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August 22, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Tariff Filing of BellSouth Telecommunications, Inc. to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Payment Charge*
Docket No. 00-00041

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to Consumer Advocate Division's Second Petition for Stay of Effectiveness and Petition for Reconsideration. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Patrick W. Turner

PWT/jem

Enclosure

225657

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Tariff Filing to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Charge*

Docket No. 00-00041

RESPONSE TO CONSUMER ADVOCATE DIVISION'S SECOND PETITION FOR STAY OF EFFECTIVENESS AND PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response to the Consumer Advocate Division's ("CAD's") Second Petition for Stay of Effectiveness and Petition for Reconsideration. As explained below, the CAD's attacks on the Order Reversing Initial Order and Approving Tariff ("Order") issued by the Tennessee Regulatory Authority ("TRA") in this docket are without merit. The TRA, therefore, should deny both petitions.

I. THE TRA SHOULD DENY THE CAD'S PETITION FOR RECONSIDERATION

As explained below, the CAD's arguments in support of its Petition for Reconsideration are meritless. The TRA, therefore, should deny this Petition.

A. The CAD's Observations Regarding the Amended Initial Order Do Not Warrant Reconsideration of the TRA's Order.

The CAD's first arguments in support of its Petition for Reconsideration are surprisingly trivial. The CAD notes that while the Order "purports to reverse the Initial Order of the Hearing Officer," the Hearing Officer "amended his Initial Order and the reversal pertains to a defunct Order not in effect." Petition at ¶ 1.

Accordingly, the CAD argues that the Order "reversing an [Initial] Order not in effect and approving BellSouth's tariff are [sic] material errors of fact and law." Petition at ¶ 2.

Despite these allegations, it is obvious that the Directors were fully aware of and considered the Hearing Officer's amendment when they reversed the Hearing Officer's Initial Order. At the request of Chairman Kyle, the Hearing Officer read the amendment into the record during the July 11, 2000 Directors Conference. (Tr. 7/11/00 Conf. at 118-120).[1] The parties then presented oral argument on the Initial Order as amended, and the TRA rendered its decision. The CAD's allegations regarding the amendment to the Initial Order, therefore, clearly do not warrant a reconsideration of the result of the Order in this docket.[2]

B. The CAD's Allegations That the Order Fails to "cite the Undisputed Facts" are Meritless.

The CAD next alleges that the Order fails to "cite the undisputed facts" regarding: "whether or not BellSouth's rates for basic local exchange service were average rates on or before June 6, 1995," Petition at ¶ 3; whether such rates "included the expenses and charges associated with billing and collections," Petition at ¶ 3; and "BellSouth's tariffs associated with billing and collections on

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[1] After reviewing a written copy of this amendment, the CAD's own representative stated, "[m]y unreadiness is cured. I've scanned it and I have no objections to the order as amended, as modified, whatever." *Id.* at 123.

[2] Although it is not necessary, BellSouth would have no objection to the TRA's issuing a revised Order clarifying that it is the Initial Order, as amended, that was reversed.

June 6,1995." Petition at ¶¶ 4-5. The Uniform Administrative Procedures Act, however, does not require an agency to address any and every factual allegation that a party can dredge up. Instead, the Act logically provides that:

> To the extent necessary for full disclosure of all relevant facts and issues, the administrative law judge or hearing officer shall afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence . . . .

T.C.A. §4-5-312(b) (emphasis added). An agency, therefore, is not required to allow discovery or examination regarding irrelevant facts or issues, and it clearly is not required to make findings on irrelevant factual allegations.

The TRA, therefore, is not required to address the "facts" purported by the CAD because these "facts" are irrelevant for at least two reasons. First, as noted in the Order, the same tariff which implements BellSouth's late payment charge also implements "adequate rate reductions for other non-basic services so as to make any rate increase revenue neutral . . . ." *See* Order at 4. Thus if any late payment factor was included in BellSouth's rates on June 6, 1995, the tariffed hunting rate reductions decrease this factor to the same extent that the tariffed late payment charge allegedly increases it. Second, for the reasons set forth at pages 10-15 of BellSouth's "Brief Addressing the Issues Presented in this Docket," these "facts" are simply irrelevant in light of the undisputed fact that BellSouth is now operating under an approved price-regulation plan.[3] The TRA, therefore, did

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[3] In the "Discovery Update" it filed in this docket on June 2, 2000, the CAD finally "admits that BellSouth is operating pursuant to a prospective price regulation plan effective on December 9, 1998."

not err by declining to make findings of fact regarding matters that are irrelevant and unnecessary to the determination of this docket.[4]

C. The CAD's Allegations That the Order Fails to Make a Concise and Explicit Statement of the Underlying Facts of Record to Support the TRA's Findings are Simply Wrong.

The CAD next alleges that the Order "fails to make a concise and explicit statement of the underlying facts of record to support the findings in accordance with Tennessee Code Annotated 4-5-314(c)." Petition at ¶ 5. Section 5-4-314(c), however, does not require an agency to make irrelevant factual findings merely because a party asks it to do so. Instead, this statute is designed to allow a reviewing court to determine "whether the facts [found by the agency] have any substantial support in the evidence." *See Levy v. State Board of Examiners*, 553 S.W.2d 909, 912 (Tenn. 1977). In addressing this statute, the Supreme Court of Tennessee has stated that

> [S]uch specific and definite findings upon the evidence should be made as will enable the court on review to determine the questions of law involved and whether the general findings should stand, particularly when there are material facts at issue.
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> * * *
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> The purpose of [the recitation of finding of fact and conclusion of law] is to enable the parties and the reviewing tribunal to make a determination whether the case has been decided upon the law and evidence or, on the contrary, upon arbitrary or extralegal considerations.

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[4] While no such action is necessary, BellSouth would have no objection to the TRA's issuing a revised order explaining that the "facts" purported in Paragraphs 3-5 of the CAD's Second Petition are irrelevant for one or both of these reasons.

Id. at 912.

Obviously, the level of factual detail required in a particular order will vary depending on the type of case that is being heard by a particular agency. If a professor is being charged with sexual harassment, for example, the evidence regarding such charges is likely to be verbal testimony. The presiding agency, therefore, likely would have to allow the parties to present testimony addressing what the professor did and did not do, and it would have to cite to specific portions of the record in support of its factual findings that the professor did or did not engage in certain conduct. The same would be true if an agency charged with setting rates or costs was presented with conflicting rate or cost proposals.

This docket, however, involves the application of the provisions of Title 65 to the plain, undisputed language of BellSouth's proposed tariff. In making a factual determination as to what BellSouth's tariff says and does, the TRA's Order concisely and explicitly states that

> On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville Metropolitan Areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills.

Order at 2. This concise and explicit finding clearly is supported by substantial and material evidence of record -- namely, the tariff package BellSouth filed on or about January 21, 2000. It is these facts to which the TRA applied the provisions of Title 65 in properly deciding to approve BellSouth's tariff. The CAD's assertion

that the Authority made no findings of fact in support of its Order, therefore, is simply wrong.[5]

D. The CAD's Arguments That the TRA Did Not Address its "sub-issues" Does Not Warrant Reconsideration of the TRA's Order.

The CAD next contends that the TRA erred by reversing the Initial Order "without permitting the presentation of evidence or making evidentiary findings of fact regarding the sub-issues that go to the ultimate issues . . . ." *See* Petition at ¶¶ 6-7. As noted in the Order, however, the Pre-Hearing Officer determined "that the two agreed-upon issues in this matter were essentially legal in nature and that resolution of threshold questions of law would dictate the direction of this proceeding, and may determine the result of this docket." *See* Order at 3 (emphasis added). Moreover, the Order notes that

> In addition to the two previously agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification.

Order at 3 (emphasis added). As noted in the Order, these "sub-issues" were merely clarifying points with regard to the prime legal issues agreed upon by the parties. The CAD was provided the opportunity to brief these sub-issues as fully as it desired, and it took advantage of this opportunity by filing both its "Briefed

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[5] As noted in section I.B of this Response, the "facts" alleged by the CAD throughout its Petition for Reconsideration are simply irrelevant to the TRA's determination of the issues presented in this docket. Accordingly, it clearly was not error for the TRA to decline to make irrelevant findings of fact.

Issues" and its "Response to Brief of BellSouth" before the Initial Order was ever entered.

After reviewing the Briefs submitted by the parties in this action and the Initial Order, the TRA determined, as a matter of law, that "the TRA has the authority to approve BellSouth's late payment charge even if the charge will apply to the services [provided] by third parties." Order at 5. This conclusion of law is fully supported by the analysis set forth at pages 3-8 of the "Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues."[6] Moreover, because these "sub-issues" also are issues of law and not of fact, no factual findings were necessary. The TRA, therefore, committed no error in approving BellSouth's tariffs based, in part, on the legal briefs submitted by both parties in this docket.

E. The CAD's allegation that the TRA erred "because the [Order] exceeded those matters presented in the Initial Order" is wrong.

The CAD continues to grasp at straws by claiming that the TRA erred "by failing to identify the issues it intended to review in accordance with Tenn. Code Ann. § 4-5-315(c) because the agency decision as stated in the August 3, 2000 Order exceeded those matters presented in the Initial Order." Petition at ¶ 8. This allegation ignores the fact that the TRA's "Final Conference Agenda" for the

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[6] While no such action is necessary, BellSouth would have no objection to the TRA's issuing a revised order explicitly citing some or all of these legal reasons in support of its legal conclusion that the TRA has the authority to approve BellSouth's late payment charge even if the charge will apply to the services provided by third parties.

July 11, 2000 Directors Conference lists this docket as Item 4 on the agenda.[7] *See* Attachment 1. This Agenda noted that during the Conference, the Directors would "Consider [the] Initial Order" in this Docket. *Id.*

Before this Agenda was ever issued, the Pre-Hearing Officer had already determined "that the two agreed-upon prime issues in this matter were essentially legal in nature, and that the resolution of threshold legal questions would dictate the direction of this proceeding, and may determine the result of this docket." *See* Second Report and Recommendation of Pre-Hearing Officer at 2. Additionally, before the Agenda was ever issued, the parties had filed both initial briefs and reply briefs which addressed the prime issues and the sub-issues in this docket as thoroughly as the parties desired to address them. The CAD, therefore, was on notice that this matter would be before the Directors at the July 11, 2000 conference; that the Hearing Officer believed that resolution of the threshold questions of law that had already been thoroughly briefed by both parties "may determine the result of this docket;" and that it was BellSouth's position that the tariff does not violate the price regulation statutes and that the TRA has the authority to approve a late payment charge that applies to services provided by third parties.

Additionally, after reviewing a written copy of the Hearing Officer's amendment to the Initial Order, the CAD's own representative stated "[m]y

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[7] BellSouth respectfully requests the TRA to take administrative notice of this Final Conference Agenda and the date it was issued and place a copy of the

unreadiness is cured. I've scanned it and I have no objections to the order as amended, as modified, whatever." *Id.* at 123. The CAD, therefore, clearly was on notice that the Directors were set to decide the legal issues involved in this docket and that the resolution of these legal issues "may determine the result of this docket." If the CAD was not prepared to address these legal issues during the July 11, 2000 Conference, it has no one to blame but itself.[8]

F. The CAD's due process rights were not violated.

In its last argument supporting its Petition for Reconsideration, the CAD once again reverts to the all-too-familiar refrain that its substantive and procedural due process rights have been violated. These recitations, however, ignore the fact that the two agreed-upon issues in this docket are legal in nature. *See* Order at 3. Moreover, the CAD was given ample opportunity to address the legal issues in this docket -- the CAD received more than 1,000 pages of documents in discovery, it submitted both an initial brief and a reply brief in this docket, and both BellSouth and the CAD presented "extensive oral arguments" to the Directors during the July 11, 2000 Authority Conference. *See* Order at 4.

Agenda in the record of this docket.

[8] *See* Tr. at 115 (Chairman Kyle noted that "[m]y understanding of considering the initial order today, there would be oral arguments for each party."); Tr. at 116 (Director Greer noted "I think the way this agency has operated over the past four years, I thought that when we send out a notice, people need to come prepared to argue.").

Moreover, after filing its Petition for Reconsideration, the CAD filed yet another document entitled "Notice of Filing." This Notice cites the Tennessee Supreme Court's decision in *Phillips v. Board of Regents*, 863 S.W.2d 45 (Tenn. 1993) as supporting the proposition that the CAD's "due process rights were violated" in this docket.[9] As it has done in the past, however, the CAD once again cites the right case for the wrong proposition.

In *Phillips*, a professor who had been terminated claimed that the letter initially notifying her of the termination hearings deprived her of her due process rights because it did not adequately inform her of the specific conduct that allegedly supported her termination. In considering this claim, the Tennessee Supreme Court cited a United States Supreme Court decision for the proposition that "due process is flexible and calls for such procedural protections as the particular situation demands." *Phillips*, 863 S.W.2d at 50. The Court noted that

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[9] As the CAD notes, the *Phillips* decision was cited by the Pre-Hearing Officer's Order in Docket No. 00-00544 in discussing the due process rights of the parties to that docket. Unlike the instant docket (which only involves issues of law), Docket No. 00-00544 involves many issues of fact regarding conflicting rate and/or cost proposals submitted by the parties to that docket. Even there, however, the Pre-Hearing Officer's Order concludes that "all parties' due process interests are protected for the purpose of setting interim rates as long as all parties are provided an opportunity to assert their position, provide evidentiary support, and respond to any opposing positions." *See* Order of Pre-Hearing Officer Granting Petitions for Leave to Intervene, Motions to Expand the Docket, Motion for Interim Relief, Motion to Establish a Procedural Schedule, and Motion to Extend Deadline to file Reply Comments in Docket No. 00-00544 at 5. While BellSouth may disagree with the Pre-Hearing Officer's Order as it applies to the highly fact-intensive Docket No. 00-00544, the fact remains that in this docket involving purely legal issues, the CAD has had the opportunity to assert its position, conduct discovery and

"[e]laborate procedures at one stage may compensate for deficiencies at other stages." *Id.* Applying these principles to the facts before it, the Tennessee Supreme Court stated that:

> We do not deem it necessary to decide whether the documentation attached to the letter was sufficiently specific to satisfy due process at that early stage of the procedure because we conclude that sufficient notice of the specific details of the allegations supporting the charge was provided, at least by the time of the de novo hearing in Chancery.

Id. at 50.

Similarly, in this docket, the CAD was well aware of the issues that were before the Authority -- they were issues that the CAD itself injected into these proceedings. Additionally, the CAD had ample opportunity to develop its position on these issues -- in fact, it had developed its position to the point of filing two briefs addressing these issues with the TRA. Additionally, since the TRA rendered its decision, the CAD has filed two Petitions for Stay and one Petition for Reconsideration in which it has had ample opportunity to present any additional argument it wished to present. These documents, however, do little more than restate arguments it has already made in this docket. While the CAD may complain that it does not agree with the result reached by the TRA, it cannot seriously maintain that it has not had ample opportunity to present its arguments on the issues it has injected into this docket.

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provide evidentiary support for its allegations, and respond to opposing positions in this docket.

II. THE TRA SHOULD DENY THE CAD'S PETITION FOR STAY OF EFFECTIVENESS[10]

Although the "Petition for Stay of Effectiveness" filed by the Consumer Advocate Division contains some 43 paragraphs of allegations, most of these allegations have already been considered and rejected by the Tennessee Regulatory Authority ("TRA"). Additionally, none of the CAD's newest arguments warrants a different outcome, let alone issuance of a stay. Indeed, the CAD never discusses the standards for obtaining a stay, which is not surprising since the CAD cannot meet them. Accordingly, the CAD's petition should be denied.

A. The CAD Cannot Satisfy The Standards For Issuance Of A Stay Pending Appeal.

Tennessee Code Annotated Section 4-5-316 authorizes an administrative agency to stay the effectiveness of an order of that agency. Although the statute does not identify the standards that should be considered, most courts consider four factors in deciding whether to grant a stay: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. *See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991); *In re: DeLorean Motor Co.,* 755 F.2d 1223, 1228 (6th Cir. 1985). Here, the CAD cannot satisfy any of these requirements.

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[10] The remainder of this Response is substantially similar to BellSouth's Response to the CAD's first Petition for Stay.

1. Likelihood of success on the merits

A party seeking a stay often has considerable difficulty in demonstrating a likelihood of success on the merits. This is because the party ordinarily must demonstrate that there exists "a likelihood of reversal." *Griepentrog*, 945 F.2d at 153. Indeed, even if a moving party "demonstrates irreparable harm that decidedly outweighs any potential harm to the defendant if the stay is granted, he is still required to show, at a minimum, serious questions going to the merits." *Id.* at 153-54 (quotations omitted). Although the CAD offers a litany of alleged errors by the TRA, none has merit or establishes any likelihood that the TRA's Order Reversing Initial Order and Approving Tariff will be reversed.

In an all-too-familiar refrain, the CAD once again argues that its procedural and substantive due process rights have been violated. This time, the CAD alleges that the violation occurred because the TRA approved BellSouth's tariff "without permitting Tennessee consumers to present or provide cross-examination of all of the evidence . . . ." *See* Petition at ¶¶9-13. These allegations, however, ignore the fact that the two agreed-upon issues in this docket are legal in nature. *See* Order at 3. Moreover, the CAD was given ample opportunity to address these legal issues in this docket -- the CAD received more than a thousand pages of documents in discovery, it submitted both an initial brief and a reply brief in this docket, and both BellSouth and the CAD presented "extensive oral arguments" to the Directors during the July 11, 2000 Authority Conference. *See* Order at 4. The CAD's substantive and procedural due process rights were not violated.

The CAD's Petition also asserts that the TRA's "decision is contrary to the legislative intent of Tenn. Code Ann. § 65-4-125(b) . . . ." *See* Petition at ¶¶14-20. In support of these assertions, the CAD states that the TRA's Order "permits BellSouth to bill and collect charges for services it knew or should know were not ordered by consumers." BellSouth, however, only sends a bill to persons or entities who subscribe to BellSouth services, *see, e.g.,* GSST A37.1.1.A, and BellSouth's tariffs govern the manner in which BellSouth's subscribers must pay their bills. *See* BellSouth's Tennessee General Subscriber Services Tariff ("GSST") at A2.4.3 ("Payment for Service"). These subscribers are aware of the fact that the charges for the services provided by these third parties will appear on their local telephone bills, *see, e.g.,* A37.1.4.E,[11] and by virtue of BellSouth's approved tariff, they are charged with the knowledge that a late payment charge will apply to any balance that remains unpaid by the next billing date. *See GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) ("The published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law. The provisions of the tariffs should govern the

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[11] *See also* AT&T's Tennessee General Services Tariff A2.4.3.G. (applying a late payment charge to "all amounts previously billed on a Customer's bill," but expressly stating that "[w]hen a local exchange company provides the billing function on behalf of [AT&T], the local exchange company's late payment charge applies."); Sprint Tennessee Tariff P.S.C. No. 3, §3.8.2. ("Subscribers billed by a local exchange company (LEC) on behalf of [Sprint] are responsible for any late-payment charges that the LEC may employ in its billing process."). As the CAD acknowledges, end users benefit from having these charges appear on their local bill because they have to pay one bill instead of several. *See* CAD's Briefed Issues at 12.

parties."). Additionally, before applying the late payment charge to any end user's unpaid balance, BellSouth plans to place a message on its bills which will notify its customers of the date after which BellSouth will begin applying the late payment charge to unpaid balances.

The CAD also asserts that the TRA's Order permits BellSouth "to bill and collect charges for services it knew or should have known are not and were not in the tariff or contract." *See* Petition ¶18. This assertion, however, simply ignores the fact that the late payment charge is now specified in the tariff, and applying the charges simply does not violate the statutory prohibition against billing "any amount in excess of that specified in the tariff or contract governing the charges for such services." *See* Tenn. Code Ann. §65-4-125(b).

The CAD also protests that the Order violates the statutory freeze on basic rates. *See* Petition at ¶¶ 21-25. These protestations, however, simply repeat arguments the CAD has already made and lost in this proceeding. Moreover, these arguments are fully refuted by the "Brief of BellSouth Telecommunications, Inc. Addressing the Issues Presented" and by the "Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues" that were filed in this docket.

In a similar argument, the CAD objects to Director Greer's observation that the TRA has classified United Telephone-Southeast's late payment charges as non-basic and that the CAD did not appeal that classification. *See* Petition at ¶¶ 28, 45. There is little doubt that the CAD does not appreciate this observation, given

that it completely eviscerates its argument that the late payment charge is a charge for a basic service. All the CAD can do, however, is claim that United's late payment charge "was in effect prior to June 6, 1995 or is otherwise not relevant to the decision in this case," *See* Petition at ¶ 45, and this claim simply misses the mark. Regardless of whether this late payment charge existed before 1995, the TRA clearly has designated the charge as "non-basic" and the CAD did not challenge this designation. Director Greer's observation, therefore, is both relevant and controlling.

Similarly, the CAD's assertion that "BellSouth's late payment charge is an extortion in violation of Tenn. Code Ann. §65-4-122(b)" is simply meritless. *See* Petition at ¶ 31. Under that statute, extortion occurs when a company "charges, collects, or receives more than a just and reasonable rate of toll or compensation for service . . . ." T.C.A. §65-4-122(b) (emphasis added). For companies operating under an approved price regulation plan, however, rates for telecommunications services "are just and reasonable when they are determined to be affordable as set forth in this section." *See* T.C.A. § 65-5-209(a) (emphasis added). Moreover, once a company's application for price regulation has been approved, the company is "empowered to, and shall charge and collect only such rates that are less than or equal to the maximum permitted by this section . . . ." T.C.A. §65-5-209(b). The information provided in BellSouth's tariff filing package and in its discovery responses clearly supports the TRA's determination that the rates set forth in BellSouth's tariff are less than or equal to the maximum permitted

by BellSouth's price regulation plan. Because BellSouth's rates are just and reasonable, they simply cannot be "more than just and reasonable" and, therefore, they are not extortionate. *See* T.C.A. §65-5-209(a).

The CAD also attacks the TRA's Order by alleging that it "is anticompetitive and contrary to legislative intent because the TRA has created a right in BellSouth as a billing aggregator that other non-regulated billing aggregators do not have under state law." *See* Petition at ¶¶ 32-44, 33. This allegation ignores the fact that unregulated entities collect late payment charges on a daily basis pursuant to the common law of contracts. For a regulated entity like BellSouth, the tariff serves as the contract between the company and the subscriber. As explained at pages 3 through 8 of the "Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues," the TRA clearly has the authority to approve a tariff that applies a late payment charge to all amounts appearing on BellSouth's bills, including amounts for services provided by third parties. The CAD's assertions to the contrary are simply wrong.

Finally, the CAD claims that "the majority decision does not permit development of the record to determine whether or not the company will engage in rate discrimination in the application of BellSouth's grouping discounts . . . ." *See* Petition at ¶51.[12] To the extent that there has been no development of the record on this point, it is because the CAD never made any attempts at any such

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[12] These allegations are slightly different than the analogous allegations in Paragraph 43 of the CAD's First Petition for Stay of Effectiveness.

development. This point is not raised or addressed in the list of issues jointly submitted by the parties, and it is not raised or addressed in any of the 45 discovery requests the CAD served upon BellSouth. It is not raised or addressed in the "Reasons Warranting Discovery" filed by the CAD, and it is not raised or addressed in the "Initial Briefing Issues." Nor is it raised or addressed in the initial brief submitted by the CAD or in the CAD's "Response to Brief of BellSouth." Nothing whatsoever prevented the "development of the record" on this point. The simple fact is that the CAD never attempted to raise or address this point in this docket.[13] Moreover, the tariff is valid on its face -- any concerns regarding future actions by BellSouth with regard to the tariff should be addressed by filing a complaint if and when such actions occur. In no event can the CAD's fretting that a company could possible apply its tariff in a discriminatory manner justify a stay of the effectiveness of a facially-valid tariff.

2. Irreparable injury

The CAD's only attempt to address the "irreparable injury" factor is to claim that "irreparable damages" will occur if a subscriber's service is "terminated for non-payment of BellSouth's new charge." *See* Petition ¶¶ 26-27; 24-30; 47-50). This argument, however, ignores the fact that non-payment of the charges for many regulated services can result in termination of a subscriber's service. Under

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[13] Additionally, charging different rates in different rate groups is a valid regulatory practice that has been permitted by the TRA and by its predecessor, the Tennessee Public Service Commission, for many, many years. It is neither novel nor discriminatory.

the CAD's reasoning, therefore, the CAD arguably could make an irreparable harm showing any time the TRA enters an Order approving a rate or charge with which the CAD disagrees -- a result that clearly is illogical and contrary to the law.

Additionally, the "harm" alleged by the CAD is far from irreparable. If a customer's service is terminated for non-payment of charges, the service will be restored upon payment of such charges. Additionally, the "harm" alleged by the CAD is altogether avoidable -- subscribers will not even be assessed a late payment charge if they do what they have agreed to do in the first place -- pay their bills on time. The CAD, therefore, cannot make a showing of irreparable injury.

3. Public interest

As BellSouth explained throughout these proceedings, BellSouth's tariff constitutes a charge only for those subscribers who do not pay their bills on time. Rather than filing for an across-the-board rate increase which would affect all or most of its subscribers in the State of Tennessee, BellSouth's late payment charge is applied only to those customers who cause BellSouth to incur additional costs by not paying their bills on time. As noted in BellSouth's discovery responses, the majority of BellSouth's subscribers do pay their bills on time and, therefore, will not be affected by this tariff. It is hardly contrary to the public interest to approve a tariff that applies a late charge only to those subscribers who cause BellSouth to incur costs when they do not pay their bills on time.

Moreover, the public interest is protected because BellSouth provides its customers with options to avoid or lessen the impact of late payment charges. For

example, low income residential customers who qualify for the Lifeline program may obtain a credit of up to $11.35 toward their basic local exchange telephone service. *See* General Subscriber Services Tariff at A3.31. Additionally, low income customers who qualify for the Link Up program may obtain a credit of up to 50% of their non-recurring charges for the connection of service, up to a maximum of $30.00. *Id.* at A4.7.1. BellSouth also recently implemented a credit challenged initiative for residential subscribers. *See* General Subscriber Services Tariff §A2.4.3.H. This tariffed initiative allows residential subscribers whose service has been temporarily suspended due to nonpayment of regulated charges to retain their local service if they elect full toll restriction (at no charge) and arrange to pay their overdue charges on an installment basis over up to twelve months.

Finally, granting the stay requested by the CAD clearly is against the public interest. The tariff provides lower hunting rates to every BellSouth subscriber in Rate Group 5. Granting the CAD's request for a stay would deny these subscribers the benefit of these lower rates. It is in the public interest, therefore, to deny the CAD's Petition for a Stay.

III. CONCLUSION

For the foregoing reasons, the Authority should deny the CAD's Second Petition for Stay of Effectiveness and Petition for Reconsideration.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[x] Mail
[x] Facsimile
[ ] Overnight

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Patrick Lee