

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)	
)	
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation Provisions)	
Of the Telecommunications Act of 1996)	
)	
The Southern Public Communication Association's,)	
Petition for a Declaratory Ruling Regarding the Remedies)	
Available for Violations of the Commission's Payphone)	
Orders)	

**THE SOUTHERN PUBLIC COMMUNICATION ASSOCIATION
PETITION FOR A DECLARATORY RULING**

The Southern Public Communication Association (“SPCA”), on behalf of its members, hereby petitions the Federal Communications Commission (“Commission”) pursuant to Section 1.1 and 1.2 of the Commission’s Rules, 47 C.F.R. §§ 1.1, 1.2, for the Commission to resolve an outstanding legal controversy and to remove an uncertainty with respect to the enforcement of the Commission’s orders regarding the charges for network services provided to payphone service providers pursuant to 47 U.S.C. §§ 201, 202, and 276.

The Commission previously held under Sections 201, 202, and 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,¹ (“Federal Act”) (1) that no later than April 15, 1997 payphone service providers (“payphone service providers”, or “PSPs”) were to receive local telephone network services at cost-based rates that complied with the Commission’s new services test, and (2) that incumbent local exchange carriers (“ILECs”) would be eligible to receive what is commonly referred to as dial-around

¹47 U.S.C. §§ 201, 202, and 276.

compensation provided that, as a condition precedent, their rates for local telephone network services provided to competing payphone providers met the new services test requirement.²

Where an ILEC has charged PSPs rates that fail to meet the new services test as ordered by the Commission, some state PUCs have issued orders for refunds to the PSPs for the amount the charged rates exceeded rates complying with the new services test, while other state PUCs, including the MPSC, have failed to order refunds or reparations when requested to do so for similar violations of the Commission's orders. There exists a significant outstanding legal controversy and uncertainty as to the available remedies for established violations of the Commission's *Payphone Orders*, and as clarified and reiterated in its more recent January 31, 2002 *Wisconsin Order*³.

The Mississippi Public Service Commission ("MPSC"), by its Order dated September 1, 2004 (in MPSC Docket No. 2003-AD-927) granted a Motion by BellSouth Telecommunications, Inc. ("BellSouth") for a dismissal of the Complaint of the SPCA against BellSouth for a refund to SPCA's members of Pay Telephone Access Service ("PTAS") rates.⁴ The Complaint requested refunds from BellSouth to the extent BellSouth had charged PTAS rates from April 15, 1997 to

²*In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶ 146-147 (September 20, 1996) ("**First Payphone Order**"), and Order of Reconsideration, 11 FCC Rcd. 21233 (November 8, 1996), ¶¶ 131, 163 ("**Payphone Reconsideration Order**") *aff'd in part and remanded in part sub nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Com'n v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("**First Bureau Waiver Order**"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("**Second Bureau Waiver Order**") (collectively "*Payphone Orders*").

³*In re Wisconsin Public Service Commission, Order Directing Filings, FCC Memorandum Opinion and Order Bureau*, FCC 02-25, 17 FCC Rcd. 2051 (January 31, 2002) ("**Wisconsin Order**"); affirmed sub nom. *New England Public Communications Council, Inc. v. Federal Communications Commission*, 334 F.3d 69 (DC Cir. 2003).

October 1, 2003, (including “the amount of the federally tariffed SLC” charges charged by BellSouth as part of the monthly line charge) in excess of the new services test, in violation of the Commission’s *Payphone Orders* and of its *Wisconsin Order*.⁵ The MPSC’s September 1, 2004 Order, though, found that the SPCA as a matter of law had not stated a cause of action and dismissed its Complaint, stating: “In essence, the SPCA claims that the FCC’s 2002 *Wisconsin Order*, which was clearly issued after this Commission’s July 14, 1997 Order,⁶ is preemptive. ...Moreover, although SPCA contends that the *Wisconsin Order* preempted this Commission’s 1997 Order, the Commission can find no language in the *Wisconsin Order* that supports SPCA’s claim.”⁷

The MPSC has thus challenged whether the Commission’s *Wisconsin Order* is preemptive. Further, the MPSC summarily dismissed the SPCA’s Complaint even though it followed close on the heels of an action by BellSouth that should have required the MPSC to consider a refund action for BellSouth’s past failure to comply with the new services test: BellSouth, effective October 1, 2003, issued a new PTAS line rate, suddenly reducing its six and a half (6½) year old PTAS line rate from \$46.00 all the way down to \$17.86 (“equal to \$24.99 less the current Subscriber Line Charge (SLC) of \$7.13”), stating it was doing so in compliance with the new services test.⁸ BellSouth’s sudden 61% reduction in its six and a half (6½) year old PTAS rates was BellSouth’s tacit admission that it had been grossly out of compliance with the

4 The MPSC Order of September 1, 2004 is attached as Exhibit A.

5 See the *Wisconsin Order*, ¶¶ 61, 68.

6 The MPSC Order of July 14, 1997 allowing BellSouth’s rate to go into effect is attached as Exhibit B.

7 See MPSC Order of September 1, 2004, attached as Exhibit A.

8 See attached BellSouth tariff pages Exhibits C through F, effective from April 15, 1997 to October 1, 2003.

Commission's new services test for quite some time before October 1, 2003.⁹ Yet the MPSC dismissed the SPCA's Complaint, refusing to allow the SPCA to conduct discovery, or to present evidence at an evidentiary hearing for refunds that would have revealed the duration and magnitude of BellSouth's noncompliance with the new services test, declaring the FCC's *Wisconsin Order* was not preemptive.

The SPCA, on behalf of its members, respectfully petitions the Commission for a declaratory ruling as to the consequences and remedies available for an ILEC's violation of the Commission's *Payphone Orders* and of its *Wisconsin Order* requiring the provision from and after April 15, 1997 of network services to PSPs at cost-based rates that satisfy the new services test (including elimination from the line rate of the amount of the federally tariffed SLC charges). The SPCA further requests a specific Commission declaratory ruling: (1) that the MPSC had an obligation to follow and apply the new services test mandated by Section 276 and the Commission's *Payphone Orders* and *Wisconsin Order*, taking into account BellSouth's tacit admission by its tariff filing effective October 1, 2003 that its prior PSP line rates had been out of compliance with the new services test, including the requirement for elimination from the line rate of "the amount of the federally tariffed SLC" charges; (2) that the MPSC should not have summarily dismissed the action of SPCA's Complaint without an evidentiary hearing because as a matter of preemptive federal law the SPCA had a right to pursue a cause of action in the MPSC for refunds for any period of time prior to the filing of the Complaint it could show that BellSouth had been out of compliance with the new services test; (3) that the PSP members of the SPCA are entitled to refunds or reparations from BellSouth Telecommunications, Inc. of the

⁹ See attached BellSouth tariff pages Exhibits C through F, effective from April 15, 1997 to October 1, 2003.

amounts BellSouth charged said SPCA members from April 15, 1997 through the effective date of the new PSP line rate tariff filing, October 1, 2003, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test, including a refund of the amount of applicable federally tariffed SLC included in the monthly per line charge; (4) that the MPSC should re-evaluate its dismissal of the claims of the Complaint for refunds or reparations to ensure compliance with the Commission's rulings; (5) whether BellSouth was eligible to receive dial-around compensation for access code and toll free calls originating from their payphones on or before October 1, 2003; and (6) for such other relief arising from the facts in MPSC Docket No. 2003-AD-927 as the Commission deems necessary to enforce the Commission's *Payphone Orders* and its *Wisconsin Order*.

I. BACKGROUND

The SPCA is a Louisiana not-for-profit trade association representing 14 independent payphone providers in Mississippi. BellSouth is an incumbent local exchange carrier in Mississippi and a Bell Operating Company as defined in 47 U.S.C. § 153(4).

On September 20, 1996, the Commission found that incumbent local exchange carriers, including BellSouth, were required under Sections 276(a) and 276(b)(1)(C) of the Federal Act¹⁰ to provide access to network services for payphone providers at cost-based rates that comply with the Commission's new services test. These carriers were required to file tariffs by which this compliance would be effective no later than April 15, 1997.¹¹

¹⁰ 47 U.S.C. §§ 276(a) and 276(b)(1)(c).

¹¹ *First Payphone Order*, ¶¶ 146-147 (1996); *Payphone Reconsideration Order*, ¶¶ 131, 163; *First Bureau Waiver Order*, ¶¶ 2, 30-33; *Second Bureau Waiver Order*, ¶10.

The Commission also found that under Section 276(b)(1)(A)¹² BellSouth would be eligible to receive compensation for completed toll free and access code calls that originated from their respective payphones (“dial-around compensation”). To ensure compliance with the Commission’s payphone regulatory scheme, the Commission held that BellSouth would not become eligible to receive dial-around compensation for their payphones without cost-based rates for services to payphone providers that comply with the Commission’s new services test as a condition precedent to receiving dial-around compensation. However, the Commission permitted BellSouth to self-certify that it was in compliance with the new services test to begin receiving compensation.¹³

BellSouth self-certified on or about May 19, 1997 that it was providing cost-based rates for network services to payphone providers that met the Commission’s new services test and was entitled to receive dial-around compensation for completed calls from its payphones. Once BellSouth certified compliance with the Commission’s new services test, other carriers were not permitted to refuse making dial-around compensation payments to BellSouth. The Commission held that, although self-certification would not substitute for actual compliance in meeting the dial-around compensation precondition, failure to comply with the new services test could only be determined by a proceeding before the Commission or a state commission, such as the MPSC.¹⁴

BellSouth on May 19, 1997, filed with the Mississippi Commission a monthly, flat PTAS

12 47 U.S.C. § 276(b)(1)(A).

13 *Payphone Reconsideration Order*, ¶ 131.

14 *Bell Atlantic-Delaware v. Frontier Communications Services*, DA 99-1971, ¶28 (Com. Car. Bur. Released September 24, 1999).

rate of \$46.00 per line a month.¹⁵ The MPSC by an Order dated July 14, 1997 (in MPSC Docket No. 97-UN-0302) approved the tariff to be effective as of April 15, 1997.¹⁶ However, the MPSC did not conduct a hearing on the 1997 tariff. Nor did the MPSC's July 14, 1997 Order make any express finding that BellSouth's rate met the requirements of the new services test. Rather, the MPSC's July 14, 1997 Order states: a) that the GSPCC, a payphone organization (not related to the SPCA which was formed some years later) wished to make a late intervention; b) that BellSouth had provide a cost study in support of its filing; c) that under applicable provisions of BellSouth's PREP plan tariffs could go into effect after 30 days notice; d) that, therefore, the BellSouth tariff was thereby approved "to be effective as of April 15, 1997"; e) that "IT IS FURTHER ORDERED, that GSPCC's Motion to intervene late is granted for the purpose of assisting the Commission in determining whether BST's rates for services to PSPs meet the FCC's new services test"; and f) that the parties should submit a joint procedural schedule. However, neither a procedural schedule nor an evidentiary hearing were ever set in the case, and no further order of the Commission appears in the MPSC's file following the MPSC's July 14, 1997 Order. Instead, BellSouth's May 19, 1997 tariff filing was simply stamped approved and allowed to go into effect effective April 15, 1997 in accordance with the Commission's July 14, 1997 Order. The MPSC therefore did not make an express determination following an evidentiary hearing that BellSouth's filed rate met the requirements of the new services test. BellSouth's 1997 tariff with its \$46.00 monthly PSP line rate was simply permitted to go into effect.¹⁷

15 See the tariff page attached hereto as Exhibit B.

16 MPSC Order of July 14, 1997 attached as Exhibit B.

17 It is the SPCA's understanding that the GSPCC ceased to function and did not continue to participate actively in

BellSouth thereafter maintained the same \$46.00 a month PTAS per line monthly rate until October 1, 2003 when, following negotiations with the SPCA, it filed a new tariff dropping the PTAS rate to \$17.86 a month, including elimination from the monthly line charge of the amount of the federally tariffed SLC charge of \$7.13 a month.¹⁸ See the BellSouth tariff pages for PTAS monthly per line rates that it filed with the MPSC effective from May 19, 1997 to October 1, 2003, attached hereto as Exhibits C to F.

The SPCA filed a Complaint on December 19, 2003, with the MPSC for refund of excess PTAS charges by BellSouth.¹⁹ The SPCA's Complaint requested a refund to its members of any amounts charged them by BellSouth in excess of cost-based rates that complied with the new services test. BellSouth on February 5, 2004, filed a Motion with the MPSC to Dismiss the Complaint of the SPCA. In its Motion to Dismiss, BellSouth argued that it had filed rates on May 19, 1997, approved by the MPSC on July 14, 1997 to be effective April 15, 1997. However, the MPSC's July, 14 1997 Order, while noting BellSouth had filed cost data, did not make an express determination that the BellSouth's tariff complied with the new services test, and the MPSC held no hearing on the matter.²⁰ Indeed, no order followed the Commission's July 14, 1997 Order in the docket. The Commission thereafter simply approved the BellSouth rate, stamping the tariff page approved and letting it go into effect. Six and a half (6 ½) years later BellSouth dropped its PTAS rate 61% effective October 1, 2003, thus tacitly admitting that its PTAS rates had been far out of compliance with the new services test for some time prior to that date. Therefore, the members of the SPCA had a right by their Complaint (dated December 19,

the MPSC Docket for financial reasons following the MPSC's issuance of its July 14, 1997 Order.

18 BellSouth's tariff page for its October 1, 2003 PSP line rate is attached as Exhibit F.

19 The SPCA's MPSC Complaint is attached hereto as Exhibit G.

2003) to state an action for refund of rates its members had paid to BellSouth that were unlawful and excessive under applicable, preemptive federal law for whatever part of the period from April 15, 1997 to October 1, 2003, it could show at an evidentiary hearing, following discovery, BellSouth had violated the new services test, including at least refunds to eliminate the amount of the SLC.²¹

However, the MPSC, without affording to the SPCA any opportunity for discovery or an evidentiary hearing on its Complaint for refunds, granted BellSouth's Motion to Dismiss the SPCA's Complaint, on September 1, 2004 adopting word for word BellSouth's proposed order.²²

The MPSC thus denied the request of the SPCA for refunds for the differences in the rates charged by BellSouth and the cost-based rates required by the new services test on the basis that this would constitute retroactive rate making and a violation of the filed rate doctrine. Specifically, the MPSC's Order denied that the Commission's *Wisconsin Order* was preemptive (Exhibit A, p. 4). The MPSC final Order granting BellSouth's Motion dismissed the SPCA's claims for refunds with prejudice.²³

The MPSC appealed the MPSC's denial of refunds to the Chancery Court of the First Judicial District of Hinds County, Mississippi. BellSouth and the MPSC on October 26, 2004 filed a Joint Notice of Removal of the appeal to the U.S. District Court for the Southern District of Mississippi, Jackson Division.

II. ENFORCEMENT OF COMMISSION ORDERS

In a series of orders, the Commission repeatedly held that local exchange network

20 MPSC Order of July 14, 1997, attached as Exhibit B.

21 See the SPCA's proposed MPSC Order, attached as Exhibit H hereto.

22 A copy of the MPSC's final Order of September 1, 2004 is attached as Exhibit A.

services provided to payphone providers must be offered at cost-based rates that satisfy the new services test, effective no later than April 15, 1997.²⁴ Secondly, in its own words, the Commission *emphasized* that a local exchange carrier was *not eligible* to receive dial-around compensation like other PSPs until the carrier was in actual compliance with the requirement for providing network services to such PSPs at cost-based rates.²⁵ The determination of whether a carrier is in actual compliance rests with the state regulatory commission.²⁶

In MPSC Docket No. 2003-AD-927, the MPSC summarily granted BellSouth's Motion to Dismiss the complaint of the SPCA for failure to state a claim, thus denying any opportunity to the SPCA to conduct discovery, examine witnesses or appear at an evidentiary hearing in support of its refund claims.²⁷ The SPCA proceeding on its Complaint would have presented the first evidentiary hearing before the MPSC on the issue of BellSouth's compliance with the Commission's *Payphone Orders* and the *Wisconsin Order*. However, the MPSC, by granting BellSouth's Motion to Dismiss, stating the *Wisconsin Order* was not preemptive, refused to determine whether and to what extent that BellSouth had overcharged Mississippi PSPs in excessive rates in the six and a half (6 ½) years following April 15, 1997, while BellSouth was collecting millions of dollars in dial-around compensation, in violation of the Commission's *Payphone Orders* and of its *Wisconsin Order*. The MPSC therefore rejected the SPCA's request for determination of a refund of the difference between the illegal rates charged its PSP members and the cost-based rates required by the new services test, including return of the amount of SLC

23 Exhibit A, MPSC September 1, 2004 Order at p. 5.

24 *Payphone Order*, ¶¶146-147 (1996); *Payphone Reconsideration Order*, ¶¶131, 163; *First Bureau Waiver Order*, ¶¶2, 30-33, 35; *Second Bureau Waiver Order*, ¶10.

25 *Ibid.*

26 *Bell-Atlantic Delaware*, ¶28.

charges collected in the monthly line rate, although BellSouth had tacitly admitted its rates had been out of compliance with the new services test by its large reduction of PSP rates to comply with the test effective October 1, 2003. The MPSC thus rejected the MPSC's Complaint to enforce the Commission's requirements, i.e. 1) that BellSouth establish cost-based rates to PSPs effective by April 15, 1997, and 2) that BellSouth was not eligible for dial-around compensation unless it was and remained in compliance with the cost-based rate requirement. The MPSC Order is inconsistent with the Commission's payphone regulatory scheme to implement Section 276.

The SPCA respectfully requests that the Commission issue a declaratory ruling that the SPCA PSP members are entitled to a refund with interest, going back to April 15, 1997, of the difference between the excessive rates charged and those required by the new services test and such other relief the Commission deems necessary. Such reparations are required to place the SPCA PSP members in the position they effectively should have been had BellSouth complied with the Commission's *Payphone* and *Wisconsin* orders.

Two explicit directives of the Commission are central to resolution of the instant matter. First, the Commission required BellSouth to provide network services to payphone providers at cost-based rates that satisfied the new services test, which rates "must be effective no later than April 15, 1997."²⁸ However, the MPSC dismissed SPCA's Complaint, thereby refusing to determine whether BellSouth's May 19, 1997 tariff, effective April 15, 1997, was in compliance with the new services test, or whether the tariff remained in compliance with cost-based rates thereafter until BellSouth, six and a half (6 ½) years later, tacitly admitted its earlier

27 MPSC Order of September 1, 2004 at p. 5.

noncompliance by suddenly dropping its \$46.00 monthly line rate 61% to \$17.86 (including elimination of the amount of a \$7.13 SLC charge) effective October 1, 2003.

Second, the issue arises whether BellSouth was or remained eligible during those six and a half (6 ½) years under Section 276 to receive dial-around compensation for calls originating from their payphones as BellSouth's costs declined and BellSouth charged rates in excess of its costs in violation of the new services test, a precondition to its receiving dial-around compensation.

Not only did the Commission establish a federal scheme for implementing Section 276, but in its own words it was emphatic about how it was to be implemented. The Commission recognized that LECs might have an incentive to charge competing payphone providers unreasonably high prices for network services. Therefore, the Commission specifically found that network services provided to payphone providers must satisfy the new services test for cost-based rates.²⁹ As the Commission stated in the *First Bureau Waiver Order*, drawing upon its earlier *Order on Reconsideration*:

The Commission concluded in the Order on Reconsideration that it had jurisdiction over the tariffing of payphone services in order to implement section 276. The plain language of the Order on Reconsideration provides that state tariffs for payphone Services must be cost based, consistent with the requirements of Section 276, nondiscriminatory, and consistent with Computer III guidelines.

First Bureau Waiver Order, ¶ 31.

Thereafter, in the *Wisconsin Order* the Commission clarified and reiterated its requirements, telling the BOCs (including BellSouth which had sought the order on review as a

²⁸ *Payphone Reconsideration Order*, ¶163.

member of the LEC Coalition):

In compliance with this statutory mandate, we affirm the Bureau's conclusion that section 276 requires BOCs to set their intrastate payphone line rates in compliance with the Commission's cost-based, forward-looking "new services" test.³⁰

Therefore, in establishing its cost-based, state-tariffed charge 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.³¹

In sum, we issue this *Order* to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*. This *Order* includes the following basic propositions: First, BOCs' intrastate payphone line rates, including usage rates, should comply with the flexible, cost-based new services test. ...Finally, BOCs' payphone line rates should be adjusted to account for SLC charges, as set forth herein.³²

The MPSC Order dismissing the SPCA's Complaint relies on the state's filed rate and retroactive rate making doctrines. However, applications of such state doctrines are preempted here by Section 276 (c). Further, in any case BellSouth has waived their application. In the RBOCs' *First Kellogg Letter*, the RBOCs stated that:

Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance....)

29 *First Payphone Order*, ¶¶146,147.

30 *Wisconsin Order* ¶ 2.

31 *Wisconsin Order* ¶ 61.

32 *Wisconsin Order* ¶ 68.

Letter from Michael K. Kellogg to Mary Beth Richards, April 10, 1997 at p. 2 (“*First Kellogg Letter*”).³³ Similarly, in their *Second Kellogg Letter* the BOCs agreed that, “where new or revised tariffs are required” in order to comply with the new services test, they would refund any charges collected from PSPs after April 15, 1997, in excess of the level of charges found to comply with the test. See Letter from Michael K. Kellogg to Mary Beth Richards, April 11, 1997, at 1 (“*Second Kellogg Letter*”).³⁴ Having agreed they could provide refunds, the filed rate doctrine notwithstanding, BellSouth is now hard pressed to deny they have waived an objection to the refund remedy now on the basis of the doctrine.

In further support of this Petition, the SPCA references and incorporates herein the following analyses of law that appears in the Illinois Public Telecommunications Association (“ITPA”) Petition for A Declaratory Ruling at pp. 9-12 (July 30, 2004, CC Docket No. 96-128):

- 1) The analysis of the implementation requirements for Section 276 at pp. 9-12;
- 2) The analysis of the retroactive ratemaking doctrine at pp. 12-14;
- 3) The list of state commissions that have entered orders issuing refunds when payphone rates have been found to be excessive under the new services test at p. 15; and
- 4) The analysis of effect of irreconcilably inconsistent PUC orders at p. 16.

Further, the SPCA hereby adopts and reiterates the same legal and administrative precedents and arguments set forth in the ITPA Petition proceeding in CC Docket 96-128 set forth by the following parties in their initial and reply comments: New England Public Communications Council, Inc.; American Public Communications Council, Inc.; Atlantic Payphone Association, Inc.; Northwest Public Communications Council, et al; and Independent

³³ The *First Kellogg Letter* is attached as Exhibit I.

³⁴ The *Second Kellogg Letter* is attached as Exhibit J.

Payphone Association of New York, Inc.

There exists a significant outstanding legal controversy as to what are the PSPs' rights for violations of the Commission's orders requiring that cost-based rates for network services be provided to PSPs. All PSPs' rights originate from the same Federal Act as interpreted and implemented by the Commission. Yet there are seriously inconsistent implementations of these rights from state to state.

Section 276 charged the Commission with promoting competition among payphone service providers and promoting the widespread deployment of payphone services to the benefit of the general public. There can be no reasonable debate about the payphone industry's struggles to maintain the widespread deployment of payphones. As found in the Commission's orders, the availability of cost-based services is fundamental to that goal. BellSouth's violation of the Commission's *Payphone Orders* and of the *Wisconsin Order* undermines the goals the Commission is charged to promote. BellSouth has collected millions of dollars in dial around compensation since April 15, 1997. Yet, BellSouth denies that PSPs the refund needed to effectively provide the PSPs with the cost-based rates for this time period that are the carriers' prerequisite for receipt of such compensation. This illegal, inequitable, and unconscionable conduct flagrantly violates the very Commission requirements that it emphasized in its *Payphone Orders* and in the *Wisconsin Order*. The Commission needs to clarify and resolve the outstanding question as to what are the consequences and remedies that attached to an ILEC's violations of the *Payphone Orders* and of its *Wisconsin Order*.

The SPCA requests the Commission to grant this Petition for Declaratory Ruling to resolve this outstanding controversy and to remove the uncertainty that exists with respect to

consequences and remedies associated with enforcement of the Commission's orders regarding the charges for network services provided to payphone providers.

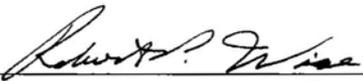
III. CONCLUSION

The SPCA, on behalf of its members, respectfully petitions the Commission for a declaratory ruling as to the consequences and remedies available for an ILEC's violation of the Commission's *Payphone Orders* and of its *Wisconsin Order* requiring the provision from April 15, 1997 of network services to PSPs at cost-based rates that satisfy the new services test, including the elimination of the amount of SLC charges from the monthly line rate. The SPCA further requests a specific Commission declaratory ruling: (1) that the MPSC, faced with a Complaint from the SPCA for refunds for BellSouth's noncompliance with the new services test, had an obligation to follow and apply the new services test mandated by Section 276 and the Commission's *Payphone Orders* and *Wisconsin Order*, taking into account BellSouth's tacit admission by its tariff filing effective October 1, 2003 that its prior PSP line rates had been out of compliance with the new services test, including the requirement for elimination from the line rate of "the amount of the federally tariffed SLC" charges; (2) that the MPSC should not have summarily dismissed the action of SPCA's Complaint because as a matter of preemptive federal law under Section 276 and the Commission's *Payphone Orders* and *Wisconsin Order*, the SPCA had the right to pursue a cause of action for refunds for any period of time prior to the filing of the Complaint that it can show that BellSouth had been out of compliance with the new services test, including its failure to eliminate the amount of SLC charges from the PTAS line rate; (3) that the PSP members of the SPCA are entitled to refunds or reparations from BellSouth of the

amounts BellSouth charged said SPCA members from April 15, 1997 through October 1, 2003, for network services to the extent that the rates and charges were in excess of the cost-based rates of the Commission's new services test, including a refund of the amount of applicable federally tariffed SLC included in the monthly per line charge; (4) that the MPSC should re-evaluate its dismissal of the SPCA's Complaint, and of its denial of refunds or reparations to ensure compliance with the Commission's rulings; (5) whether BellSouth was and remained eligible to receive dial-around compensation for access code and toll free calls originating from their payphones on or before October 1, 2003; and (6) for such other relief arising from the facts in MPSC Docket No. 2003-AD-927 as the Commission deems necessary to enforce the Commission's Payphone Orders.

Respectfully submitted,

THE SOUTHERN PUBLIC COMMUNICATION ASSOCIATION

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November 9, 2004

CERTIFICATE OF SERVICE

I, Robert P. Wise, do hereby certify that I have this day caused to be mailed by U.S. Mail a true and correct copy of the above and foregoing Petition of the SPCA for a declaratory ruling as follows:

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I, Robert P. Wise, do hereby further certify that I have this day caused a copy of the foregoing SPCA Petition to be served by electronic mail or U.S. Mail, on the following parties as indicated below:

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Howard Meister
President
Payphone Association of Ohio
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Cleveland, Ohio 44103

This the 9th day of November, 2004.


Robert P. Wise

OF COUNSEL:

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**BEFORE THE
MISSISSIPPI PUBLIC SERVICE COMMISSION**

**In Re: Complaint of the Southern Public
Communication Association for Refund of
Excess Charges by BellSouth Telecommunications,
Inc. Pursuant to its Rates for Payphone Line Access,
Usage, And Features**)
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)

Docket No. 2003-AD-927

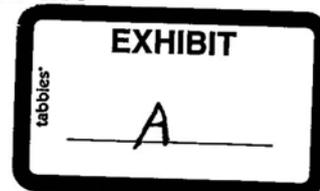
ORDER

COMES NOW, the Mississippi Public Service Commission ("Commission"), being fully apprised of the facts and matters raised herein, including a full review of the pleadings filed and upon hearing oral argument of legal counsel for the parties on the Motion to Dismiss, finds and rules as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On December 19, 2003, the Southern Public Communication Association ("SPCA") filed a Formal Complaint seeking refunds for alleged overcharges in connection with pay telephone access service ("PTAS") purchased from BellSouth Telecommunications, Inc. ("BellSouth"). SPCA sought two types of refunds in its Complaint: (a) the amount of the federally tariffed end user common line charge ("EUCL") or subscriber line charge ("SLC") paid since April 15, 1997 through October 1, 2003¹; and (b) the amounts paid for intrastate pay telephone access service that SPCA believes represents an "overcharge". SPCA asserts that its claims for refunds arise out of Section 276 of the Telecommunications Act of 1996 ("TA 96") as well as the various orders issued by the Federal Communications Commission ("FCC") implementing the provisions

¹ Effective on October 1, 2003, BellSouth's PTAS tariff rates were modified pursuant to agreement between the payphone service provider members of SPCA and BellSouth. (BellSouth's Motion to Dismiss at p. 5). SPCA's claim for refunds ends on this date. (SPCA's Complaint at pp. 3, 7-11).



of TA 96 as they relate to payphone services. SPCA relies in particular upon the FCC's *Wisconsin Order*². (Complaint at pp. 1-3).

The Commission had previously approved BellSouth's tariffed rates for PTAS, effective as of April 15, 1997, by Order dated July 14, 1997, in Docket No. 97-UN-0302. The Commission takes administrative notice of its prior proceedings and orders in Docket No. 97-UN-0302. Significantly, the Commission notes that its July 14, 1997, Order approving BellSouth's tariffed PTAS rates was never appealed or contested by any party, despite the fact that SPCA's predecessor entity, the Gulf States Public Communications Council ("GSPCC"), was a party to that proceeding and had been furnished with the proprietary cost studies and underlying cost data filed by BellSouth in support of its PTAS rates as being in compliance with the FCC's "new services test". (Motion to Dismiss at pp.3-5). In 2003, BellSouth reduced its tariffed rates for PTAS service through a tariff that became effective October 1, 2003.

On February 5, 2004, BellSouth filed both an Answer and a separate Motion to Dismiss. BellSouth raised a number of grounds for dismissal, including: (1) the FCC did not require or contemplate refunds in the *Wisconsin Order*; (2) during the appeal of the *Wisconsin Order* to the District of Columbia Circuit, the FCC argued its *Wisconsin Order* applied to the ILECs in that state only, which further demonstrates refunds are not appropriate in this proceeding; (3) the filed rate doctrine precludes any refunds in this proceeding; (4) the prohibition against retroactive ratemaking precludes any refunds in this proceeding; (5) refunds are not authorized by any other payphone orders; (6) similar requests for refunds after the issuance of the *Wisconsin Order* have been denied in other states; and, finally, (7) SPCA's claims are time-barred.

² Memorandum Opinion and Order, *In the Matter of Wisconsin Public Service Commission*, 17 FCC Rcd. 2051 (Jan. 31, 2002) (the "*Wisconsin Order*"); affirmed, 334 F. 3d 69, 357 U.S. App. D.C. 231 (D.C. Cir. 2003).

On February 27, 2004, SPCA responded to BellSouth's Motion to Dismiss, claiming that BellSouth's tariff filings did not satisfy Section 276 of the Telecommunications Act of 1996 and the FCC's orders implementing Section 276 until October 1, 2003. SPCA primarily relies upon the FCC's January 31, 2002 *Memorandum Opinion and Order* in Docket No. 00-01 ("*Wisconsin Order*"); in its Complaint, SPCA states "[t]he *Wisconsin Order* . . . provided a basis for this Petition." (Complaint, pp. 2 and 5).

Subsequent to the filing of the Motion to Dismiss and the Response in Opposition thereto, the parties have each filed numerous legal memoranda supporting their respective positions. In addition, BellSouth filed a Motion to Strike portions of SPCA's Third Supplemental Response in Opposition.

The legal standard applicable to a motion to dismiss requires the Commission to accept the allegations in the complaint as true and consider whether the facts state a cause of action. *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss. 1999).

On June 29, 2004, the Commission conducted a Hearing on BellSouth's Motion to Dismiss. At the Hearing, SPCA and BellSouth were each represented by legal counsel. Additionally, legal counsel for the Commission and the Mississippi Public Utilities Staff ("MPUS") were present.

Following the Hearing, the Commission requested that the parties submit Proposed Orders for consideration by the Commission. Both SPCA and BellSouth submitted Proposed Orders on July 30, 2004.

II. COMMISSION JURISDICTION

Pursuant to Miss. Code Ann., § 77-3-5, this Commission has exclusive original jurisdiction over the intrastate business and property of public utilities. Also, Miss. Code Ann., §

77-2-3, as amended, provides that the function of this Commission shall be regulatory and quasi-judicial in nature. This Commission is empowered to make investigations and determinations, prescribe rules and issue orders regarding the control and conduct of the businesses coming within its jurisdiction.

III. FINDINGS OF THE COMMISSION

It is clear that SPCA seeks an order from this Commission that would violate both the prohibition against retroactive ratemaking (*United Gas Corp. v. Mississippi Public Service Commission*, 127 So. 2d 1355 (Miss. 1988)) as well as the filed rate doctrine (*United Gas Pipe Line Co. v. Wilmot Gas & Oil Co.*, 97 So. 2d 530 (Miss. 1957)). This Commission cannot grant such a request. Furthermore, SPCA's Response in Opposition to BellSouth's Motion to Dismiss states, in relevant part, that this Commission's July 14, 1997, Order was issued "without the benefit of the FCC's [January 31, 2002] *Wisconsin Order*" and that this Commission should "review prior actions." In essence, the SPCA claims that the FCC's 2002 *Wisconsin Order*, which was clearly issued after this Commission's July 14, 1997 Order, is preemptive. SPCA's claims in this regard cannot even withstand scrutiny based upon the FCC's *Wisconsin Order* itself, in which the FCC acknowledged that "disparate applications of the new services test in various state proceedings" would occur and the FCC never directed or even discussed the issuance of refunds. Moreover, although SPCA contends that the *Wisconsin Order* preempted this Commission's 1997 Order, the Commission can find no language in the *Wisconsin Order* that supports SPCA's claim.

SPCA also cannot support its statement that BellSouth was under a continuing duty to revise its rates by any clear or express statutory language. Furthermore, SPCA has not supported its claim that BellSouth was under any continuing filing obligation.

Accordingly, the Commission finds that SPCA cannot demonstrate any legal basis that justifies the relief it requests. SPCA cannot circumvent this Commission's lawful authority and the previously approved tariff rates. BellSouth's PTAS tariff was duly approved by this Commission in 1997. Further, there is no language contained within the FCC's *Wisconsin Order* that justifies such extraordinary relief.

Finally, the Commission notes that both parties have provided orders from other state commissions to support their positions in this proceeding. The Commission finds, however, that allowing the complaint to continue would effectively excuse SPCA's failure to raise any concern regarding Commission approved tariff rates in Mississippi from July 1997 to October 2003. Although SPCA cites to decisions from Georgia, Kentucky, Louisiana, North Carolina, South Carolina, and Tennessee, the Commission notes that all of these orders were issued after this Commission's July 1997 Order. Had SPCA believed such orders supported its position, SPCA could have raised its concerns in 1999, 2001, or 2002 after any of these decisions had been issued. SPCA, however, did not file its complaint here until December, 2003. Both federal and state statutes of limitation, as well as BellSouth's approved tariffs, require complaining parties to proactively seek relief. Consequently, the Commission makes the additional finding that SPCA's failure to file its complaint until some six (6) years after this Commission approved BellSouth's PTAS tariffs bars its Complaint under both federal and state statutes of limitation.

IT IS THEREFORE ORDERED THAT:

(1) The Commission grants BellSouth's Motion to Dismiss and, accordingly, SPCA's Complaint is hereby dismissed with prejudice.

(2) The Commission denies as moot BellSouth's Motion to Strike Portions of SPCA's Motion to Strike.

(3) This Order is effective upon execution.

Chairman Bo Robinson voted Aye; Vice Chairman Nielsen Cochran voted Aye; and Commissioner Michael Callahan voted Aye.

SO ORDERED by the Commission on this the 1ST day of September, 2004.



MISSISSIPPI PUBLIC SERVICE COMMISSION

Bo Robinson
BO ROBINSON, CHAIRMAN

Nielsen Cochran
NIELSEN COCHRAN, VICE CHAIRMAN

Michael Callahan
MICHAEL CALLAHAN, COMMISSIONER

Attest: A True Copy

Brian U. Ray
Brian U. Ray, Executive Secretary

BEFORE THE PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSISSIPPI

97-UN-0302

BELLSOUTH TELECOMMUNICATIONS,
INC.

IN RE: NOTICE OF TARIFF FILING
FOR FLAT RATE OPTION(S)
CUSTOMER PROVIDED PUBLIC
TELEPHONES AND SMARTLINE
SERVICE FOR PUBLIC
TELEPHONES

ORDER

This cause came on this day on the notice of BellSouth Telecommunications, Inc. ("BST"), requesting the Mississippi Public Service Commission ("Commission") to enter an Order approving BST's tariff filing dated May 19, 1997, which adds a flat rate option for Customer Provided Public Telephone Service and a flat rate option for Smartline Service for Public Telephones ("Smartline"). BST also requested that the Commission concur that the rates proposed in this tariff filing as well as BST's existing tariffed rates for services offered to Payphone Service Providers ("PSPs") comply with the Federal Communications Commission's ("FCC") "new services" test.

The Commission being fully apprised in the premises and having considered the documents and evidence before it, finds as follows:

1) On June 17, 1997, the Gulf States Public Communications Council ("GSPCC") filed a Motion for Intervention and Motion for

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Leave to File Late, or in the Alternative, Motion to Initiate Proceedings ("Motion"). In its Memorandum in support of said Motion, GSPCC made certain allegations regarding BST's services offered to PSP.

2) In its Memorandum, GSPCC alleges that BST has failed to demonstrate with cost data that it has eliminated all subsidies to its payphone operations. With regard to this allegation, it is noted that BellSouth filed tariffs in Docket No. 97-UN-0091 on February 18, 1997, to reduce its revenues by \$1.38 Million which was the amount identified by a cost study as the intrastate subsidy flowing to its payphone operations. This cost study was provided to the Mississippi Public Utilities Staff ("MPUS"). BellSouth ultimately applied the revenue reductions to the Carrier Common Line rate element of Switched Access Service. This tariff filing was approved by the Commission on March 27, 1997, effective March 20, 1997.

3) GSPCC also alleges that the Commission should investigate whether BST has structured its tariffs in a way that creates illegal discrimination in favor of BST's payphone services. However, effective April 1, 1997 (pursuant to FCC Orders dated September 20, 1996 and November 8, 1996 in Docket No. 96-128), BST moved its payphone operations into a deregulated separate affiliate which must purchase access line service under

the exact same terms, conditions and rates as any other PSPs. Therefore, the Commission finds that BST's tariff for services provided to PSPs does not discriminate in favor of its payphone affiliate.

4) GSPCC further alleges that BST has not demonstrated that its rates offered to PSPs are cost-based and meet federal pricing guidelines (i.e., the "new services test" in which a service must cover its cost and provide a reasonable contribution to overhead.) BST did, however, file cost data in support of its tariff filing. Although GSPCC's Motion to intervene was filed late, the Commission finds no harm to either party by granting said Motion for the purpose of assisting the Commission in determining whether BST's rates for services to PSPs meet the FCC's new services test.

5) The Commission takes note of the provision of BST's Price Regulation Evaluation Plan (PREP) which allows a service to go into effect thirty (30) days after notice to the Commission of filing and directs BST to implement the tariff filed in the proceeding to be effective April 15, 1997.

IT IS, THEREFORE, ORDERED, that BST'S May 19, 1997, tariff filing as set forth above is hereby approved to be effective as of April 15, 1997.

IT IS FURTHER ORDERED, that GSPCC's Motion to intervene late is granted for the purpose of assisting the Commission in determining whether BST's rates for services to PSPs meet the FCC's new services test.

The parties are directed to consult with one another and submit a jointly proposed procedural schedule in this matter.

Chairman Nielsen Cochran voted Aye; Vice-Chairman Bo Robinson voted Aye; Commissioner Curt Hebert voted A/R

SO ORDERED on this the 14th day of July, 1997.

MISSISSIPPI PUBLIC SERVICE COMMISSION



Nielsen Cochran
Nielsen Cochran, Chairman

Bo Robinson
Bo Robinson, Vice-Chairman

Curt Hebert
Curt Hebert, Commissioner

ATTEST: A True Copy

Brian U. Ray
BRIAN U. RAY
Executive Secretary

A7. COIN TELEPHONE SERVICE (N)

A7.4 Access Line Service For Customer-Provided Public Telephones (Cont'd) (N)

A7.4.5 Rates And Charges

A. Access line service for customer-provided public telephones is available on a usage or flat rate basis. (N)

2. Flat Rate Service Monthly Charges⁶ (N)

a. Per Access Line (N)

	Monthly Rate	USOC	(N)
(1) Unrestricted, outward ¹	\$46.00	1ZB	(N)
(2) Unrestricted, two way ¹	46.00	1ZA	(N)
(3) Restricted, outward ^{1,2,3}	46.00	1ZY	(N)
(4) Restricted, two way ^{1,2,3}	46.00	1FZ	(N)
(5) Restricted, outward ^{2,3,4}	46.00	1Z3	(N)
(6) Restricted, two way ^{2,3,4}	46.00	1Z5	(N)
(7) Restricted, outward ^{2,3,5}	46.00	13D	(N)
(8) Restricted, two way ^{2,3,5}	46.00	13E	(N)

- Note 1: For Access Lines which do not offer central office blocking of 900 and 976 calls, this feature is available at the request of the subscriber as provided under Customized Code Restriction (CCR) Option Number 4 defined in A13.20 of this Tariff. (N)
- Note 2: Provides operator screening. (N)
- Note 3: Provides central office blocking of 011+ calls direct distance dialed to numbers outside the North American Numbering Plan. (N)
- Note 4: 1+900, 7 or 10 digit local, 1+DDD and 976 are blocked from completion. (N)
- Note 5: 1+900, 1+DDD, and 976 are blocked from completion. (N)
- Note 6: Rate structure and rates to be implemented August 19, 1997, retroactive to April 15, 1997. (N)



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APR 15 1997

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 COMMISSION
 PUBLIC UTILITIES STAFF

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MAY 19 1997

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A7. COIN TELEPHONE SERVICE

A7.4 Access Line Service For Payphone Service Provider Telephones (Cont'd)

A7.4.5 Rates And Charges

- A. Access line service for *PSP* telephones is available on a usage or flat rate basis. (Cont'd)
2. Flat Rate Service Monthly Charges
- a. Per Access Line

	Monthly Rate	USOC
(1) Unrestricted, outward ¹	\$46.00	1ZB
(2) Unrestricted, two way ¹	46.00	1ZA
(3) Restricted, outward ^{1,2,3}	46.00	1ZY
(4) Restricted, two way ^{1,2,3}	46.00	1FZ
(5) Restricted, outward ^{2,3,4}	46.00	1Z3
(6) Restricted, two way ^{2,3,4}	46.00	1Z5
(7) Restricted, outward ^{2,3,5}	46.00	13D
(8) Restricted, two way ^{2,3,5}	46.00	13E

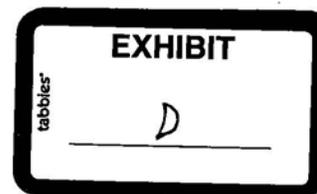
Note 1: For Access Lines which do not offer central office blocking of 900 and 976 calls, this feature is available at the request of the subscriber as provided under Customized Code Restriction (CCR) Option Number 4 defined in A13.20 of this Tariff.

Note 2: Provides operator screening.

Note 3: Provides central office blocking of 011+ calls direct distance dialed to numbers outside the North American Numbering Plan.

Note 4: 1+900, 7 or 10 digit local, 1+DDD and 976 are blocked from completion.

Note 5: 1+900, 1+DDD, and 976 are blocked from completion.



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APR 27 1998
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98-UN-0283

A7. COIN TELEPHONE SERVICE

A7.4 Access Line Service For Payphone Service Provider Telephones (Cont'd)

A7.4.5 Rates And Charges

- A. Access line service for PSP telephones is available on a usage or flat rate basis. (Cont'd)
- 2. Flat Rate Service-Monthly Charges
 - a. Per Access Line

	Monthly Rate	USOC
(1) Unrestricted, outward ¹	\$46.00	1ZB
(2) Unrestricted, two way ¹	46.00	1ZA
(3) Restricted, outward ^{1,2,3}	46.00	1ZY
(4) Restricted, two way ^{1,2,3}	46.00	1FZ
(5) Restricted, outward ^{2,3,4}	46.00	1Z3
(6) Restricted, two way ^{2,3,4}	46.00	1Z5
(7) Restricted, outward ^{2,3,5}	46.00	13D
(8) Restricted, two way ^{2,3,5}	46.00	13E

Note 1: For Access Lines which do not offer central office blocking of 900 calls, this feature is available at the request of the subscriber as provided under Customized Code Restriction (CCR) Option Number 4 defined in A13.20 of this Tariff. (T)

Note 2: Provides operator screening.

Note 3: Provides central office blocking of 011+ calls direct distance dialed to numbers outside the North American Numbering Plan.

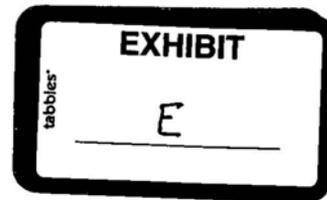
Note 4: 1+900, 7 or 10 digit local and 1+DDD calls are blocked from completion. (T)

Note 5: 1+900 and 1+DDD calls are blocked from completion. (T)

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02-UN-0732

BELLSOUTH
TELECOMMUNICATIONS, INC.
MISSISSIPPI
ISSUED: September 11, 2003
BY: President - Mississippi
Jackson, Mississippi

GENERAL SUBSCRIBER SERVICES TARIFF

Third Revised Page 8.1
Cancels Second Revised Page 8.1
EFFECTIVE: October 13, 2003

A7. COIN TELEPHONE SERVICE

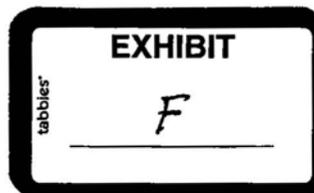
A7.4 Access Line Service For Payphone Service Provider Telephones (Cont'd)

A7.4.5 Rates And Charges

- A. Access line service for PSP telephones is *only* available on a *flat* rate basis. (Cont'd) (C)
- 2. Flat Rate Service Monthly Charges¹ (T)
 - a. Per Access Line

	Monthly Rate ^{2,3}	USOC	
(1) Unrestricted, outward ⁴	\$17.86	1ZB	(R)(T)
(2) Unrestricted, two way ⁴	17.86	1ZA	(R)(T)
(3) Restricted, outward ^{4,5,6}	17.86	1ZY	(R)(T)
(4) Restricted, two way ^{4,5,6}	17.86	1FZ	(R)(T)
(5) Restricted, outward ^{5,6,7}	17.86	1Z3	(R)(T)
(6) Restricted, two way ^{5,6,7}	17.86	1Z5	(R)(T)
(7) Restricted, outward ^{5,6,8}	17.86	13D	(R)(T)
(8) Restricted, two way ^{5,6,8}	17.86	13E	(R)(T)

- Note 1:** Without waiver of any of BellSouth's rights, which rights are expressly reserved, this rate complies with the "new services test" as applied by the Federal Communications Commission's Memorandum Opinion and Order *In the Matter of Wisconsin Public Service Commission*, released January 31, 2002. (N)
- Note 2:** The access line rate is equal to \$24.99 less the current Subscriber Line Charge (SLC) of \$7.13. Rates for the SLC may change over time. BellSouth will charge a monthly rate of \$24.99 including the current SLC, and will file tariff revisions in a timely fashion adjusting the access line rate to reflect future changes in the SLC charge. (N)
- Note 3:** Rates will be effective October 1, 2003. New rates and credits will be implemented beginning with billing after the tariff effective date. (N)
- Note 4:** For Access Lines which do not offer central office blocking of 900 calls, this feature is available at the request of the subscriber as provided under Customized Code Restriction (CCR) Option Number 4 defined in A13.20 of this Tariff. (T)
- Note 5:** Provides operator screening. (T)
- Note 6:** Provides central office blocking of 011+ calls direct distance dialed to numbers outside the North American Numbering Plan. (T)
- Note 7:** 1+900, 7 or 10 digit local and 1+DDD calls are blocked from completion. (T)
- Note 8:** 1+900 and 1+DDD calls are blocked from completion. (T)



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MISSISSIPPI PUBLIC
SERVICE COMMISSION

BEFORE THE
MISSISSIPPI PUBLIC SERVICE COMMISSION

In Re: Complaint of the Southern Public
Communication Association for Refund of Excess
Charges by BellSouth Telecommunications, Inc.
Pursuant to its Rates for Payphone Line Access,
Usage, and Features.

Docket No.: 2003-AD-927

COMPLAINT OF THE SOUTHERN PUBLIC COMMUNICATION ASSOCIATION
FOR REFUND OF EXCESS CHARGES BY BELLSOUTH TELECOMMUNICATIONS, INC.
PURSUANT TO ITS RATES FOR PAYPHONE LINE ACCESS, USAGE, AND FEATURES

1. The Complainant, Southern Public Communication Association ("SPCA" or "Complainant") hereby files this Complaint requesting that the Mississippi Public Service Commission ("MPSC" or "Commission") expeditiously order BellSouth Telecommunications, Inc. ("BellSouth") to refund to SPCA members the overcharges made pursuant to its Mississippi intrastate tariffs for pay telephone access services ("PTAS") rates. Such refund is now required in order for BellSouth to comply with Section 276 of the Telecommunications Act of 1996 (the "Act") and the orders of the Federal Communications Commission ("FCC") implementing Section 276 of the Act. The SPCA files this Complaint pursuant to Rule 11 and other applicable sections of the MPSC Rules of Practice and Procedure.

2. The Act was signed into law in February of 1996 with the express purpose of promoting "competition among payphone service providers and promote the widespread deployment of payphone services to benefit the general public." The Act required the FCC to issue regulations to implement the Act's purposes. The implementation developed in a series of FCC orders commonly referred to as the "Payphone Orders". The FCC under the Payphone Orders required Incumbent Local Exchange Companies ("ILECs") to file tariffs at the state level establishing cost

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based, non-discriminatory rates for basic payphone access lines and related usage and ancillary services on or before April 15, 1997.¹

3. The FCC determined that to be "non-discriminatory," the rates assessed by ILECs for payphone services tariffed at the state level must satisfy the FCC's "new services test" ("NST"). The NST is a "cost-based" test that establishes pricing based upon the direct cost of providing the services, plus a reasonable amount of common overhead loadings. On January 31, 2002, the FCC issued an Order for the express purpose of clarifying the application of the NST to RBOC rates for PTAS.² The *Wisconsin Order* provided that PTAS rates charged by RBOCs must comply with the NST and provided a basis for this Petition.

4. In its *Wisconsin Order*, the FCC specifically found that all RBOCs must reduce the monthly per line rate by the amount of the subscriber line charge to prevent the double recovery of costs associated with facilities involved in providing PTAS to PSPs.

5. By means of a settlement agreement addressing rates effective from October 1, 2003 forward, BellSouth reduced the PTAS monthly rates paid by PSPs from \$46.00 a month to an access line rate equal to \$24.99 per month less the Subscriber Line Charge, currently \$7.13, for a present net monthly rate of \$17.86 (BellSouth Tariff A7.4.5(A) effective October 1, 2003). The settlement agreement, though, reserved the right of the SPCA to seek refunds based on the agreed

¹ *First Payphone Order*, 11 FCC Rcd 20541.

² *In re Wisconsin Public Service Commission, Order Directing Filings, FCC Memorandum Opinion and Order Bureau*, 17 FCC Rcd. 2051. (hereafter the "*Wisconsin Order*"); affirmed, 334 F.3d 69, 357 U.S.App.D.C.231, 29 Communications Reg.(P&F)992 (DC Cir. 2003).

upon rate reflected in the newly amended tariff monthly rate not to exceed \$24.99 per month including the SLC.

6. However, from April 15, 1997 to October 1, 2003, BellSouth violated Section 276 of the Act and the FCC's implementing *Payphone Orders* because BellSouth's PTAS rates for payphone access services were not cost-based as required by the NST. Consequently, PSPs are entitled to a refund of overcharges paid during such period. In support of this Petition, SPCA states as follows:

I. PARTIES

7. The Complainant, SPCA, is a trade association whose members include independent pay telephone service providers ("PSPs"), operator services providers, and other public telecommunications related providers in Mississippi, Louisiana and Alabama. The SPCA serves as an advocate for the payphone industry in the state of Mississippi. SPCA members own and operate approximately 3793 public pay telephones throughout the State of Mississippi, typically installed at small businesses, public parks, airports, etc. In this fashion, SPCA members significantly contribute to the widespread deployment of pay phone service in the State and provide Mississippians with access to the public communications switched network. In fact, many Mississippians, particularly those with low income, utilize pay phones as their primary means of communication.

8. Many SPCA members are current customers of BellSouth or were customers of BellSouth at some time between April 15, 1997 and October 1, 2003 for purposes of obtaining PTAS, which include public access lines ("PAL"), the mechanism by which PSP telephones connect to the

public switched telephone network, and other "unbundled functionalities."³ The rates for such services in Mississippi are set forth in BellSouth's tariffs filed with this Commission. Collectively, SPCA's members are a group of substantially affected parties that both competed with BellSouth for placement of pay telephones and purchased underlying PTAS from BellSouth between April 15, 1997 and October 1, 2003. As such, SPCA has standing to initiate this proceeding.

9. The name and address of Petitioner is as follows:

The Southern Public Communication Association
2007 MacArthur Drive, Building 6&7, Suite #4
Alexandria, Louisiana 71303

10. All pleadings, notices and other documents related to this proceedings should be provided to the following on behalf of Petitioner:

Robert P. Wise, Esq.
Wise, Carter, Child & Caraway, P.A.
401 E. Capitol Street, Suite 600
Jackson, MS 39201
Tel: (601) 968-5561 Fax: (601) 968-5593
RPW@wisecarter.com

and

Kenneth E. Pickering, Esq.
Pickering & Cotogno
301 Magazine Street
New Orleans, Louisiana 70130
Tel: (504) 581-1222 Fax: (504) 581-3912
pickering@pclawfirm.com

11. BellSouth is a corporation organized and formed under the laws of the State of Georgia. BellSouth's main office is located at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth (i) is a "Regional Bell Operating Company" ("BOC"); (ii) is an ILEC under the terms of the Act, and is certificated as an ILEC in Mississippi to provide PTAS, among other telephone

³ Order on Reconsideration, 11 FCC Rcd. 21233 at ¶ 163 (Nov. 8, 1996) (*Reconsideration Order*), *aff'd in part and remanded in part*, *Ill. Telecomms. Ass'n. v. FCC*, 117 F.3d 55 (D.C. Cir. 1997).

services; and (iii) provides payphone services to locations within the State of Mississippi in competition with PSPs, including SPCA members.

II. SUBSTANTIAL INTERESTS

12. SPCA members both competed with BellSouth and purchased PTAS from BellSouth between April 15, 1997 and October 1, 2003. As such, their substantial interests are directly and substantially affected by BellSouth's anticompetitive use of PTAS rates that exceed the rates permitted under Section 276 of the Act, the FCC's implementing orders, and relevant portions of Mississippi law during the relevant time frame. Accordingly, BellSouth's actions with respect to its PTAS rates directly and adversely affect the interests of SPCA's Mississippi members.

III. STATUTORY AUTHORITY

13. The Commission has jurisdiction over this Petition pursuant to the various provisions of Mississippi law vesting the Commission with authority to regulate telecommunications companies, prohibiting anticompetitive practices, vesting the Commission with jurisdiction over anticompetitive behavior, requiring rates to be fair, just, and reasonable and authorizing the Commission to determine and fix just and reasonable rates and rebates.

14. Additionally, the FCC affirmatively stated that it will rely upon state commissions such as the MPSC to ensure that rates, terms, and conditions applicable to the provision of basic payphone service comply with Section 276 of the Act.⁴ Notwithstanding such reliance, the FCC

⁴ Order on Reconsideration, 11 FCC Rcd 21233 at ¶ 163 (Nov. 8, 1996) (*Reconsideration Order*), *aff'd in part and remanded in part*, *Ill. Pub. Telecomms. Ass'n. v. FCC*, 117 F.3d 55 (D.C. Cir. 1997); *In the Matter of Wisconsin Public Service Commission: Order Directing Filings, FCC Memorandum Opinion and Order Bureau*, 17 FCC Rcd. 2051 at ¶ 15. (January 31, 2002) (*Wisconsin Order*).

has retained jurisdiction under Section 276 of the Act to ensure that all of its requirements are met.

IV. MATERIAL FACTS IN DISPUTE

15. Petitioner anticipates that disputed issues of material fact will include, but not be limited to, BellSouth's disagreement with some or all of Petitioner's contentions set forth in this Petition.

V. BELLSOUTH'S INTRASTATE PAY TELEPHONE ACCESS
SERVICE RATES WERE NOT REVISED IN ACCORDANCE
WITH THE COST-BASED NEW SERVICES TEST UNTIL OCTOBER 1, 2003

16. Congress enacted Section 276 of the Act to "promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public."⁵ To that end, Section 276 prohibits a BOC from "prefer[ing] or discriminat[ing] in favor of its payphone service."⁶ Section 276 also directs the FCC to promulgate regulations that "discontinue the intrastate and interstate payphone subsidies from basic exchange and exchange access revenues."⁷ Congress further directed the FCC to prescribe regulations to "terminat[e] the current system of payphone regulation" and "eliminate all discrimination between [a BOC] and independent payphones and all subsidies or cost recovery for BOC pay phones."⁸ Additionally, any state requirement that is inconsistent with the FCC regulations is explicitly pre-empted by the Act.⁹

17. In response, the FCC issued a series of Orders (collectively referred to as the "*Payphone Orders*") interpreting the requirements of the Act with respect to the calculation of the costs of underlying payphone services, fundamentally restructuring the manner in which payphones and

⁵ 47 U.S.C. § 276(b)(1) (Supp. 2001); *North Carolina Utilities Commission*, 2002 WL 10254 at ***3.

⁶ 47 U.S.C. § 276(a).

⁷ 47 U.S.C. 276(b)(1)(B).

⁸ H.R. Rep. No. 104-204, at 88 (1995).

⁹ 47 U.S.C. 276(c).

PTAS rates are regulated.¹⁰ The FCC distinguished between the payphone equipment, such as the telephone itself, and the ILEC-provided network services needed to connect the payphone equipment to the public switched network. In enforcing the Act, the FCC required incumbent LECs to file tariffs to establish cost-based, non-discriminatory rates for basic local payphone interconnection services at the state level on or before April 15, 1997, consistent with Section 276 of the Act and the FCC's Computer III tariffing guidelines.¹¹ Additionally, ILECs were required to tariff at the state level "any basic network services or unbundled features used by a LEC's operations to provide payphone services. . . ."¹² To meet these requirements, LECs must, by necessity, separate the "basic payphone line" from the "network services or unbundled features" used by the LEC's payphones.

18. Consistent with the Computer III tariffing guidelines, the FCC determined that the rates assessed by LECs for payphone services tariffed at the state level must satisfy the NST.¹³ The

¹⁰ *Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20 1996); ("First Payphone Order"); Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) ("Reconsideration Order"), *aff'd in part and remanded in part*, *Ill. Pub. Telecomms. Ass'n. v. FCC*, 117 F.3d 55 (D.C.Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) ("Second Payphone Order"), *vacated and remanded*, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) ("Third Payphone Order"), *aff'd*, *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C.Cir. 2000); *In the Matter of Wisconsin Public Service Commission: Order Directing Filings*, FCC Memorandum Opinion and Order Bureau, 17 FCC Rcd. 205 1 (January 31, 2002).

¹¹ *First Payphone Order*, 11 FCC Rcd at 20541.

¹² *Reconsideration Order* at ¶¶ 162, 163.

¹³ *See Amendment of Sections 64.702 of the FCC's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958 (1986).

NST is a cost-based test that establishes the direct cost of providing the service as a price floor, then allows the LECs to add only a reasonable amount of overhead to derive the overall price of the service.¹⁴ In applying the NST, the FCC requires the following:

Once the direct costs have been identified, LECs will add an appropriate level of overhead costs to derive the overall price of the new service. To provide the flexibility needed to achieve efficient pricing, we are not mandating uniform loading, but BOCs will be expected to justify the loading methodology they select as well as any deviations from it.¹⁵

19. On January 31, 2002, the FCC issued the *Wisconsin Order*, its most recent ruling clarifying and further interpreting the requirements of the Act and the application of the NST specifically to PTAS. The FCC's stated purpose of the *Wisconsin Order* is "to assist states in determining whether BOC's intrastate payphone line rates comply with Section 276 and [the FCC's] Payphone Orders"¹⁶ and "assist states in applying the new services test to BOCs intrastate payphone rates."¹⁷ In the *Wisconsin Order*, the FCC confirmed that all BOCs must calculate PTAS rates in compliance with the NST.

20. In summary, the FCC's *Wisconsin Order* concluded in part as follows:

a. Section 276 requires BOCs to set their intrastate payphone line rates, including usage rates, in compliance with the FCC's cost-based NST;¹⁸

¹⁴ 47 C.F.R. § 61.49(h).

¹⁵ *Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking*, 6 FCC Rcd 4525 at ¶ 44 (1991).

¹⁶ *Wisconsin Order* at ¶ 2.

¹⁷ *Wisconsin Order* at ¶ 68.

¹⁸ *Reconsideration Order*, 11 FCC Rcd at 20614, para. 146; *Wisconsin Order* at ¶ ¶ 2, 43-44, 68.

b. Intrastate payphone service rates must be calculated using a forward-looking, direct cost methodology such as TELRIC or TSLRIC;¹⁹

c. Overhead loading rates for payphone lines must be cost-based, may be calculated using UNE overhead loading factors, provided that such rates do not exceed an upper limit calculated using the methodology from either the Physical Collocation Tariff Order or the ONA Tariff Order, and may not be set artificially high in order to subsidize or contribute to other LEC services. Additionally, any overhead allocations for payphone services that represent a significant departure from overhead allocations for UNE services must be justified by the LEC;²⁰

d. The NST applies to usage sensitive as well as flat-rate elements of the services offered by PSPs. Therefore, any rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost based and priced in accordance with the NST; and

e. In establishing its cost-based, state-tariffed rate for PTAS, a BOC must reduce the monthly per line rate determined under the NST by the amount of the federally tariffed subscriber line charge ("SLC" or "EUCL") to prevent double recovery of costs associated with the facilities involved in providing PTAS to PSPs.²¹

21. BellSouth's tariff filings failed to comply with the FCC's requirements, Section 276 of the Act and the FCC's implementing Payphone Orders until October 1, 2003. Since April 15, 1997 BellSouth's intrastate PTAS rates included an amount for the federally tariffed subscriber line

¹⁹ *Wisconsin Order* at ¶ ¶ 45-50, 68.

²⁰ *Wisconsin Order* at ¶ ¶ 51-58, 68.

²¹ *Wisconsin Order* at ¶ ¶ 59-61, 68.

charge thus providing a double recovery of costs. Additionally, BellSouth's intrastate PTAS rates were not calculated in compliance with the FCC's cost-based, forward-looking NST. From April 15, 1997 to October 1, 2003 BellSouth's PTAS rates were noncompliant with the requirements of the Act and the FCC's implementing Payphone Orders for reasons which include, but are not limited to, the following:

a. BellSouth's PTAS rates precluded the "widespread deployment" of pay telephones in complete contravention of Congress' express purpose of passing Section 276 of the Act and, therefore, were contrary to the public interest;

b. BellSouth's rates were calculated to recapture embedded costs rather than only those forward looking, direct economic costs associated with providing the services;

c. BellSouth's rates include a federally tariffed SLC or EUCL and, therefore, allow for a double recovery of costs; and

d. BellSouth's rates contain overhead allocations significantly exceeding the allocations for comparable services, such as unbundled UNEs and fail to take into account other sources of revenue resulting in a double recovery of costs.

22 Accordingly, BellSouth's PTAS rates were unfair, unjust, unreasonable, discriminatory, and anticompetitive. Moreover, BellSouth's PTAS rates violated Section 276 of the Act and the FCC's implementing Payphone Orders.

VI. BELLSOUTH MUST REIMBURSE PSP CUSTOMERS FOR OVERCHARGES

23. PSPs are entitled to a refund for (i) all amounts paid for subscriber line charges since April 15, 1997 and October 1, 2003 and (ii) all PTAS fees paid to BellSouth between April 15, 1997

and October 1, 2003 that exceed a cost-based rate calculated in accordance with the NST. BellSouth failed to reduce PTAS rates during previous years in spite of the fact that the FCC standards for establishing compliant rates have been in place since 1997, and in spite of the fact that costs for providing those services to PSP's have declined dramatically. Therefore, since the PTAS rates exceed the cost of providing those services plus a reasonable overhead, BellSouth's PTAS rates have not been in compliance with the FCC's *Payphone Orders* and the NST, and PSP's are entitled to reimbursement for all such overcharges.

24. In the *Wisconsin Order*, the FCC confirmed that in establishing its cost-based, state-tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the NST by the amount of the applicable federal tariffed SLC/EUCL in order to avoid over-recovery of costs.²² BellSouth has charged PSPs the EUCL charge in violation of the NST. Therefore, PSPs are entitled to a refund for the EUCL overcharges as well as the line rate paid to BellSouth between April 15, 1997 and October 1, 2003.

25. Pursuant to a letter dated April 10, 1997, from Michael K. Kellogg, the RBOC Payphone Coalition counsel, to the Deputy Chief of the Common Carrier Bureau ("CCB"), the RBOC Coalition, including BellSouth, requested that the FCC waive the requirement for the RBOCs to file intrastate payphone tariffs that met the NST by April 15, 1997. As a part of that request, Mr. Kellogg asserted that in the event a new tariff rate for PTAS is filed "to comply with the 'new

²² *Wisconsin Order* at ¶¶ 59-61.

services' test pursuant to this waiver and the new tariff rate is lower than the previous tariff rate as a result of applying the 'new services' test, the LEC will provide a credit or other compensation to purchasers back to April 15, 1997."

26. In response to the RBOC Coalition's request, CCB issued a *Waiver Order* dated April 15, 1997.²³ The *Waiver Order* granted all LECs a limited waiver, and stated that "[a] LEC who seeks to rely on the waiver ... 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."²⁴ Issuance of the FCC's *Wisconsin Order* (now affirmed by the D.C. Circuit) clarified significant aspects of the FCC's position rendering the issues, five years after the issuance of the *Waiver Order*, and is ripe for full consideration by the Mississippi Commission. Accordingly, BellSouth should be directed to refund all overpayments, consisting of all EUCL charges, paid to BellSouth by PSPs from April 15, 1997 to October 1, 2003.

VII. RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that the Commission:

- A. Direct BellSouth to refund to PSPs who are members of SPCA all amounts paid for EUCL/SLC between April 15, 1997 and October 1, 2003.
- B. Direct BellSouth to refund to PSPs who are members of SPCA the difference between (a) the PTAS rates, including rates for access lines, features, and usage paid by PSPs to BellSouth

²³ *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, DA 97-805 (rel. Apr. 15, 1997) (*Waive Order*).

²⁴ *Id.*

between April 15, 1997 and October 1, 2003, and (b) the lawful PTAS rates which should have been charged by BellSouth between April 15, 1997 and October 1, 2003 if the rates had been properly calculated using the NST;

C. Issue a scheduling order for the filing of pre-filed testimony, the serving of data requests, and the filing of rebuttal testimony;

D. Schedule a formal administrative hearing to address disputed issues of fact and law regarding BellSouth's tariffed PTAS rates, including rates for access lines, features, and usage, pursuant to applicable law; and

E. Grant such other relief as the Commission deems just and proper.

Respectfully submitted:



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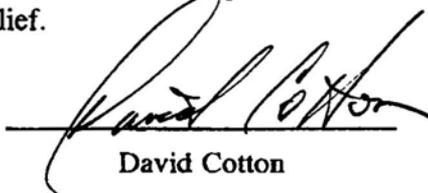
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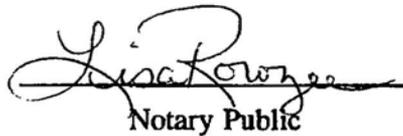
STATE OF LOUISIANA

PARISH OF ~~RAPIDES~~ Grant

CAME BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, David Cotton, who stated under oath that he is the President of the Southern Public Communication Association, that he is authorized to provide this verification on behalf of the Association, and that the statements in the Complaint are true and correct to the best of his knowledge, information and belief.


David Cotton

SWORN TO AND SUBSCRIBED before me, this 12th day of December, 2003.


Notary Public

My Commission Expires:

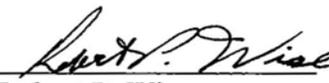


CERTIFICATE OF SERVICE

I, Robert P. Wise, do hereby certify that I have this day caused to be hand delivered a true and correct copy of the above and foregoing Complaint to the attorney for BellSouth Telecommunications, Inc. at the following address:

Thomas B. Alexander
General Counsel – Mississippi
BellSouth Telecommunications, Inc.
175 E. Capitol Street
Suite 790, Landmark Center
Jackson, Mississippi 39201

This the 19th day of December, 2003.


Robert P. Wise

FILED

LAW OFFICES
WISE CARTER CHILD & CARAWAY

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JUL 30 2004

**MISS. PUBLIC SERVICE
COMMISSION**

Robert P. Wise

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July 30, 2004

Via Hand Delivery

Mr. Brian U. Ray
Mississippi Public Utilities Staff
2d Floor, Woolfolk State Office Building
Jackson, MS 39215-1174

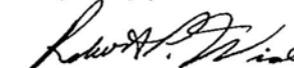
Re: **Docket No. 2003-AD-0927**
Complaint of the Southern Public Communication Association for Refund
of Charges by BellSouth Telecommunications, Inc. Pursuant to its
Rates for Payphone Line Access, Usage, and Features

Dear Brian:

On behalf of the Southern Public Communication Association ("SPCA") I am enclosing a proposed Order Overruling BellSouth's Motion to Dismiss the Complaint, and ordering the parties to present a scheduling order for the exchange of data requests, prefiled testimony and the scheduling of an evidentiary hearing on the Complaint.

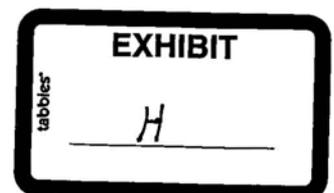
With best regards.

Very truly yours,


Robert P. Wise

RPW

cc: Allison Fry, Esq., MPSC, w/encl. Via hand delivery
Tad Campbell, Esq., MPSC, w/encl. Via hand delivery
Thomas Alexander, Esq., BellSouth, w/encl. Via scanned email and hand delivery
Ken Pickering, Esq. w/encl. Via scanned email: pickering@pclawfirm.com
Mr. C. Max Tullos, Jr., via email: daddymax@sotelco.com



FILED

JUL 30 2004

MISS. PUBLIC SERVICE
COMMISSION

BEFORE THE
MISSISSIPPI PUBLIC SERVICE COMMISSION

In Re: Complaint of the Southern Public
Communication Association for Refund of
Excess Charges by BellSouth Telecommunications,
Inc. Pursuant to its Rates for Payphone Line Access,
Usage, and Features.

Docket No. 2003-AD-927

(PROPOSED)

ORDER OVERRULING BELL SOUTH'S MOTION TO DISMISS

I. PROCEDURAL HISTORY

1. The Southern Public Communications Association (the "SPCA"), a trade association whose members include Mississippi non-LEC payphone service providers ("PSPs"), filed a verified Complaint against BellSouth Telecommunications, Inc. ("BellSouth"), a public telecommunications utility, with the Mississippi Public Service Commission (the "Commission") on December 19, 2003, pursuant to Rule 11 of the Commission's Rules of Practice and Procedure. The SPCA alleged in its Complaint that until October 1, 2003, when BellSouth issued new line rates in response to negotiations with the SPCA, and beginning as far back as April 15, 1997, BellSouth submitted Subscriber Line Charges ("SLC") and Pay Telephone Access Service ("PTAS") line charges to the PSPs in excess of and in violation of the federally mandated new services test requirements set forth in the Telecommunications Act of 1996 ("TA96") at 47 U.S.C. § 276, the Federal Communications Commission ("FCC") regulations and *Payphone Orders* issued in 1996 and 1997 pursuant to TA96, and the FCC's reiteration of its regulations and requirements in its January 31, 2002 Order, *In re Wisconsin Public Service Commission, Order Directing Filings, FCC Memorandum Opinion and Order Bureau*, 17 FCC Rcd. 2051 (hereafter the "Wisconsin Order"); affirmed *New England Public Communications Council, Inc. v. Federal Communications Commission*, 334 F.3d 69 (DC Cir. 2003).

2. The SPCA's Complaint therefore requested that the Commission issue an order requiring BellSouth to refund to SPCA's Mississippi members (1) SLC charges charged in violation of the *Wisconsin Order* requiring the elimination of SLC charges from the line rate charged to PSPs, and (2) PTAS rates to the extent BellSouth charged such rates to the PSPs in excess of and in violation of the federally mandated New Services Test.

3. Following service of the Complaint on BellSouth, notice of the Complaint was published on December 30, 2003.

4. BellSouth filed an Answer to the SPCA's Complaint on February 5, 2004.

5. BellSouth on February 5, 2004 also filed the Motion to Dismiss that is the subject of the present Order. BellSouth's Motion to Dismiss alleges that the SPCA's demand for refunds "fail to state a claim upon which the [Commission] may grant relief", and that BellSouth has at all times charged SPCA members the tariffed PTAS rates that comply with Commission Orders.

6. The Commission held a special hearing on the Motion to Dismiss on June 29, 2004 at which counsel for both parties presented argument. The Commission has also received the written memoranda of the parties' counsel.

II. THE COMMISSION'S FINDINGS

7. The Commission, being fully apprised in the premises, and as authorized by law, finds as follows:

8. The Commission has jurisdiction over the subject matter and the parties hereto to enter this Order and the entry hereof is in the public interest. The Commission has broad authority to resolve disputes between providers of utility services, or between utilities and their user customers, under the Commission's Rule 11 Complaint procedure. BellSouth is a

certificated utility providing telecommunications services in Mississippi. The members of the SPCA are both independent providers of pay telephone services to their end user telephone customers and users themselves of BellSouth's PTAS services. Under § 77-3-5 *Miss. Code Ann.* the Legislature stated that, "...the public service commission shall have exclusive jurisdiction over the intrastate business and property of public utilities." Further, it is the legislated policy of the State through the Commission, "To provide fair regulation of public utilities in the interest of the public." § 77-3-2(a) *Miss. Code Ann.* The Commission also has such powers as are necessarily implied to carry out its statutory duties. *Mississippi Pub. Serv. Comm'n v. Columbus & Greenville Ry. Co.*, 573 So.2d 1343, 1346 (Miss.1990). The SPCA has filed its Complaint for refunds from BellSouth under the Commission's well-established Rule 11 complaint procedure. The Mississippi Commission has a Complaint Rule because, as the Supreme Court has stated: "The Commission is vested with power... to make judicial findings and adjudications..." *Illinois Cent. R.R. Co. v. MPSC*, 220 Miss. 439, 71 So.2d 176, 178-79 (1954). Similarly, the Mississippi Supreme Court has, "acknowledged the commission's authority to decide judicial questions and to pass upon the rights of the parties, which decisions could then be appealed..." *Singing River Mill Co. v. Mark Fields, Inc.*, 599 So.2d 938, 942 (Miss.1992). See also, *Arnold Line Water Association, Inc. v. MPSC*, 744 So.2d 246, 248-49 (Miss.1999)(the Commission has exclusive original jurisdiction over contract disputes involving a public utility). In addition, the Commission's original jurisdiction to hear complaints between providers of utility services, or between utility services and their user customers, and, where necessary, to award damages or refunds by the utility provider, is consistent with the Commission's statutory

mandate, “[t]o encourage and promote harmony between public utilities”. *Miss. Code Ann.* § 77-3-2(e).

9. Moreover, the FCC stated in its November 8, 1996 Payphone “*Order on Reconsideration*” that it was looking to the States to ensure that the Bell Operating Companies (“BOCs”) maintain properly tariffed payphone line rates under the new services test requirement of 47 USC § 276. The FCC stated: “We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276”. *Order on Reconsideration*, 11 FCC R. 21,233 at par. 163 (1996). It follows also that if BellSouth failed to reduce PTAS rates with declining costs in accordance with the federally mandated new services test under TA96 § 276, it would be subject to this Commission’s Complaint proceedings to hear claims for refunds for repayment of the alleged illegal overcharges to the affected PSPs bringing the complaint.

10. A motion to dismiss “raises an issue of law” by testing “the legal sufficiency of the complaint.” *Little v. Mississippi Dept. of Human Services*, 835 So.2d 9, 10-11 (Miss. 2002). Further, “[w]hen considering such a motion, the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt on the face of the complaint that the plaintiff will be unable to prove any set of facts in support of his claim.” *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002).

11. In affirming the January 31, 2002 *Wisconsin Order*, the U.S. Court of Appeals for the D.C. Circuit summarized the federal regulatory history leading up to the FCC’s issuance of the *Wisconsin Order* as follows:

In the Telecommunications Act of 1996, Congress fundamentally restructured the local telephone industry. Section 276 of the Act, which is specifically aimed at promoting competition in the payphone service industry, prohibits “any Bell operating company that provides payphone service” from subsidizing or

discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also authorizes the Commission to prescribe regulations consistent with the goal of promoting competition, requiring that the Commission take five specific steps toward that goal. One of these steps is "prescrib[ing] a set of nonstructural safeguards for Bell operating company payphone service" that "shall, at a minimum, include the nonstructural safeguards equal" to those governing BOCs' provision of enhanced services--the so-called *Computer III* safeguards. *Id.* § 276(b)(1)(C). Finally, recognizing that the prescribed regulations would trench on state authority, Congress provided that section 276 preempts state law "[t]o the extent that any State requirements are inconsistent with the Commission's regulations." *Id.* § 276(c).

The Commission implemented section 276 in a series of orders, beginning with the so-called *Payphone Orders*. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 20541, 1996 WL 547458 (1996) (Report and Order) ("*First Payphone Order*"); Order on Reconsideration, 11 F.C.C.R. 21233, 1996 WL 658824 (1996) ("*Payphone Reconsideration Order*"). Among other things, these orders require that incumbent LECs provide "individual central office coin transmission services to PSPs" at rates that satisfy the flexible, cost-based "new services test" that developed as an outgrowth of the *Computer III* proceeding. *First Payphone Order*, 11 F.C.C.R. at 20614 ¶ 146. Specifically, in an order following the initial *Computer III* order, the Commission directed that service element rates be set at the direct costs of providing the service element, plus "an appropriate level of overhead costs." In the Matter of Amendments of Part 69 of the Commission's Rules ... ("*Access Charge Subelements Order*"). In the *Payphone Reconsideration Order*, the Commission clarified that while the states, not the Commission, would review the LECs' intrastate payphone line tariffs, the states must ensure that the tariffs are "(1) cost-based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies ...; and (3) nondiscriminatory," and that the states "must apply ... the *Computer III* guidelines for tariffing such intrastate services." 11 F.C.C.R. at 21308 ¶ 163.

New England Public Communications Council, Inc. v. Federal Communications Commission, 334 F.3d 69, 71-72 (DC Cir. 2003). Thus, as far back as 1996 and 1997, the FCC issued a series of *Payphone Orders* implementing the mandate of section 276 of TA96 to establish, "nonstructural safeguards...equal to those adopted in *Computer Inquiry-III*", i.e., the new services test. The *Payphone Orders* required the Bell Operating Companies ("BOCs"), including BellSouth, to establish and maintain in their state filed tariffs cost-based PTAS rates in compliance with the new services test.

12. The FCC noted in its first paragraph of its January 31, 2002 *Wisconsin Order* that, “In this *Memorandum Opinion and Order* (Order), we grant the LEC Coalition’s application for review of the Bureau’s March 2, 2000 Order (*Bureau Order*)....” The January 31, 2002 *Wisconsin Order* then identifies the members of the LEC Coalition bringing the application for review (at paragraph one, footnote1) as including specifically BellSouth Telecommunications, Inc. among the other BOCs. Therefore, BellSouth is estopped to deny that through the LEC Coalition it was a party to, and therefore subject to, the FCC’s pronouncements in the resulting January 31, 2002 *Wisconsin Order* resulting from the Coalition’s application for review. Moreover, the U.S. Court of Appeals, in affirming the *Wisconsin Order*, explicitly rejected the argument that the FCC’s *Wisconsin Order* applied only to Wisconsin LECs, stating: “Contrary to the Commission’s argument, the order on review is more than just ‘an adjudicatory-type proceeding...pertaining to rates in Wisconsin.’ ...Instead it establishes a rule that affects line rates in every state. Indeed, the Commission has acknowledged as much....” (Emph. Added). *New England Public Communications Council, Inc. v. Federal Communications Commission*, 334 F.3d 69, 75 (DC Cir. 2003). Finally, the *Wisconsin Order*, while including the specific requirement that the BOCs eliminate SLC charges from PTAS line rates, otherwise simply reiterated the new services test requirements for PTAS line services long established by the FCC’s earlier 1996 and 1997 *Payphone Orders*, all pursuant to Section 276 of TA 96.

13. In the January 31, 2002 *Wisconsin Order*, reciting the FCC’s earlier November, 1996 *Payphone Reconsideration Order* (11 FCC Rcd at 20614, para.146), the FCC stated to the BOCs:

In compliance with this statutory mandate, we affirm the Bureau’s conclusion that section 276 **requires BOCs to set** their intrastate payphone line rates **in compliance**

with the Commission's cost-based, forward-looking "**new services**" test. (Emph. Added. *Wisconsin Order* paragraph 2, p.2).

Therefore, in establishing its cost-based, state-tariffed charge 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**. (Emph. added. *Wisconsin Order* paragraph 61, p. 20).

In sum, we issue this *Order* to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*. This *Order* includes the following basic propositions: **First, BOCs' intrastate payphone line rates, including usage rates, should comply with the flexible, cost-based new services test. ...Finally, BOCs' payphone line rates should be adjusted to account for SLC charges, as set forth herein.** (Emph. Added. *Wisconsin Order* paragraph 68, p. 22).

Therefore, in the January 31, 2002 *Wisconsin Order* the FCC once more made it clear to BellSouth and the other BOCs of the LEC Coalition that they bore a responsibility that they "must reduce" or must take action to "adjust" their state-tariffed monthly per line charges to PSPs in accordance with the federally mandated new services test: (1) to eliminate SLC charges from their PTAS line rates,¹ and (2) to reduce the line rates to comply with the cost-based (i.e., *Computer III*) safeguards of the new services test. In affirming the *Wisconsin Order*, the D.C. Circuit said: "A group of BOCs now petitions for review.... ...We deny the petitions for review and affirm the *Wisconsin Order* in all respects." *New England Public Communications Council, Inc. v. Federal Communications Commission*, 334 F.3d 69, 73 and 79 (DC Cir. 2003).

14. BellSouth argues that it issued and filed with the Commission on May 19, 1997 a flat rate tariff for PTAS rates of \$46.00 a month per line, effective April 15, 1997, that

¹As to elimination of the SLC, see the Order of the Kentucky PSC (June 5, 2003 in Case 361) attached to SPCA's Second Supplemental Response eliminating the SLC from the date of the *Wisconsin Order*: "[We] conclude that the LECs themselves should have taken action to adjust their rates...On January 31, 2002, the rules implementing the New Services Test were at last fully in place. We therefore modify our May 1, 2003 determination to require that the LECs to refund amounts paid by payphone providers since January 31, 2002, the date of the FCC's *Wisconsin Order*, that are in excess of the appropriate payphone access rate." This SLC refund was in addition to the earlier Jan. 5, 1999 NST refunds issued in Case 361 prior to the *Wisconsin Order*.

it has asserted in filings with this Commission that it complied with the new services test. The Commission stamped the tariff approved. Although BellSouth from time to time reiterated its tariff, BellSouth maintained the \$46.00 PTAS rate on file with the Commission for a period of over six years until changing the PTAS rate effective October 1, 2003 to a monthly flat rate excluding SLC charges from the line charge and reduced down to \$17.86, a 61% decrease. BellSouth claims the benefit of the state filed rate doctrine and of the state prohibition against retroactive rate making for the period before it reduced its PTAS rates.

15. However, even if we were to hold that the state's filed rate doctrine and prohibition against retroactive rate making could apply here (despite any express federal preemption afforded the application of the new services test to PTAS rates of TA96 at 47 U.S.C. § 276(c)), and BellSouth's initial 1997 tariff could be presumed lawful for a time, BellSouth still had an obligation to review and amend its 1997 tariff as it experienced declining line costs to avoid collection of PTAS rates that were not in conformity with the requirements of the federally mandated new services test. Therefore, even if the initial rate filed in May 1997 were lawful and subject for a time to the protection of the state's filed rate doctrine and prohibition against retroactive rate making, the members of the SPCA have a right by their Complaint to conduct discovery and to show at an evidentiary hearing, as they have alleged in the Complaint, that the BellSouth PTAS rate became unlawfully excessive as BellSouth's costs declined and BellSouth began to collect rates that were excessive under the federally mandated new services test, requiring that the Commission refund the excess to the affected Mississippi PSP members of the SPCA who were BellSouth's customers. The Mississippi Supreme Court has stated that the State's filed rate doctrine does not shelter the unlawful collection of rates, even if the rate itself was lawfully adopted by the reviewing

administrative agency. See *American Bankers Insurance Company of Florida v. Alexander*, 818 So.2d 1073 (Miss.2001), in which the plaintiffs brought an action to recover maximum insurance premium rates that were lawfully adopted by the Mississippi Insurance Commission, but that lenders had applied illegally because lender guidelines had not been met. The defendants filed a motion to dismiss based on the filed rate doctrine. The Mississippi Court overruled the defendants, finding that the filed rate doctrine does not preclude contract, common law tort or statutory actions for refunds/damages for lawful rates unlawfully collected under applicable statutes, concluding that, “the filed-rate doctrine is not a roadblock to the plaintiffs’ day in Court.” *Alexander*, 818 So.2d at 1085. Especially telling for the present case is that the Mississippi Court’s analysis included a review of a federal telecommunications case (*Gelb v. AT&T Co.*, 813 F.Supp. 1022 (S.D.N.Y.1993)) in which, as the Mississippi Court noted, “The federal court held that there was nothing in the policy underpinnings of the filed rate doctrine which would cause it to protect a defendant **who unlawfully extracted payment, even at a lawful rate.**” *Alexander*, 818 So.2d at 1083 (emphasis added). Under these circumstances, we cannot say that the Complaint of the SPCA fails to state a cause of action for refunds, alleging as it does that BellSouth unlawfully extracted from its members PTAS payments that were unlawfully excessive under the federally mandated new services test, and that included collection of SLC payments specifically precluded by the FCC’s January 31, 2002 *Wisconsin Order*.²

² We note that the SPCA also argues that the Federal preemption of any “inconsistent...State requirements” under Section 276(c) preempts any application of the state filed-rate doctrine to bar the claims of the SPCA for refunds of payments extracted illegally under the standards of the federal new services test. The SPCA thus argues that the state filed rate doctrine is a state doctrine that must yield to federal preemption under the regulations issued by the FCC under TA96 (at § 276), and that the circumstances of this case are unique because of the special protection afforded to the SPCA’s rights under the express preemption clause of TA96 at § 276(c). However, in light of the analysis of state law noted above, we need not reach this argument at this time.

16. BellSouth also has raised certain statutes of limitations arguments that the SPCA in turn argues are precluded as state requirements inconsistent with the federally preemptive mandate calling for the application of the new services test under 47 U.S.C. § 276. However, the Commission need not reach BellSouth's affirmative defenses or the SPCA's preemption argument to overrule the present Motion to Dismiss. We note that statutes of limitations are affirmative defenses. See, for example, Rule 8(c) of the Mississippi Rules of Civil Procedure listing affirmative defenses. Also, BellSouth has listed these defenses in its Answer as affirmative defenses (Answer, Fifth Affirmative Defense, p.6). Since the purpose of a Motion to Dismiss is to test the legal sufficiency of the Complaint, we need not address BellSouth's affirmative defenses which go beyond the face of the complaint and which, if applicable, would be a matter of BellSouth's own affirmative proof at the evidentiary hearing on this matter following the SPCAs presentation of its evidence. *Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621, 623 (Miss. 2002) (“[w]hen considering such a motion [to dismiss], the allegations in the complaint must be taken as true, and the motion should not be granted unless it appears beyond doubt on the face of the complaint that the plaintiff will be unable to prove any set of facts in support of his claim.”).³ We therefore need not in this order address BellSouth's statute of limitations defenses or the

³ See also the Order Denying [BellSouth's] Motion to Dismiss in Florida where the Commission concluded: “...FPTA [Florida Pay Telephone Association] is only required to state a cause of action; it is not required to prove the ultimate issues of fact. BellSouth's Motion to Dismiss goes beyond the four corners of the petition to the ultimate issues of fact and appears to raise affirmative defenses, which are inappropriate for us to consider in the context of a Motion to Dismiss. Therefore, viewed in the light most favorable to FPTA, it appears that FPTA has stated a cause of action for which we may grant relief. Accordingly, we hold that BellSouth's Motion to Dismiss is denied.” (Order p. 9, July 16, 2003, Docket No. 030300-TP; attached to SPCA's Supp. Response).

SPCA's federal preemption argument as to state limitations, reserving them for review following a full evidentiary hearing on this matter.⁴

17. Moreover, in addition, in this case a statute of limitations could not be a complete defense to the Complaint since it is alleged that BellSouth invoiced monthly charges to members of the SPCA over a period of years which they assert were each excessive and unlawful under the FCC's orders and the new services test. Even if this Commission were to rule that a statute of limitations were applicable, the members of the SPCA would still be able to go back and claim refunds accruing during at least the period covering the asserted statute of limitations preceding the date of the filing of the Complaint. For example, while the federal two year statute of limitations is not applicable in this case (since the Complaint here is before the Mississippi Commission, not the FCC), the DC Circuit, in a recent case applying the federal statute of limitations to claims of payphone providers before the FCC for pre-TA96 illegal EUCL charges, found that the Plaintiff's claims for unlawful EUCL charges occurred, "when they incurred EUCL charges" as they were billed. Therefore, the applicable statute of limitations for claims before the FCC only, "barred them from recovering charges paid *more than* two years before they filed their complaints." (Opinion p. 6; *emph. added*). Further, the DC Circuit affirmed the FCC's finding that the payphone providers could recover pre-TA96 illegal EUCL charges for at least "the two-year period preceding the filing of their complaints." (Opinion p.14).

Communications Vending Corporation of Arizona v. FCC (D.C. Cir., April 30, 2004, No. 02-1364). As the analysis in the *Communications Vending* decision indicates, the rendering of each BellSouth invoice to collect a charge that the payphone providers in this case allege was

⁴ In addition to the FL order granting a full evidentiary hearing on the complaint to SPCA, see also the order of the Alabama Commission dated July 15, 2004 stating the SPCA, "has shown compelling reasons it should be heard on its complaint." (AL PSC Docket 29172, July 15, 2004 at p.2).

illegal under TA96 accrued a separate, new claim for its recovery, and thus a new cause of action. Mississippi law similarly recognizes that there cannot be a cause of action to accrue until the action for injury exists; the claims or actions for injury did not exist until each time BellSouth invoiced and collected the alleged illegal charge. See, e.g., *McArthur Mechanical Contractors, Inc.* 336 So.2d 1306, 1308 (Miss.1976) (“Where there is an open running account which is not also a mutual account, the cause of action arises from the date of each item, and they are severally barred when as to each the statute has run.”); accord., 54 C.J.S. *Limitation of Actions* § 161. See also, *Meridian Production Credit Ass’n v. Edwards*, 231 So.2d 806, 808 (Miss.1970) (“The rule is well settled in this state that where a debt is payable in installments the statute of limitations begins to run as to each installment from the time it becomes due....”; and *Estate of Kidd v. Kidd*, 435 So.2d 632, 635 (Miss.1983) (“A cause of action accrues only when it comes into existence as an enforceable claim”). Since any application of any statute of limitations, for whatever period, even if we found it were not preempted by 47 U.S.C. §276(c), could not preclude all of the SPCA’s claims for refunds of payments made prior to October 1, 2003, the Commission cannot sustain the Motion to Dismiss. The SPCA is entitled to a hearing to present evidence in support of the claims alleged in the Complaint.⁵

18. For all of the reasons recited above, the Commission must overrule BellSouth’s Motion to Dismiss since the Commission cannot at this juncture at least, prior to a full evidentiary hearing, find that the Complaint fails to state a claim upon which relief may be granted. The Commission finds that the parties should present to the Commission a

⁵ While not necessary to the conclusions reached above, the Commission also notes that even if it were to find a state statute of limitations were applicable, and not preempted under 47 U.S.C. §276(c), any attempt in a state-filed tariff to shorten a state limitations period further would be precluded by Mississippi law under §15-1-5 *Miss. Code Ann.* (“Period of Limitations Shall Not Be Changed By Contract”). The 60 day limitation of BellSouth’s state tariff could therefore have no application here under any circumstances.

scheduling order for the exchange of data requests, prefiled direct and rebuttal testimony, and a full evidentiary hearing on this matter.

III. CONCLUSION

IT IS, THEREFORE, ORDERED as follows:

1. The Commission has jurisdiction over the subject matter and the parties herein.
2. The Complaint as a matter of law states a claim upon which relief may be granted. Therefore, BellSouth's Motion to Dismiss is overruled.
3. The parties will present to the Commission within twenty (20) days hereof a scheduling Order for the exchange of data requests, prefiled direct and rebuttal testimony, and an evidentiary hearing before the Commission.
4. This Order is effective as of the date hereof.

SO ORDERED, on this the ____ day of _____, 2004.

Chairman Bo Robinson voted _____; Vice-Chairman Nielsen Cochran voted _____; and Commissioner Michael Callahan voted _____.

MISSISSIPPI PUBLIC SERVICE COMMISSION

Bo Robinson, Chairman

Nielsen Cochran, Vice-Chairman

Michael Callahan, Commissioner

ATTEST A TRUE COPY:

Brian U. Ray, Executive Secretary

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April 10, 1997

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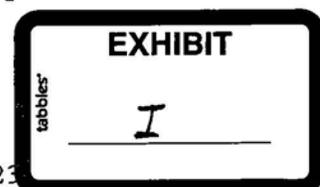
In re Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996,
CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be



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Mary Beth Richards
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too low to meet the "new services" test and will therefore have to be raised.

In order to allow deregulation to move forward and ensure that LEC PSPs are able to compete on a level playing field starting, as planned, on April 15, 1997, we propose that the limited waiver issued by the Commission on April 4 for interstate tariffs apply to intrastate payphone tariffs as well. Specifically, we request that the Commission grant us 45 days from the April 4th Order to file new intrastate tariffs, in those States and for those services where new tariffs are required. Each LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised.

Unlike with federal tariffs, there is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th. Once the new state tariffs go into effect, to the extent that the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However, we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance. Moreover, we will not seek additional reimbursement to the extent that tariff rates are raised as a result of applying the "new services" test.)

The LECs thus ask the Commission to waive the requirement that effective intrastate payphone tariffs meet the "new services test," subject to three conditions: (1) LECs must file a written ex parte with the Commission by April 15, 1997, in which they attempt to identify any potentially non-compliant state tariff rates, (2) where a LEC's state tariff rate does not comply with the "new services" test, the LEC must file a new state tariff rate that does comply within 45 days of the April 4, 1997 Order, and (3) in the event a LEC files a new tariff rate to comply with the "new services" test pursuant to this waiver, and the new tariff rate is lower than the previous tariff rate as a result of applying the "new services" test, the LEC will undertake

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(consistent with state regulations) to provide a credit or other compensation to purchasers back to April 15, 1997.

The requested waiver is appropriate both because special circumstances warrant a deviation from the general rule and because the waiver will serve the public interest. Because the federal "new services" test has not previously been applied to existing state services -- and because the LECs did not understand the Commission to be requiring such an application of the test until the Commission issued its clarification order just a few days ago -- special circumstances exist to grant a limited waiver of brief duration to address this responsibility. In addition, granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated from payphones. And competing PSPs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above -- which ensures that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up -- will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Accordingly, we request a limited waiver, as outlined above, of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

We appreciate your urgent consideration of this matter. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,


Michael K. Kellogg

cc: Dan Abeyta	Christopher Heimann	Brent Olson
Thomas Boasberg	Radhika Karmarkar	Michael Pryor
Craig Brown	Regina Keeney	James Schlichting
Michelle Carey	Linda Kinney	Blaise Scinto
Michael Carowitz	Carol Matthey	Anne Stevens
James Casserly	Richard Metzger	Richard Welch
James Coltharp	John B. Muleta	Christopher Wright
Rose M. Crellin	Judy Nitsche	
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April 11, 1997

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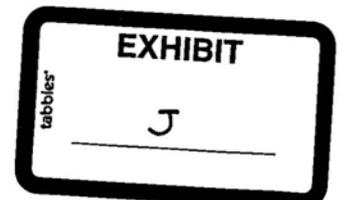
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In re Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996,
CC Docket No. 96-128

Dear Mary Beth:

This letter will clarify the request I made yesterday on behalf of the RBOCs for a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions.

To the best of my knowledge, all the RBOCs have (or will by April 15, 1997, have) effective state tariffs for all the basic payphone lines and unbundled features and functions required by the Commission's order. We are not seeking a waiver of that requirement. We seek a waiver only of the requirement that those intrastate tariffs satisfy the Commission's "new services" test. The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test or to file new or revised tariffs that do satisfy those standards. Furthermore, as noted, where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

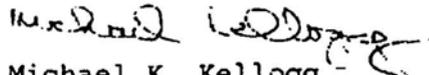


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Mary Beth Richards
April 11, 1997
Page 2

I hope this clarification is helpful. Copies of this letter have been served by hand on the APCC, AT&T, MCI and Sprint.

Yours sincerely,


Michael K. Kellogg

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