IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE: ALL TELEPHONE COMPANIES FILINGS REGARDING RECLASSIFICATION OF PAY TELEPHONE SERVICE AS REQUIRED BY FCC DOCKET 96-128	)))))	DOCKET NO. 97-00409

TENNESSEE CONSUMERS' MOTION TO SUBMIT RESPONSE IN OPPOSITION TO BELLSOUTH'S PETITION FOR STAY

Tennessee consumers respectfully move the Tennessee Regulatory Authority for permission to submit this response to BellSouth's Petition for Stay. For cause Tennessee consumers would show that counsel was out of the office during the period in which BellSouth filed its Petition for Stay with the Tennessee Regulatory Authority and its subsequent Petition for Stay with the Court of Appeals. The filing of BellSouth's Petition for Stay with the Court of Appeals stayed any action by the parties at the agency level unless the Court permits continued resolution of an issue below. As a result no filing at the agency in response to BellSouth's Petition for Stay was permitted.

However, Tennessee consumers were informed Thursday evening that the Court of Appeals entered an order permitting the agency to resolve BellSouth's Petition for Stay. Tennessee consumers therefore respectfully submit this response for consideration.

Tennessee consumers oppose BellSouth's Petition for Stay on the grounds that the company neither makes a showing that further delay promotes widespread payphone deployment and competition nor shows that a stay is warranted.

Without objection by any party, this agency adopted the Hearing Officer's finding that a delay potentially damages payphone competition.[1] Furthermore, Section 276 requires that a payphone decision must promote widespread deployment. Promotion of the widespread deployment and competition of payphones was intended to occur by April 1997.

BellSouth's payphone rates have not been reduced since their pre-1997 inception despite the tremendous advances in technology which dramatically reduced costs and changed the situation from one of payphone subsidies to a payphone profit center at the corporate level. The factual record in this proceeding demonstrably shows that BellSouth's existing rates and the delay have caused or are associated with or have lessened competition and reduced the widespread deployment. In fact, the evidence showed that even BellSouth's own payphone subsidiary, the largest payphone provider in Tennessee suffers under the oppressiveness of the existing rates. Their subsidiary has found it necessary to reduce deployment and reduced deployment necessarily reduces competition. Indeed, the harm at this stage may be nearly irreversible. Deployment and competition will surely deteriorate if a stay further prevents reduction of the rate to some unknown future date.

While Tennessee consumers are in general or perfect agreement with TPOA we would further address two issues. The first issue is the statutory power of the TRA to assess pre-judgment interest. The second issue is the company's misleading "below actual cost" argument.

Pre-judgment interest.

The TRA should be presumed to have power to assess interest. See Tenn. Code Ann. §

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[1]Order of the Pre-Hearing Officer Denying Motion for Interim Relief, Requesting Comments from Parties to Docket No. 97-00409 and Setting a Procedural Schedule, July 21, 2000, finding no. 5.

65-4-106 (doubts about the extent or existence of a power shall be resolved in favor of the agency.) must necessarily have statutory power to assess interest. *Scholz v. S.B. International, Inc.*, No. M1997-00215-COA-R3-CV, filed Aug. 31, 2000 (M.S.) set a standard that pre-judgment interest is a normal part of an excessive compensation remedy wherein some party is entitled to funds retained and used by another party. There should not be any real disagreement about the import of *Scholz*.

The lack of sufficient power to assess interest, however, would create an irrational two-tiered process wherein a party would receive an adjudication by the TRA and then seek recourse in a Chancery Court solely for interest. An example should suffice. Tenn. Code Ann. § 65-4-122 (b) provides that a utility which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful. The agency's decision in this case meets this legal standard. Since every right has a remedy for its violation Tenn. Code Ann. §§ 65-4-122 (d) and (e) provides that any consumer can exercise his right to receive a remedy in the Chancery Court.

The remedy sought would be the receipt of interest and the adjudication by the TRA would be conclusive on the extortion finding of the statute. BellSouth's position would create unnecessary litigation by causing the payphone providers to take the authority's judgment to the Chancery Court and initiating a proceeding to complete the compensatory remedy. Prohibiting the TRA from assessing interest could result in the Court making an independent assessment of the facts which could violate the separation of powers or alternatively, the Court would be simply accepting the TRA's decision to award a judgment but deciding the interest rate.

Finally, the TRA must be able to grant complete relief under section 276. Complete relief

includes removal of all vestiges of a subsidy. Retention of the proceeds arising from the use of compensation due TPOA is contrary to removal of the subsidy.

There is no likelihood of below cost resale.

BellSouth contends that the TRA's decision reducing payphone rates "could conceivably result in sales [of payphone services] to CLECs below actual cost, given the requirement that BellSouth must resell such service to CLECs at a discount of 16% below tariffed rates." BellSouth Petition for Stay at p.3. The company, however, fails to produce any calculations demonstrating its assertion.

The company's argument is misleading and irrelevant. Both of the average rates selected by the TRA are above BellSouth's intrastate direct costs as those costs were submitted in the **proprietary** testimony of BellSouth's witness, Mr. Sandy E. Sanders. A 16% resale rate reduction will not result in a rate which exceeds the average rate.

In addition, the assertion is misleading because BellSouth implies that if retail payphone rates are set at "cost" then wholesale rates might be "below actual cost." That implication is simply incorrect. The TRA is well aware that the 16% discount represents the company's cost savings (i.e., avoided costs), the costs avoided when the company is not retailing the service and is instead selling it wholesale.

In this case, BellSouth witnesses testified that the company incurs unspecified "retail" related cost in providing payphone services and, for that reason, argued that the lower TELRIC overhead loadings recommended by TPOA witness Don Wood were insufficient. See, Supplemental Rebuttal of Don Wood, at p. 5. The decision of the TRA reflects an agreement that the retail cost are included and the agency adopted an overhead loading factor of 1.5,

substantially in excess of the TELRIC factor. Since BellSouth persuaded the Authority to include "retail" costs in the rates for payphone service, it is estopped from denying that such costs would be avoided when the service is provided at the wholesale rate to CLECs. Therefore, the implication that the wholesale price could be "below actual cost" is misleading and inaccurate.

BellSouth's argument is irrelevant. The purpose of this proceeding is to determine cost-based rates for payphone services, not the calculation or re-calculation of an appropriate wholesale discount. If the 16% resale discount would exceed BellSouth's avoided costs, it remedy is to request a reduction in the size of the discount, not to increase the retail rate.

Wherefore, Tennessee consumers pray that the Tennessee Regulatory Authority permits and considers this response in opposition to BellSouth's Petition for Stay and further that the agency denies the Petition for Stay.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on the parties listed below by mail on this the 5th day of January, 2001.

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