15, 1997 and November 10, 2003.

C. Decision

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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 7th day of October, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

( S E A L )

LF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.