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December 27, 2000

VIA HAND DELIVERY

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

Re: *All Telephone Companies Tariff Filings Regarding Reclassification Of Pay Telephone Service As Required By Federal Communications Commission (FCC) Docket 96-128*
Docket No. 97-00409

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc. Petition for Stay. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

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POSTED 12-27-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: **All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128**

Docket No. 97-00409

BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR STAY

Pursuant to Tennessee Code Annotated § 4-5-316, BellSouth Telecommunications, Inc. ("BellSouth") hereby petitions the Tennessee Regulatory Authority ("Authority") for a stay of the Authority's December 19, 2000 final decision in Docket Number 97-00409, *All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128* (the "TRA Decision").[1] Specifically, BellSouth seeks a stay of the TRA Decision's requirement(1) that BellSouth file by December 29, 2000, and make effective upon notification by the Authority, a new tariff incorporating rate reductions for the provision of pay telephone service; and (2) that BellSouth refund to its pay telephone customers all amounts collected in excess of the new rates since April 15, 1997, with prejudgment interest at the rate of 6% per annum. BellSouth believes the TRA Decision is in error and seeks a stay pending resolution of the appeal it intends to file in the Tennessee Court of Appeals.

Pursuant to Authority Rule 1220-1-2-.19, the Authority should consider and give appropriate weight to the following four factors: (1) the likelihood of success of BellSouth on appeal; (2) the hardship or injury which may be imposed on BellSouth if a stay is not granted; (3) the hardship or

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[1] Although no written order has yet been issued by the Authority, the TRA Decision constitutes a "final decision or order" within the meaning of TENN. CODE ANN. § 65-2-112.

injury which may be imposed on others if a stay is granted; and (4) the public interest. BellSouth submits that the Authority's application of these four factors should be similar to that of a court. Specifically, these factors should not be considered prerequisites, each of which must be met for a stay, but rather should be treated as considerations that must be balanced together. *See, e.g. State of Ohio v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (discussing FED. R. APP. P. 18). When these factors are balanced in this docket, it is clear that a stay should issue.

I. Likelihood of Success on the Merits

BellSouth is likely to succeed on the merits of its appeal because the Authority incorrectly applied the New Services Test and employed criteria beyond the New Services Test in arriving at the rates adopted. Specifically, the Authority erred in finding that the New Services Test imposes a price ceiling and in determining that services whose cost/price ratio ranged from .70 to .67 were the only relevant "comparable services" under the New Services Test, thereby restricting BellSouth's use of overhead loadings to achieve the result of a maximum pay telephone rate that is only 1.5 times greater than direct cost.

Furthermore, the Authority erred in finding that pay telephone rates must be based on jurisdictionally separated costs. The Authority's solution to the separations issue unjustifiably sets a 75% intrastate cost separations factor in calculating non-traffic-sensitive costs submitted by BellSouth. Not only is such a figure wholly without basis in the record before the Authority, but no specific precedent is even cited for the proposition that such a factor can be logically transplanted from other contexts into the New Services Test context. At the very least, the Authority should have

allowed BellSouth to submit revised cost studies that were both jurisdictionally separated and based on the actual experience of providing pay telephone access.

The Authority's finding that the only relevant "comparable services" are those with a cost/price ratio ranging from .70 to .67, and thus that the maximum price allowed will be 1.5 time direct costs, is arbitrary and wholly inconsistent with the FCC's application of the New Services Test. Indeed, as submitted by BellSouth, the FCC has approved overhead loadings resulting in prices as high as 4.8 times direct cost. Additionally, the Authority has risked imposing a payphone service price on BellSouth that could conceivably result in sales to CLECs below actual cost, given the requirement that BellSouth must resale such services to CLECs at a discount of 16% below tariffed rates. *See* TRA Docket No. 97-01334, *In re: Petition of Telescan, Inc. for Arbitration with United Telephone Southeast Under Section 252 of the Federal Telecommunications Act of 1996.*

With regard to the imposition of prejudgment interest on any refunds owed to pay telephone owners, there is also a strong probability that BellSouth will succeed on the merits. The Authority has only those powers accorded to it by statute: the Authority does not have the power to award prejudgment interest.[2] *See Deaderick Paging v. Public Service Comm'n*, 867 S.W.2d 729, 282 (Tenn. Ct. App. 1993) (citation omitted) ("the powers of the [Authority's predecessor agency] must be found in the statutes. If they are not there, they are non-existent"); *Wayne County v. Solid Waste Disp. Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988) (citations omitted) ("the authority [that statutes] vest in an administrative agency must have its source in the language of the statutes themselves"). Tennessee's prejudgment interest statute, TENN. CODE ANN. § 47-14-123, expressly

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[2] The Authority is not authorized to award damages of any kind, including prejudgment interest, which is "an element of, or in the nature of, damages." TENN. CODE ANN. § 47-14-123.

limits the power to grant prejudgment interest to "courts or juries." *See* TENN. CODE ANN. § 47-14-123. The Tennessee General Assembly has shown its appreciation of the differences between courts and administrative agencies, as evidenced in the language of other statutes. *Compare, e.g., id.* § 24-1-208 (expressly listing courts, juries and administrative agencies) *with id.* § 47-14-123 (omitting reference to administrative agencies). Thus, a customary canon of statutory construction, *expressio unius est exclusio alterius*, confirms that the Authority's Order is contrary to law. *See Smith v. Lincoln Mem. Univ.*, 304 S.W.2d 70, 72 (Tenn. 1957).

The same canon applies to the Authority's purported basis in federal law for such an unprecedented remedy. Without any citation to FCC precedent allowing such prejudgment interest, the Authority has based its entire argument on a dictionary definition of reimbursement. That will not suffice. Certainly an agency as methodical and precise as the FCC would have explicitly provided for prejudgment interest if it had intended such a remedy to be available.

II. Hardship or Injury Which BellSouth Is Likely to Suffer If a Stay Is Not Granted

BellSouth will be irreparably injured unless the proposed rate reductions are stayed because of the prohibition against retroactive ratemaking. *See AARP v. Tennessee Public Service Comm'n*, 896 S.W.2d 127, 134 (Tenn. Ct. App. 1994) ("Commission has no statutory authority to fix rates retroactively"); *Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n*, 844 S.W.2d. 151, 159 (Tenn. Ct. App. 1992); *South Central Bell Telephone Co. v. Tennessee Public Service Comm'n*, 675 S.W.2d 718, 720 (Tenn. Ct. App. 1984). The requirement that rates be set prospectively prevents a utility's rates from being set in order to recoup past losses. *Transcontinental & Western Air v. Civil Aeronautics Board*, 336 U.S. 601, 69 S. Ct. 756, 93 L. Ed. 911 (1949).

In this case, if a stay of the TRA Decision pending appeal is not granted, BellSouth will be required to reduce its pay telephone rates by approximately $1.6 million annually (even excluding the price reduction with respect to BellSouth's affiliated payphone operating company). Once these rate reductions take effect, the prohibition against retroactive ratemaking will prevent BellSouth from ever recovering these revenues from its customers, the pay telephone owners, even if it ultimately succeeds on the merits of its appeal. Thus, absent a stay, BellSouth will be deprived of an adequate remedy in that thousands, if not millions, of dollars will be forever lost should a Court ultimately set aside the TRA Decision. This is the essence of irreparable injury.

In addition, there is a likelihood that BellSouth will suffer irreparable harm if it is required to make the refund, with prejudgment interest, ordered by the Authority prior to resolution of the issues on appeal. The record is replete with evidence of the precarious financial conditions of the pay phone owners who are members of the TPOA, resulting largely from reductions in their revenues due to intense competition from cellular and other forms of wireless communications. If BellSouth is required to make a refund to these customers in the approximate amount of $6.5 million, including prejudgment interest in the approximate amount of $860,000, which is ultimately determined to be erroneous, there is more than a substantial risk that BellSouth will never be able to recover the incorrectly refunded amounts from these customers. That, too, constitutes irreparable harm.

III. The Hardship or Injury Which May Be Imposed on Others If a Stay Is Granted

BellSouth is already obligated, pursuant to its agreement with the TPOA, to reimburse pay telephone owners the difference between the rate they have been paying and any new lower rate imposed, with such reimbursement to be calculated going back to April 15, 1997. Thus, no harm will

befall pay telephone owners or other interested parties if the Authority stays the proposed rate reductions. If the appellate courts uphold the decision of the Authority, the pay telephone customers will receive the lower rate prospectively as well as the full refund with prejudgment interest calculated up to the time the refund is made. Significantly, however, the converse is not true. That is, the pay telephone owners are not under any obligation to compensate BellSouth for the difference between the current rates and the reduced rates required by the TRA Decision. Thus, if a stay is denied, but the TRA Decision is ultimately overturned, BellSouth will have no way of recovering the difference in rates which will have accumulated in the time it takes a reviewing court to decide the merits of BellSouth's appeal.

Stated simply, if the Authority grants the stay and the reviewing court ultimately rules against BellSouth on the merits, the pay telephone owners will be protected. But if a stay is denied and the reviewing court ultimately rules for BellSouth on the merits, BellSouth will not be protected. The prohibition on retroactive ratemaking will operate to prevent BellSouth from ever recovering its losses in the form of the erroneously reduced rates, and the financial conditions of the pay telephone customers may as a practical matter prevent BellSouth from recovering the erroneously paid refund with prejudgment interest.

IV. The Public Interest

Affording parties the opportunity for full and complete relief on appeal is in the public interest. *See, e.g., Ohio Oil Co. v. Conway*, 279 U.S. 813, 815, 49 S. Ct. 73 L. Ed. 972 (1929) (staying payment of an allegedly unconstitutional tax, when state law did not provide a remedy for its return if the statute was ultimately adjudged invalid). Because, as set forth more fully above, BellSouth will

be denied this opportunity unless the proposed rate reductions are stayed, the public interest factor also weighs heavily in favor of issuance of a stay.

CONCLUSION

For the foregoing reasons, the Authority should issue a stay of the TRA Decision, effective until such time as an appropriate court decides the merits of BellSouth's appeal.

DATED: December 27, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2000, a copy of the foregoing document was served on the parties of record, as follows:

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