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January 4, 2001

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:

On January 3, 2001, the Tennessee Payphone Owners Association filed a Response to BellSouth's Petition for Stay in the above-captioned proceeding which contained some typographical errors. Please accept for filing the original and thirteen copies of a replacement filing in this proceeding. Please discard the previous filing made on January 3, 2001 and replace it with the enclosed filing. I apologize for any inconvenience and thank you for your attention to this matter.Copies have been provided to parties of record.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: [signature]
Henry Walker

HW/nl
Enclosure

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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

TENNESSEE PAYPHONE OWNERS ASSOCIATION'S RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S PETITION FOR STAY

The Tennessee Payphone Owners Association ("TPOA") submits the following response in opposition to the Petition for Stay filed by BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned proceeding. Pursuant to TRA Rule 1220-1-2-.19, the Authority's determination whether to grant the stay request hinges upon the likelihood of BellSouth prevailing on the merits of an appeal of the TRA's decision, the relative harm to the parties of granting or denying BellSouth's petition, and the public interest.

I. Success on the Merits

There is no reasonable likelihood that the Federal Communications Commission[1] will reverse the Authority's decision establishing new, cost-based rates for BellSouth's payphone services. The TRA's ruling not only falls comfortably within the parameters of the FCC's directions for setting payphone rates but is also consistent with many of the recommendations of BellSouth's own witnesses.

First, just as BellSouth proposed, [2] the Authority used BellSouth's TSLRIC cost study to determine the "direct" (*ie.*, no shared or common) costs of the company's payphone services. Then, again at BellSouth's suggestion, the TRA selected a cost/price ratio of .67 that

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[1] Although BellSouth has announced its intention to file a petition for review with the Tennessee Court of Appeals, only the Federal Communications Commission ("FCC") or a court sitting in review of the FCC's decision has the power to review whether the TRA has properly exercised the federal ratemaking authority over payphone tariffs which the FCC has delegated to the TRA and other state regulatory commissions.

Section 276 of the federal Telecommunications Act of 1996 (47 U.S.C. § 276) grants the FCC preemptive authority over all payphone tariffs, both intrastate and interstate. *See Illinois Public Telephone Association v. FCC*, 117 F.3d 555 (D.C. Cir., 1997) (decision clarified on rehearing, 123 F.3d 693). As the FCC itself has explained, "Section 276 provides the Commission with jurisdiction over all tariffing of payphone services. The Commission has delegated to each state the review, pursuant to federal guidelines, of payphone tariffs filed in the state." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, Order DA 97-678 (Comm. Carrier Bureau, rel. April 4, 1997 ("Bureau Waiver Order"), paragraph 19. The FCC has also said repeatedly that it retains continuing jurisdiction over payphone rates in order to insure that the state commissions correctly and timely implement the FCC's guidelines for the tariffing of intrastate payphone services (*Id.* at paragraphs 31 and 32). The agency stated that if a state could not or did properly exercise its delegated authority, "any party" may seek relief from the FCC. *Id*, at footnotes 20 and 93. *See also* DA 97-805 (Common Carrier Bureau, rel. April 15, 1997, footnote 60 ("The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the *Payphone Reclassification Proceeding,* including the intrastate tariffing of payphone services, have been met.")

[2] Rebuttal Testimony of BellSouth witness William Taylor, at 15.

is within the range of cost/price ratios approved by the FCC for other services under the federal "New Services" test.[3] *See* Direct Testimony of BellSouth witness Sandy Sanders, pp. 10-12, and Sanders Rebuttal Testimony, pp 4-7, showing a range of FCC-approved cost/price ratios from .02 to .93. Next, since BellSouth acknowledged that the company's TSLRIC cost study produced jurisdictionally "unseparated" costs,[4] the TRA allocated 25% of BellSouth's payphone costs to the interstate jurisdiction (*see* 47 C.F.R. § 36.154(c)) and then set intrastate rates based on BellSouth's remaining costs. Finally, having established new, cost-based payphone rates consistent with the FCC's instructions, the TRA completed its delegated federal responsibilities by ordering BellSouth to reimburse payphone owners the difference between the new rates and the old rates, including 6% interest, retroactive to April 15, 1997. Any FCC decision ordering a refund would also presumably include interest. *See* 47 U.S.C. § 204 (a) (1).

None of the objections raised by BellSouth in the Petition for Stay is likely to persuade the FCC that the payphone rates set by the TRA should be higher. If anything, the FCC will more likely order a further reduction of BellSouth's rates because, as explained below, the TRA's decision does not fully take into account other sources of revenue (*e.g.*, the interstate SLC/EUCL and PIC charges) that contribute to the recovery of BellSouth's payphone costs in Tennessee. Such an adjustment would further reduce the payphone rates set by the TRA in this case.

This brief will now consider the specific arguments raised by BellSouth in the Petition for Stay.

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3 Direct Testimony of BellSouth witness Sandy Sanders, at 8.

4 *See* BellSouth response to the Staff's post-hearing information for request, filed November 21, 2000.

A. The TRA's oral decision explained that the FCC's New Services test "sets a price ceiling [for payphone services] equal to the direct cost plus a reasonable allocation of overhead costs." Transcript of Authority conference on December 19, 2000. BellSouth contends that the TRA "erred in finding that the New Services Test imposes a price ceiling." Petition, at 2. But the TRA's words come, almost verbatim, from the direct testimony of BellSouth witness Sandy Sanders who stated (at p. 9), "The FCC's 'new services' test requires that prices be set at levels that do not recover more than a just and reasonable portion of overhead costs." Since the TRA adopted Mr. Sanders testimony on that point, it is difficult to understand why BellSouth now believes a court will likely overturn this aspect of the Authority's decision.

B. Similarly, BellSouth complains because the TRA adopted a cost/price ratio of .67 as a "reasonable" allocation of overhead costs. Brief, at 2. According to Mr. Sanders, however, the only requirement for what is a "reasonable level of overhead" is that the loading factor selected by the TRA "must fall within a range of cost/price ratios that have previously been accepted by the FCC" under the New Services test. Sanders, Rebuttal Testimony, at 4. As previously noted, the .67 ratio adopted by the TRA in this case is within the range of FCC-approved ratios cited by Mr. Sanders.

C. BellSouth next objects that the Authority "erred in finding that pay telephone rates must be based on jurisdictionally separated costs." Brief, 2. BellSouth itself, however, acknowledged that its TSLRIC cost study showed the "unseparated" costs of providing payphone service (BellSouth Response to Staff Data Request, filed November 21, 2000) and that the interstate charges (SLC/EUCL and PIC) that BellSouth collects from payphone owners allow the company "to recover regulated costs assigned to the interstate jurisdiction." "Response of

BellSouth to Appeal of Pre-Hearing Officer's Order Denying TPOA's Motion for Interim Relief," filed August 9, 2000, at p. 3 Therefore, the TRA, as it is required by federal law to do,[5] separated BellSouth's total costs into jurisdictional components and set rates to cover BellSouth's intrastate costs.

D. The company then complains that the TRA's decision to allocate 25% of BellSouth's costs to the interstate jurisdiction is "wholly without basis in the record" and that the Authority "should have allowed BellSouth to submit revised cost studies that were both jurisdictionally separated and based on the actual experience of providing payphone service." But as the TRA noted in its oral decision, the 25% allocation factor adopted by the TRA is also used by the FCC to separate the interstate portion of a carrier's loop costs which is the largest component of payphone rates. In the absence of a jurisdictionally separated cost study, the TRA's allocation factor is a reasonable means of allocating interstate and intrastate costs. Perhaps BellSouth could also have conducted and submitted to the TRA a TSLRIC study which included an interstate allocation factor, but the company chose not to, arguing instead that the TRA should simply ignore the separations issue. *See* "BellSouth Comments" filed June 30, 2000, at p. 7. Having lost that argument, BellSouth is in no position now to demand the right to try the case over with new evidence.

Curiously, BellSouth fails to appreciate that the TRA's use of the 25% allocation factor in this case works in BellSouth's favor. As noted in TPOA's testimony, BellSouth collects approximately $12 each month in interstate revenue (the SLC/EUCL and PIC charges) for each

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[5] No telephone company has "a legal or equitable right to obtain more than its full costs." *Crockett Telephone Company, et al. v. FCC,* 963 F.2d 1564, 1572 (D.C. Cir., 1992).

payphone line. According to the FCC, this interstate revenue "must" be "taken into account" in setting intrastate payphone rates. *In the Matter of: Wisconsin Public Service Commission*, CCB/CPD No. 00-1, Released March 2, 2000 ("the *Wisconsin Order*") at paragraph 12. In other words, once a carrier's total costs of providing service have been established, state regulators should subtract the carrier's interstate revenue and fix payphone rates based on the remaining costs. In this case, the TRA allocated only 25% of BellSouth's total costs, or about five dollars, to the interstate jurisdiction. If the TRA had fully "taken into account" BellSouth's interstate revenue of $12 a month, BellSouth's intrastate payphone rates would have been about seven dollars lower than the rates about which BellSouth complains so loudly. Should this case be appealed to the FCC, it seems more likely that the federal agency will reduce, rather than increase, BellSouth's Tennessee rates in order to take into account the full amount of BellSouth's revenue from SLC/EUCL and PIC charges.

E. Finally, BellSouth objects to the TRA's conclusion that BellSouth's refund must include interest on the excess rates BellSouth has collected and held since April 15, 1997. The carrier does not contest the TRA's power to order refunds of those excess rates but argues that four years of holding someone else's money should be ignored in calculating the amount of that refund.

The TRA's statutory powers include "general supervisory and regulatory power over all public utilities, ...so far as may be necessary for the purposes of carrying out" the Authority's responsibilities. T.C.A. § 65-4-104. If, under appropriate circumstances, the TRA has the power to set interim rates, subject to a retroactive true-up (*see*, *eg*. *Consumer Advocate v. Bissell*, 1996 WL 482970 (Tenn. Ct. App. 1996)) , the TRA must also have the concomitant power to include interest in calculating the amount of that true-up.[6] To put it another way, the power to order that payphone owners be reimbursed for having paid excessive rates necessarily encompasses the power to include interest in calculating that reimbursement; otherwise, "my remedy does not altogether right my wrong." *Scholz v. S.B. International*, 2000 WL 1231430 (Tenn. Ct. App., August 31, 2000) quoting from *Proctor & Gamble v. Sherman*, 2 F.2d 165, 166 (S.D. N.Y. 1924). Since BellSouth agrees that the TRA can order refunds to payphone owners; the company must also acknowledge that any such refunds would be insufficient without the inclusion of interest.

II. Relative Harm to the Parties and the Public Interest

BellSouth inaccurately claims that the company will be irreparably harmed if it is forced to comply with the TRA's order to reduce payphone rates and that order is later reversed on appeal.

First, even if the FCC or a reviewing court were to reverse the TRA's decision and establish a higher payphone rate for Tennessee, that rate would apply retroactively to April 15, 1997. As noted above, the FCC has preemptive jurisdiction over the payphone rates at issue in this case and has ordered that such rates, when finally set in accordance with federal guidelines, must be applied retroactively to April 15, 1997. The cases relied upon by BellSouth concerning the legality of retroactive ratemaking are clearly inapplicable to these proceedings.

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[6] The TRA routinely includes interest in other kinds of ratemaking proceedings. See, for example, the TRA's "Regulatory Reform Plan" for telephone companies. Under the TRA's plan, which was reviewed and approved by the Court of Appeals in *AARP v. Tennessee Public Service Commission*, 896 S.W. 2d 127 (1994), a carrier's projected excess earnings are placed in a "deferred revenue account" which may later be used to improve service or reduce rates. The rules require the carrier to pay interest on that revenue until it is disbursed. *See* Rule 1220-4-2-.55(1)(b). *See also* the "Purchased Gas Adjustment Rules" which require refunds, including interest payments, to gas customers. Rule 1220-4-7-.03(1)(b)(2)(vii).

Second, even if the FCC had not ordered that the new payphone rates be applied retroactively, BellSouth itself has recently notified the TRA that the company has the right at any time to increase rates for other services in order to offset the TRA-ordered reduction in payphone rates. In a cover letter accompanying the revised payphone tariffs filed on December 29, 2000, BellSouth states that the reduction in payphone rates "creates a corresponding amount of headroom under BellSouth's price regulation plan" and that BellSouth "reserves the right to use this headroom for future non-basic rate adjustments." Letter from Guy Hicks to David Waddell, December 29, 2000. Since, as the letter notes, these offsetting rate adjustments may be "cumulative," BellSouth will presumably claim the right to increase rates to offset the entire amount of the retroactive reduction in payphone revenue. While the TPOA takes no position as to whether BellSouth may or may not increase rates to offset the company's loss in payphone revenue, it is noteworthy that BellSouth can claim on December 27 that the company is legally precluded from recouping its lost payphone revenue and then contend on December 29 that the company has the right to increase rates to offset any reduction in payphone revenue. BellSouth cannot have it both ways.

While BellSouth is protected from loss, the payphone owners have suffered from the unanticipated, nearly four-year delay in completing this docket. Since April, 1997, many Tennessee payphones have been taken out of service and some providers have gone out of business altogether because, in large part, of BellSouth's excessive payphone charges. *See* Affidavits attached to TPOA's Motion for Interim Rate Relief. Although the Authority denied TPOA's request for interim rate relief, the Authority acknowledged that "further delay in setting cost-based telephone rates potentially harms competition in the pay telephone market." *Order of Pre-*

Hearing Officer Denying Motion for Interim Relief, July 21, 2000, at p. 8. Granting BellSouth's request for a stay would be wholly inconsistent with the agency's stated intent to resolve this matter expeditiously in order to avoid further harm to the payphone industry and the public interest.

III. Conclusion

Because the TRA's decision relies, in large part, on BellSouth's own evidence, the carrier has no realistic chance of prevailing on appeal. Furthermore, while BellSouth is protected from harm by the retroactive application of whatever rate is finally established, any further delay in the implementation of the TRA's decision may further damage both payphone owners and the development of a competitive payphone market. BellSouth's Petition for Stay should be denied.

Respectfully submitted,

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By:____________________

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2001, a copy of the foregoing document was served on the parties of record, via U.S. Mail, addressed as follows:

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