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November 13, 2000

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
360 James Robertson Parkway
Nashville, TN 37201

Re: Tariff Filings by all Telephone Companies Regarding Reclassification of Pay Telephone Service as Required by FCC Order 96-439
Docket No. 97-00409

Dear Mr. Waddell:

Please accept for filing the original and thirteen copies of a Motion to File a Reply Brief and the Reply Brief of the Tennessee Payphone Owners in the above-captioned proceeding. Copies have been provided to parties of record.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
Enclosure

0678851.01
094693-000 11/13/2000

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: TARIFF FILINGS BY LOCAL EXCHANGE COMPANIES TO COMPLY WITH FCC ORDER 96-439 CONCERNING THE RECLASSIFICATION OF PAY TELEPHONES

DOCKET NO. 97-00409

MOTION TO FILE REPLY BRIEF

The Tennessee Payphone Owners Association ("TPOA") requests permission to file the attached reply brief in response to the briefs submitted by BellSouth and United on the issue of prejudgment interest.

Although the TRA's filing schedule did not include a date for filing of a reply brief, it is customary for movant — or the party carrying the burden of persuasion — to be able to file both an initial brief as well as a reply to whatever response is made by the opposing parties. Here, TPOA filed a motion seeking prejudgment interest and a brief in support of the motion. BellSouth and United then filed briefs opposing the TPOA's motion and responding to the arguments raised in TPOA's brief. TPOA now seeks the same opportunity to reply normally provided to the party carrying the burden of persuasion.

TPOA also requests permission to file this reply in order to address an issue that was not discussed in TPOA's initial brief, *i.e.* whether the TRA's authority to order a rate refund includes the power to add prejudgment interest. This issue was not raised by the parties during oral argument on Oct. 25, 2000, and was therefore not addressed in TPOA's initial brief. The issue was, however, discussed at some length by both BellSouth and United in their briefs. TPOA

therefore seeks the chance to respond to those arguments and address the TRA's authority to award prejudgment interest.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

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Henry Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: TARIFF FILINGS BY LOCAL EXCHANGE COMPANIES TO COMPLY WITH FCC ORDER 96-439 CONCERNING THE RECLASSIFICATION OF PAY TELEPHONES

DOCKET NO. 97-00409

REPLY BRIEF OF TPOA ON PREJUDGMENT INTEREST

The Tennessee Payphone Owners Association ("TPOA") submits the following reply to the briefs filed by BellSouth Telecommunications, Inc. ("BellSouth") and United Telephone-Southeast, Inc. ("United") concerning the award of interest in this proceeding.

ARGUMENT

I. As explained in TPOA's earlier brief, Tennessee law now "favor[s] awarding prejudgment interest whenever doing so will more fully compensate plaintiffs for the loss of use of their funds." *Scholz v. S.B. International*, 2000 WL 1231430 (Tenn. Ct. App., August 31, 2000) at p. 8. The reason for this change is the recognition by Tennessee courts that prejudgment interest is necessary to make parties whole and prevent unjust enrichment. As Judge Learned Hand observed, " The present use of my money is itself a thing of value, and if I get no compensation for its loss, my remedy does not altogether right my wrong." *Scholz, supra*, at 3, quoting *Proctor & Gamble v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924).

If, as Judge Koch wrote in *Scholz*, one "bother[s] to understand what interest represents" (*Scholz, supra*), the arguments made by BellSouth and United that prejudgment interest in this case would be an "inequity" (BellSouth brief, at 13) or consists of "added amounts

unrelated to the refund amount" (United brief, at 2) make little sense. United, for example, claims that the award of prejudgment interest "would effectively amount to a retroactive increase in rates not agreed to by the partes." United brief, at 2. BellSouth similarly argues that the "inequity" of prejudgment interest "is compounded as there was no way for BellSouth to charge less than the tariffed rate in effect throughout this proceeding." BellSouth brief, at 13. The two carriers apparently do not understand that interest represents simply the time value of money, not amounts "added" or "unrelated" to the principal. Nor does the payment of interest imply that BellSouth should have charged a different rate for the last three years or that United is being assessed a "retroactive increase in rates." It means only that the TRA recognizes that "a dollar today is worth more than a dollar next year" (*Scholz, supra*) and that the inclusion of interest is the only way to fully and accurately "reimburse" those who have paid excessive rates since 1997 and to avoid giving BellSouth and United a windfall.

II. Given these "well settled beliefs about value" (*Scholz, supra*, again quoting Judge Learned Hand), the only remaining issue is whether the TRA's duty to "reimburse" payphone owners, as the FCC has required, necessarily includes interest as part of that reimbursement.

A. In this case, the TRA is acting pursuant to a delegation of ratemaking authority from the Federal Communications Commission.[1] The FCC has declared that local exchange carriers "must reimburse ... customers or provide credit from April 15, 1997" if the newly tariffed rates are less than existing rates. FCC docket 96-128, Order released April 15, 1997, paragraph 25. If this case were before the FCC (as it would be if the TRA had declined to

[1] See footnote 1 of Don Wood's "Supplemental Rebuttal Testimony" for a discussion of the relationship of this case to federal law and the FCC's guidelines.

act or if a party appeals the TRA's decision), any refund of interim rates ordered by the FCC would presumably include interest as in other FCC ratemaking proceedings. *See* 47 U.S.C. § 204 (a) (1).

The Tennessee Court of Appeals has recognized that the TRA may order a rate refund, which implicitly includes interest, where "necessary to complete the obvious intent of the federal scheme to return the refund to the class that ultimately has had to pay it." *Consumer Advocate v. Bissell*, 1996 WL 482970 (Tenn. App. 1996) at p. 4. (A copy of the *Bissell* decision is attached.) In that case, as in this one, a rate refund ordered by the TRA was merely the final step in what began as a federal ratemaking proceeding. *Id.* Although the Court acknowledged that the TRA does not have the authority under state law to order refunds, the Court affirmed the TRA's approval of a refund mechanism in the tariffs of Kingsport Power Company because the refunds were consistent with the intent of federal law which is to "return the refund to the class that ultimately has had to pay it." Absent a refund provision, the court noted, Kingsport Power would receive a windfall. Although the Court's decision does not specifically mention the payment of interest, any refunds ordered pursuant to the tariff at issue in the *Bissell* case would, in fact, include interest (which is added to the refund by the Federal Energy Regulatory Commission as part of the FERC's ratemaking process). The *Bissell* case therefore holds that if federal law requires a utility to make a rate refund, which includes interest, the TRA has the power to complete the intent of the federal plan by ordering that the refund be returned to those who have paid the excess rates.[2]

---

[2] Similarly, the TRA itself routinely approves rate refunds (or credits), including interest, for natural gas customers. The agency's "PGA" rules, require regulated gas companies (continued...)

In this case, the "intent of the federal scheme" as ordered by the FCC is, of course, to "reimburse" payphone owners for having paid excessive rates for three-and-a-half years. As previously discussed, any such reimbursement ordered by the FCC would normally include interest and without interest, would not fully compensate payphone owners for the loss of the use of that money. If the TRA is to carry out the final step in the FCC's plan, the Authority must have the power to order refunds, including interest, just as the FCC would do.

More fundamentally, the *Bissell* decision reminds one that the arguments of United and BellSouth about whether the TRA has authority under state law to award prejudgment interest miss the larger point of this proceeding. There is no Tennessee statute that empowers the TRA to order prejudgment interest, postjudgment interest, or any refund at all, yet no party has questioned the TRA's power to exercise the federal ratemaking authority delegated to it by the FCC and to order a retroactive true-up of payphone rates back to April 15, 1997. Although not found in the state statutes, that power emanates from federal law, as the Court held in *Bissell*. In addition, as discussed below, that power also derives from the agreement of the parties.

B. As both United and BellSouth acknowledge, the TRA could include prejudgment interest in this case if the parties had agreed to it three years ago. United brief at 2; BellSouth brief at 12.

The parties discussion of this case when it arose in 1997 and, again, when the case was postponed in 1998, did not address the issue of interest. But the parties did agree--as they had to-- to abide by the FCC's order that the LECs "reimburse" their customers for any excess

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[2](...continued)
to include interest whenever the company is required to make a rate refund (or give credits) to customers. See TRA rule 1220-4-1-.12, Appendix A, Section III.

payments and agreed further that "no party" would be "prejudiced" by a delay in the case. See the "Agreed Motion for Continuance" filed March 4, 1998, (see also the transcript of the parties' first prehearing conference held in April, 1997, when TPOA agreed not to challenge BellSouth's existing tariffs in exchange for a retroactive true-up once rates were finally set.)

"Reimburse" means to "make good losses suffered" or "to place in a treasury as an equivalent for what has been taken, lost, or expended." Ballentine's Law Dictionary, Third Edition, p. 1081. Obviously, the failure to include three-and-a-half years of interest will not "make good losses suffered" by Tennessee payphone owners. It will, on the other hand, prejudice them because of the long, unanticipated delay in this case. Although interest was not discussed, the parties' intent was that payphone owners would be "reimbursed" and that no one would be "prejudiced by delay." The only way to carry out that intent and to give payphone owners "an equivalent for what has been taken" is to include interest as part of any refund awarded in this proceeding.

BellSouth and United argue that, because the parties' agreement did not specifically mention interest, the TRA cannot consider it. But all the parties are well aware of the time value of money and all agreed that no party would be prejudiced by a delay in the case. Such an understanding presumes that any refund would include interest. It is certainly more logical to assume that the agreement implicitly includes interest than it is to assume, as the carriers do, that the agreement prohibits the TRA from recognizing the time value of money.

CONCLUSION

As the TRA considers whether to order a rate refund, the agency must also decide whether the Authority has the power to fashion a refund which will fully reimburse payphone owners for the value of their loss. No reasonable person can dispute that the inclusion of interest, both prejudgment and postjudgment, is equitable and consistent with current Tennessee law as applied to the award of damages. Where both federal law and the parties' own agreement requires that payphone owners be fully "reimbursed" for any excess payments, there should be no question of the TRA's power and duty to count both interest and principal in calculating a refund.

Respectfully submitted,

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Henry Walker

CONSUMER ADVOCATE DIVISION, Office of the Attorney General State of Tennessee, Petitioner/Appellant,

vs.

KEITH BISSELL, CHAIRMAN; STEVE HEWLETT, COMMISSIONER; SARA KYLE, COMMISSIONER; Constituting the Tennessee Public Service Commission, Respondents/Appellees.

Appeal No. 01-A-01-9601-BC-00049
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
1996 Tenn. App. LEXIS 528
August 28, 1996, FILED
APPEALED FROM THE PUBLIC SERVICE COMMISSION, AT NASHVILLE, TENNESSEE. Public Service Commission No. 94-04283.

Petition for Rehearing Overruled September 18, 1996, Reported at: 1996 Tenn. App. LEXIS 589.

COUNSEL

For PETITIONER/APPELLANT: CHARLES W. BURSON, Attorney General & Reporter, MICHAEL E. MOORE, Solicitor General, DAVID W. YATES, Associate Consumer Advocate, Nashville, Tennessee.

For RESPONDENTS/APPELLEES: H. EDWARD PHILLIPS, III, Tennessee Public Service Commission, Nashville, Tennessee.

For KINGSPORT POWER COMPANY: WILLIAM C. BOVENDER, T. ARTHUR SCOTT, Kingsport, Tennessee. JAMES R. BACHA, Columbus, Ohio.

JUDGES

BEN H. CANTRELL, JUDGE, CONCUR: SAMUEL L. LEWIS, JUDGE, WILLIAM C. KOCH, JR., JUDGE

AUTHOR: CANTRELL

OPINION

The only question in this case is whether the Public Service Commission exceeded its authority by approving a tariff which allows Kingsport Power Company to pass its purchased power costs along to its customers without going through a ratemaking proceeding. We affirm the action of the Public Service Commission.

I.

Kingsport Power Company (KPC) furnishes electric power to retail customers in upper East Tennessee. It buys its electricity from an affiliated company, Appalachian Power Company. Both companies are wholly owned by American Electric Power (AEP).

The price KPC pays Appalachian for electric power is regulated by the Federal Energy Regulatory Commission (FERC), and state regulatory commissions must accept the FERC-approved rates as reasonable. **Nantahala Power & Light v. Thornburg,** 476 U.S. 953, 90 L. Ed. 2d 943, 106 S. Ct. 2349 (1986). Under the FERC rules, however, Appalachian may put its increased rates into effect while FERC conducts its investigation. If upon concluding its

investigation, FERC decides that the rate increase was not justified, Appalachian is required to refund the amount of the increase to KPC, with interest.

Historically, when Appalachian increased its rates to KPC, KPC would file an application with the Tennessee Public Service Commission (PSC) for an increase in its retail rates to its customers. The PSC would then conduct a ratemaking proceeding under Tenn. Code Ann. § 65-5-203.

In 1992 the Commission suggested that its staff and KPC work out a rule or a tariff that would allow the increased power costs to be passed along to KPC's customers without going through a formal ratemaking proceeding. On November 14, 1994, KPC petitioned the PSC to implement a tariff called a purchased power adjustment rider. After several skirmishes with the Consumer Advocate Division of the Attorney General's Office and with the Kingsport Power Users Association, the Commission entered a final order on November 30, 1995 approving the tariff. As we have noted, the tariff allows KPC to raise its rates by a formula in the tariff to pass the increased cost of power along to its customers. In the event KPC receives a refund after a final order from FERC, KPC is required to pass the refund along to its customers as well.

II.

Ratemaking In General

A public utility has the authority to set its own rates -- subject to being regulated by the legislature or by a body delegated the legislative power. **See** 64 Am. Jur. 2d **Public Utilities** § 81; 133; 240:

> Until the legislature or other body having the right to prescribe the rates to be charged by public utilities has exercised this power, the rates are the subject of contract between the corporation and its patrons . . . .

Id. § 81.

The legislative control over public utility rates at the time this controversy arose was expressed in Part 2 of Title 65 Chapter 5 of the Tennessee Code.[1] The first section of that chapter provided:

> The commission has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established . . . .

Tenn. Code Ann. § 65-5-201.

That chapter also provided:

(a) When any public utility shall increase any existing individual rates, joint rates, tolls, fares, charges, or schedules thereof, or change or alter any existing classification, the commission shall have power either upon written complaint, or upon its own initiative, to hear and determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change, or alteration is just and reasonable shall be upon the public utility making the same. In determining whether such increase, change or alteration is just and reasonable, the commission shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility. The commission shall have authority pending such hearing and determination to order the suspension, not exceeding three (3) months from the date of the increase, change, or alteration until the commission shall have approved the increase, change, or alteration; provided, that if the investigation cannot be completed within three (3) months, the commission shall have authority to extend the period of suspension for such further period as will reasonably enable it to complete its investigation of any such increase, change or alteration; and provided further, that the commission shall give the investigation preference over other matters pending before it and shall decide the matter as speedily as possible, and in any event not later than nine (9) months after the filing of the increase, change or alteration. It shall be the duty of the commission to approve any such increase, change or alteration upon being satisfied after full hearing that the same is just and reasonable.

(b)(1) If the investigation has not been concluded and a final order made at the expiration of six (6) months from the date filed of any such increase, change or alteration, the utility may place the proposed increase, change or alteration, or any portion thereof, in effect at any time thereafter prior to the final commission decision thereon upon notifying the commission, in writing, of its intention so to do; provided, that the commission may require the utility to file with the commission a bond in an amount equal to the proposed annual increase conditioned upon making any refund ordered by the commission as hereinafter provided.

Tenn. Code Ann. § 65-5-203(a)(b)(1).

Thus the legislature has recognized that a public utility may set its own rates, subject to the PSC's power to suspend the rates for a certain period of time while it makes the utility prove that the rates are just and reasonable. **Cumberland Tel. & Tel. Co. v. Railroad and Public Utilities Commission,** 287 F. 406 (M.D. Tenn. 1921). If the utility fails to carry that burden, the agency

has the additional authority to fix rates that meet the just and reasonable criteria. **CF Industries v. Tennessee Public Service Commission,** 599 S.W.2d 536 (Tenn. 1980).

Under these statutes the rates charged by a public utility are not always the product of a ratemaking proceeding in the Commission. New tariffs automatically become effective unless the Commission elects to suspend them while conducting an investigation.[2] Therefore, there is nothing inherently wrong in KPC's power costs being passed along to its customers without a ratemaking proceeding in the Commission.[3]

III.

Retroactive Ratemaking

The Consumer Advocate argues, however, that the Commission's order is illegal because it amounts to retroactive ratemaking. This conclusion is drawn from the fact that if FERC later finds that the increase it allowed Appalachian was unjustified, Appalachian must refund any overpayment to KPC and the tariff requires KPC to pass the refund along to its customers.

This court has consistently held that the Commission does not have the authority to approve temporary or tentative rates subject to refund. In **South Central Bell v. Tennessee Public Service Commission,** 675 S.W.2d 718 (Tenn. App. 1984) we said that the Commission's power to order refunds was limited to that expressly stated in Tenn. Code Ann. § 65-5-203. (The conditions described in that section are not involved here.)

We are of the opinion, however, that under the circumstances of this case, the PSC had the power to approve a tariff with a contingent refund provision. The tariff allows KPC to pass its increased power costs along to its customers, but it also requires KPC to give back to its customers that part of the increase (if any) that is refunded by Appalachian to KPC. If our analysis in Part II of this opinion is correct, the only offending part of the tariff is the refund provision. Otherwise, the tariff operates prospectively and comes within the powers granted the PSC by the legislature.

But, what makes this case different from **South Central Bell v. Tennessee Public Service Commission,** supra, is that the refund in this proceeding is merely the third step in a larger proceeding, the first two steps of which are governed by federal law. First, the PSC must accept the FERC-regulated cost of KPC's power purchased from Appalachian. Then, Appalachian must refund to KPC that part of the cost found by FERC to be unreasonable after it concludes its investigation. The third step, the refund included in KPC's tariff, is necessary to complete the obvious intent of the federal scheme to return the refund to the class that ultimately has had to pay it. If we struck the refund provision in the tariff, KPC would receive the refund and keep it.

We should note, also, that the problem would be no different if KPC were required to go through a ratemaking proceeding before beginning to collect its increased power costs. The question of what could be done with a refund received by KPC after the new rates had gone into effect would still have to be answered. Because a refund order by the PSC would amount to retroactive ratemaking, KPC could not be forced to account for the refund to its customers.

IV.

Due Process

The Consumer Advocate also argues that the tariff violates the ratepayers' right to due process. This argument is based on the part of Tenn. Code Ann. § 65-5-201 that says "the Commission has the power after hearing upon notice" to fix just and reasonable rates. We think, however, that the notice required by that section is notice to the utility. When the PSC exercises its statutory authority to modify the utility's posted rates the utility is entitled to the statutory notice and hearing.

> Whether notice and a hearing in proceedings before a public service commission are necessary depends chiefly upon the statutory or constitutional provisions applicable to such proceedings, which may make notice and hearing prerequisite to action by the commission, and upon the nature and object of such proceedings, that is, whether the proceedings are, on the one hand, legislative and rule-making in character, or are, on the other hand, determinative and judicial or quasi-judicial, affecting the rights and property of private or specific persons.

64 Am. Jur. 2d **Public Utilities** § 266.

Ratemaking is a legislative function. **See** 64 Am. Jur. 2d **Public Utilities** § 240. It is not an adjudicatory proceeding affecting the vested property rights of the individual ratepayers. **Hatten v. City of Houston,** 373 S.W.2d 525 (Tex. App. 1963). **(See also Cope v. Bethlehem Housing Authority,** 95 Pa. Commw. 99, 514 A.2d 295 (Pa. 1986) on the general question of what process is due when an agency deals with non-vested rights). Therefore, since it is a legislative function, a change in rates by the PSC does not require notice to the individual ratepayers.

We hold that the tariff does not violate the due process rights of the rate-payers because it raises or lowers their rates without a hearing.

The order of the Commission is affirmed and the cause is remanded for any further proceedings that may become necessary. Tax the costs on appeal to the State.

BEN H. CANTRELL, JUDGE

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE

DISPOSITION

AFFIRMED AND REMANDED

OPINION FOOTNOTES

1 We should point out that the Public Service Commission was abolished by the legislature and replaced by an appointed body, the Tennessee Regulatory Authority. **See** Acts 1995, ch. 305 (effective July 1, 1996).

2 The investigation, or ratemaking proceeding, would then be conducted according to the contested case provisions of the Administrative Procedures Act. Tenn. Code Ann. § 4-5-301.

3 We should note also that the Commission has the authority at any time to investigate any public utility's earnings, Tenn. Code Ann. § 65-5-201, and the Consumer Advocate may request such an investigation. Tenn. Code Ann. § 47-18-114.

CONSUMER ADVOCATE DIVISION, Office of the Attorney General State of Tennessee, Petitioner/Appellant,

vs.

KEITH BISSELL, CHAIRMAN; STEVE HEWLETT, COMMISSIONER; SARA KYLE, COMMISSIONER; Constituting the Tennessee Public Service Commission, Respondents/Appellees.

Appeal No. 01-A-01-9601-BC-00049
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
1996 Tenn. App. LEXIS 589
September 18, 1996, FILED
Public Service Commission No. 94-04283.
Original Opinion of August 28, 1996, Reported at: 1996 Tenn. App. LEXIS 528.

JUDGES

SAMUEL L. LEWIS, JUDGE, BEN H. CANTRELL, JUDGE, WILLIAM C. KOCH, JR., JUDGE

OPINION

ORDER ON PETITION TO REHEAR

The Consumer Advocate has filed a petition to rehear, in the main rearguing the issues dealt with in the court's opinion. With respect to those issues we think the opinion is clear and correct.

The petition also addresses a portion of the Commission's order that the Consumer Advocate reads as a limitation on his statutory powers. We see nothing in the order or in this court's opinion that limits the Consumer Advocate's authority in any way. He is free at any time to initiate proceedings, intervene in ongoing proceedings, and request information that will help him decide whether to take such action. Tenn. Code Ann. § 65-4-118.

Therefore, we are of the opinion that the petition to rehear should be overruled. It is so ordered.

ENTER this 18th day of September, 1996.

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE

DISPOSITION

Petition to rehear overruled.