

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)

**REPLY COMMENTS OF THE SOUTHERN PUBLIC COMMUNICATION
ASSOCIATION ON THE SPCA PETITION FOR
DECLARATORY RULING**

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I. THREE ESSENTIAL FACTS REMAIN BEYOND DISPUTE

The comments filed in response to the Petition of the Southern Public Communication Association (SPCA) for Declaratory Ruling leave three essential facts beyond dispute:

1. The MPSC's July 14, 1997 Order allowed the BellSouth \$46.00 PTAS rate to go into effect as a carrier-certified, carrier made rate, without any independent determination by the MPSC that the BellSouth rate or cost study complied with the federally mandated standard of the new services test since, as the MPSC's Comments admit, "**...neither a procedural schedule nor an evidentiary hearing were ever set in the case.**" (MPSC Comments p. 6).
2. BellSouth, in response to negotiations and the threat of action by the SPCA, suddenly dropped its six and a half year old, carrier-made \$46.00 PTAS rate to \$17.86 ("equal to \$24.99 less the current Subscriber Line Charge (SLC) of

\$7.13”) effective October 1, 2003, stating in the new tariff (at Note 1) that, “...this rate complies with the ‘new services test’ as applied by the [FCC] Memorandum and Opinion and Order *In the Matter of Wisconsin Public Service Commission*, released January 31, 2002,” thus tacitly admitting that its prior carrier-made rate (including collection of the amount of SLC charges) had been out of compliance with the standard of the FCC’s *Payphone* and *Wisconsin* orders.

3. The SPCA by its Complaint in the MPSC alleged a legal action to challenge the compliance of BellSouth’s carrier-made \$46.00 PTAS rate (plus collection of the amount of federally tariffed SLC charges) with the federally mandated, cost-based new services test. The SPCA sought not to remake retroactively the 1997 tariff, but requested a refund as reparations to the members of the SPCA for an unlawful, carrier-made rate as permitted by law under *Arizona Grocery Co. v. Atchison, T. & S. Ry. Co.*, 284 U.S. 370, 384-385, 52 S.Ct. 183, 184, 76 L. Ed. 348, 353 (1932) and, more recently, under *Maislin Industries, U.S. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128-129, 110 S.Ct. 2759, 2767, 111 L.Ed.2d 94, 109-110 (1990).

Yet, the MPSC summarily dismissed the SPCA’s Complaint, saying the SPCA had no legal right to seek a refund/reparations for alleged violations of the Commission’s *Payphone* and *Wisconsin Orders*. BellSouth repeated its violations of the FCC’s *Orders* each month that it billed and collected from SPCA members its carrier-made rates that were unreasonable because they failed to conform to the federally mandated, new services test requirements. BellSouth’s monthly billings of the unreasonable rate gave

the SPCA a cause of action each time it paid the unlawful rates for a refund.¹

As we will see, the MPSC dismissed the SPCA's Complaint by ignoring the SPCA's clear cause of action for refunds/reparations under *Arizona Grocery Co.* supra, and *Maislin Industries*, supra. The Commission must address the present uncertainty, resulting from conflicting state results, as to the availability of refund remedies under the Commission's *Payphone* and *Wisconsin Orders*. The Commission should remove the uncertainty by declaring the remedy of refunds/reparations is available to the members of the SPCA as a matter of law under *Arizona Grocery Co.* supra, and *Maislin Industries*, supra, for BellSouth's violations of the Commission's *Orders*. Only by the FCC's declarations will the SPCA's members be assured of a remedy for the violations of the Commission's *Orders* alleged in the SPCA Complaint to the MPSC. Accordingly, the Commission should also declare that the MPSC wrongfully dismissed the SPCA's Complaint for refunds.

II. THE SPCA HAS A LAWFUL CAUSE OF ACTION FOR REFUNDS FOR VIOLATIONS OF THE COMMISSION'S PAYPHONE ORDERS, THE STATE FILED RATE/RETROACTIVE RATE MAKING DOCTRINES NOTWITHSTANDING

The MPSC misconstrued the filed rate doctrine and violated the Commission's *Payphone* and *Wisconsin Orders* by dismissing the SPCA's complaint, thus failing to afford the SPCA a refund remedy for BellSouth's collection of rates in excess of those allowed by the new services test. As noted in the *Arizona Grocery* case, even at common law a carrier that filed unreasonable carrier-made rates, "took its chances that in an action...these might be adjudged unreasonable and reparation be awarded." *Arizona Grocery Co.*, 284 U.S. at 383, 76 L.Ed. at 352. As a matter of law BellSouth's carrier-

¹ Each month's wrongful collection of the rate creates a new action for refund. See, e.g., *Communications Vending Corporation of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1073-1074 (C.A.D.C. 2004).

made state rate is subject to being found unenforceable by BellSouth if adjudicated in violation of the federally mandated standard of the new services test. *Maislin Ind.*, 497 U.S. at 128-129, 110 S.Ct. at 2767, 111 L.Ed.2d at 109-110; 47 U.S.C. § 276 (a), (b)(1)(C), (c). The MPSC's summary dismissal of the SPCA's Complaint seeking to adjudicate the reasonableness of the BellSouth carrier-made rate against the federally mandated standard of the new services test was erroneous as a matter of law.

The following passages from *Arizona Grocery* bear emphasis:

Although the Act thus created a legal rate it did not abrogate, but expressly affirmed the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate, it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

The act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier reparation was to be awarded.... In passing upon the issue of fact the function of the Commission was judicial in character; its action affected only the past so far as any remedy of the shipper was concerned and adjudged for the present merely that the rate was then unreasonable;....

Arizona Grocery Co., 284 U.S. at 384-385, 76 L.Ed. at 353. The MPSC complains specifically that the Commission's *Wisconsin Order* made no mention of refunds (MPSC Comments p.4). But the Commission issued its *Wisconsin Order* against the backdrop of the earlier United State Supreme Court opinions in the *Arizona Grocery* and *Maislin* cases which establish the right to refunds for excessive, unreasonable carrier-made rates. PTAS rates filed and maintained by BellSouth, which became increasingly excessive as BellSouth's costs declined over the years, were *per se* unreasonable as a matter of law under new services test, and thus subject to the remedy of refunds by law under *Arizona Grocery* and *Maislin*. The Commission should make the availability of the remedy of

refunds for the SPCA to enforce the Commission's orders explicit in its declaratory ruling.

The Commission has stated that, “[w]e 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 that the SPCA has a cause of action by its Complaint to the MPSC, and a right to a hearing, to challenge whether the state-filed, but carrier-made, BellSouth tariff was in fact reasonable under the federally mandated standard of the new services test. As stated in *Arizona Grocery*, if the SPCA, “could show that it was unreasonable, [it] might recover reparation.” *Arizona Grocery Co.*, 284 U.S. at 384-385, 76 L.Ed. at 353. A challenge to the reasonableness of a carrier made rate under federally mandated standards is an exception to the filed-rate doctrine under *Arizona Grocery* and *Maislin* cases. After all, the law left upon BellSouth as the “carrier the burden of conforming its charges” to rate that was lawful under the new services test. *Arizona Grocery Co.*, 284 U.S. at 384-385, 76 L.Ed. at 353. Further, the application of the state’s filed rate doctrine as a bar to a challenge under the new services test is precluded here also by the express preemption of 47 U.S.C. § 276(c). But the SPCA will only have the remedy of refunds for the violations of the Commission’s orders if the Commission issues its declaratory ruling declaring that the MPSC should not have summarily dismissed the SPCA’s Complaint, but should have afford the SPCA rights of discovery, an evidentiary hearing and a remedy for violations shown of the Commission’s orders.

Further, the SPCA’s Complaint is not a request for retroactive rate making. Rather, as stated in *Arizona Grocery*, the adjudication of the reasonableness of the rate

under the SPCA's Complaint would have, "affected only the past so far as any remedy...was concerned and adjudged for the present merely that the rate was then unreasonable". *Arizona Grocery Co.*, 284 U.S. at 384-385, 76 L.Ed. at 353. The SPCA has prayed for a refund of the excessive rates as a remedy, not for a remaking of the past tariff.

As the MPSC has admitted in its Comments, there was no evidentiary hearing on BellSouth's carrier-made tariff. Further, the state filed rate doctrine, as a state doctrine, is preempted as a matter of law under 47 U.S.C. 276(c) from standing in the way of a refund challenge based on violations alleged of the Commission's *Payphone* and *Wisconsin Orders*. Therefore, again, in the words of Justice Roberts in *Arizona Grocery*:

...the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition **or upon complaint**, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

(Emph.) *Arizona Grocery Co.*, 284 U.S. at 390, 76 L.Ed. at 356; *Accord., Maislin Industries, U.S. Inc.*, 497 U.S. 116, 128-129, 110 S.Ct. 2759, 2767, 111 L.Ed. at 109-110. Well, the SPCA for its members filed its Complaint as to the unreasonable, carrier-made rate that is in violation of 47 U.S.C. § 276 and of the Commission's regulations by its *Payphone* and *Wisconsin Orders*. The Commission's regulations under its *Payphone* and *Wisconsin Orders* are expressly preemptive under § 47 U.S.C. 276(c). The Commission should therefore end the uncertainty of the MPSC and of any other state commission as to the availability of refunds for enforcement of the Commission's *Payphone* and *Wisconsin Orders* by declaring as a matter of law the MPSC should not have summarily dismissed the Complaint, but should at the very least have allowed an adjudication for refunds by

the standard of the federally mandated new services test.

Further, BellSouth in Mississippi has collected millions in dial around compensation since 1997. BellSouth therefore should be required to stick to its offer in the *Kellogg letters* to refund the PTAS rates collected in excess of the rate determined by an actual hearing under the new services test, or face a return of the dial around funds.

The filed rate doctrine in Mississippi is essentially the same as that set forth by the United States Supreme Court. 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 legally filed with the administrative agency. See *American Bankers Insurance Company of Florida v. Alexander*, 818 So.2d 1073, 1083-1085 (Miss.2001). 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, "[t]he 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. Thus, the Mississippi Supreme Court has adopted the exception to the filed rate doctrine made by the U.S. Supreme Court in the *Arizona Grocery* and *Maislin* cases for a refund due for collection of an unlawful rate, even though it adhered to legally filed, carrier-made rate.²

III. PRIMARY JURISDICTION OVER THIS MATTER RESTS WITH THE COMMISSION; ISSUES OF COMITY DO NOT APPLY

The MPSC and BellSouth urge that principles of comity should cause the Commission to defer to the current SPCA appeal from the MPSC in court without the input of the Commission. However, the MPSC and BellSouth removed the SPCA's

² See also the legal analysis contained in the IPTA Reply Comments dated September 7, 2004 at pp. 6-10.

appeal from a state court in Mississippi to the U.S. District Court for the Southern District of Mississippi. Since the case is now in a federal court, the Commission's involvement now would not constitute an interference with an ongoing state proceeding. See, e.g., *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1122 (C.A.D.C.) ("Comity includes the concern that 'interference with a **state judicial proceeding** prevents the state...from effectuating its substantive policies,'"). (Emph). Here the only current court proceeding is a federal one.

Further, the SPCA has made a motion in the federal court, still pending, to refer primary jurisdiction to the Commission because in fact primary jurisdiction rests in the Commission in this matter. At the heart of the SPCA's appeal is the failure of the MPSC to enforce the Commission's *Payphone* and *Wisconsin Orders* by recognizing in the SPCA's Complaint a cause of action for refunds based on violations of Commission orders. Further, the Commission has special expertise and experience concerning its *Payphone* and *Wisconsin* regulations that it issued pursuant to Section 276 of TA 96. The Commission's expertise extends beyond its technical expertise concerning the application of the new services to its mandate to implement TA 96, "and the concomitant policy judgments it must make." See *Total Communications Services, Inc. v. American Telephone and Telegraph Co.*, 919 F.Supp. 472, 478-479 (D.D.C. 1996). Moreover, the issues raised by the SPCA were already largely before the Commission in the IPTA Petition before the SPCA's appeal was removed to the U.S. District Court. See *Id.* at 478-479 ("Importantly, the plaintiffs do not deny the fact, brought forward by AT&T, that many of the issues presently pending before the court are already before the FCC."). Finally, only the Commission is in a position to remove the current uncertainty and

controversy as to remedies available for violations of the Commission's *Payphone* and *Wisconsin Orders* created by conflicting state pronouncements.

IV. THE SPCA'S CAUSE OF ACTION FOR REFUNDS IS NOT PRECLUDED BY STATUTES OF LIMITATIONS

The SPCA filed its Complaint with the MPSC on December 19, 2003. The MPSC in its Comments asserts that the SPCA's Complaint was precluded by applicable statutes of limitations. However, in this case a statute of limitations could not be a complete defense to the SPCA's Complaint, requiring a dismissal, since as the Complaint alleges, BellSouth invoiced monthly excessive PTAS charges to members of the SPCA in violation of the federal new services test. Each billing and collection by BellSouth of the unlawfully excessive rate created a new cause of action for the SPCA to demand its recovery. The members of the SPCA should still be able to go back and claim refunds accruing during at least the period covering the asserted state statute of limitations (3 years) preceding the date of the filing of the Complaint in the MPSC.³

The federal two year statute of limitations applicable to complaints filed with the Commission is not applicable in this case since the SPCA filed its Complaint with the MPSC, not with the Commission.⁴ However, by way of analogy only, the DC Circuit in a recent case applied the federal statute of limitations to complaints filed with the Commission by payphone providers for pre-TA96 illegal EUCL charges. The D.C. Circuit found that, "...the Commission reasonably found that their cause of action accrued under section 415 when the LECs billed them for the EUCL charges." The

³ The Mississippi statute of limitations applicable to contracts is three (3) years, *Miss. Code Ann.* § 15-1-49 (1972).

⁴ The 2 year limitations period of 47 U.S.C. § 415(b) applies only to complaints filed "with the Commission", i.e., the FCC, pursuant to 47 U.S.C. § 208. The SPCA filed its complaint with the MPSC pursuant to Rule 11 of the MPSC Rules of Practice and Procedure.

carrier billed the EUCL charges on a monthly basis. *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1074 (C.A.D.C. 2004). Therefore, the DC Circuit affirmed the FCC's finding that the payphone providers could recover unlawful pre-TA96 EUCL charges for at least, "the two-year period preceding the filing of their complaints." *Id.*, 365 F.3d at 1066 and 1073.

As the analysis in the *Communications Vending* decision indicates, the rendering by BellSouth of each invoice to collect a charge that the payphone providers allege was unlawfully excessive under TA96 accrued a separate, new claim for a refund, and thus a new cause of action each month. Mississippi law similarly recognizes that there cannot be a cause of action to accrue until the action for injury arises with each new billing. The claims or actions for injury did not exist until each time BellSouth invoiced and collected the alleged unlawful 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 not preempted here 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 MPSC should not have dismissed the

SPCA's Complaint.

Further, BellSouth's Comments reference a 60 day limitation period for the bringing of claims contained in its state-filed tariff (BellSouth Comments at ft.n. 11, p.8). However, any attempt in a state-filed tariff to shorten the period of a state statute of limitations is precluded by Mississippi law under §15-1-5 *Miss. Code Ann.* ("Period of Limitations Shall Not Be Changed By Contract"). Also, any attempt in a state-filed tariff to override the rights of the SPCA to a remedy under 47 U.S.C. § 276 is expressly preempted as a matter of law by 47 U.S.C. § 276(c). The 60 day limitation of BellSouth's state tariff could therefore have no application under any circumstances.

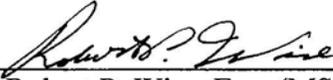
Finally, any statute of limitations could not accrue until, "a readily discoverable injury occurs or, if an injury is not readily discoverable, when the plaintiff should have discovered it." *Communications Vending Corp. of Arizona*, 365 F.3d at 1074. Only BellSouth possessed the cost data demonstrating its declining costs, and thus its non-conformity with the cost-based rates required under the new services test. The accrual of the SPCA's action for refunds was not discoverable until BellSouth filed a new tariff in October 2003 dropping the PTAS rate by more than half, stating that the new rate conformed to the new services test. But BellSouth's new rate demonstrated once and for all that its prior, carrier-made rate was badly out of compliance with the requirements of 47 U.S.C. § 276 and with the Commission's regulations under its *Payphone* and *Wisconsin Orders*. Hence, the SPCA should be able to recover back to April 15, 1997.

V. CONCLUSION

For all of the foregoing reasons, the Commission should grant the Petitions of IPTA and of the SPCA for a declaratory ruling.

Respectfully submitted,

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December 22, 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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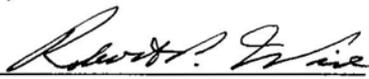
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