**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**
February 23, 2001

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| **IN RE:** | ) | |
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| **ALL TELEPHONE COMPANIES TARIFF** | ) | **DOCKET NO.** |
| **FILINGS REGARDING RECLASSIFICATION** | ) | **97-00409** |
| **OF PAY TELEPHONE SERVICE AS REQUIRED** | ) | |
| **BY FEDERAL COMMUNICATIONS COMMISSION** | ) | |
| **(FCC) DOCKET 96-128** | ) | |

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**ORDER DENYING PETITION FOR STAY**

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This matter came before the Tennessee Regulatory Authority ("TRA" or "Authority") at the regularly scheduled Authority Conference held on January 9, 2001 on *BellSouth Telecommunications, Inc.'s Petition for Stay* ("Petition for Stay") filed by BellSouth Telecommunications, Inc. ("BellSouth") on December 27, 2000 and the *Tennessee Consumers' Motion to Submit Response in Opposition to BellSouth's Petition for Stay* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General and Reporter ("Consumer Advocate") on January 5, 2001.

## I. Factual and Procedural History

At a regularly scheduled Authority Conference on December 19, 2000, the TRA addressed, in part, the merits of Docket No. 97-00409, "the Payphone Docket." The TRA set permanent, monthly, non-traffic sensitive and traffic sensitive rates for BellSouth's payphone access lines. Additionally, the TRA required BellSouth to file a compliant tariff, no later than December 29, 2000 to be effective upon notification by the TRA. Further, the

TRA ordered the LECs[1] to reimburse the payphone service providers ("PSPs") within sixty (60) days of December 19, 2000. The TRA found that the reimbursement should include two components; the overpayment component and the inflation/time value of money adjustment component. The overpayment component equals the cumulative difference between the tariffed rates since April 15, 1997 and the rates established in this proceeding. The inflation/time value of money adjustment component equals six (6) percent interest annually since April 15, 1997.

The TRA also set the non-traffic sensitive rates for Citizens Telecommunications Company of Tennessee, L.L.C. and Citizens Telecommunications Company of the Volunteer State, L.L.C. (collectively "Citizens"), but did not set the traffic sensitive rates, because the cost data provided by Citizens was insufficient. Instead, the TRA directed Citizens to file the necessary data no later than December 29, 2000. As to United Telephone-Southeast, Inc. ("UTSE"), the TRA held that UTSE's cost study was unacceptable because it was not payphone specific and included corporate overheads in the direct cost calculations. As a result, the TRA directed UTSE to file a second cost study no later than February 2, 2001 and ordered UTSE to place in effect, as interim rates, the rates adopted as permanent rates for BellSouth.

On December 27, 2000, BellSouth filed its Petition for Stay, which requested that the TRA stay all December 19th rulings related to BellSouth. On December 28, 2000, the TRA issued a *Notice of Filings* informing BellSouth that the rulings rendered during the December 19th Authority Conference remain in full force and effect pending action on the Petition for Stay. The Notice also stated that the TRA would consider the Petition for Stay

[1] Citizens Telecommunications Company of Tennessee, L.L.C.; Citizens Telecommunications Company of the Volunteer State, L.L.C.; and United Telephone-Southeast, Inc. are also parties to the Payphone Docket.

at the January 9, 2001 Authority Conference and directed any party wishing to respond to the Petition for Stay to do so no later than Wednesday, January 3, 2001.

On December 29, 2000, BellSouth filed a *Motion to Stay Decision of the Tennessee Regulatory Authority* ("Motion") and a *Petition for Review* in the Tennessee Court of Appeals, Middle Division. In addition, BellSouth filed a memorandum in support of the Motion and the affidavit of Charles L. Holworth, Jr.

The Court of Appeals entered an Order on January 3, 2001 addressing BellSouth's Motion. The Court recognized that a request for stay should initially be filed with the TRA and acknowledged that the TRA had docketed the Petition for Stay for consideration at the Authority Conference scheduled for January 9, 2001. The Court found that BellSouth's Motion "failed to demonstrate that BellSouth will suffer irreparable harm if a stay is not granted prior to the January 9, 2001 hearing." Thus, the Court reserved any ruling on the Motion pending the resolution of the Petition for Stay by the TRA.

UTSE filed a letter with the TRA on January 3, 2001 in support of BellSouth's Petition for Stay. The Tennessee Payphone Owners Association ("TPOA") filed a response with the TRA on January 3, 2001 opposing the Petition for Stay.

On January 5, 2001, the Consumer Advocate filed *Tennessee Consumers' Motion to Submit Response in Opposition to BellSouth's Petition for Stay.* The Consumer Advocate requested that the TRA consider its response to BellSouth's Petition for Stay contained within the motion.

## II. Positions of the Parties

### A. BellSouth

BellSouth argues that the TRA should consider and balance the following factors contained in TRA Rule 1220-1-2-.19(3): 1) the likelihood of success on appeal; 2) the hardship or injury which may be imposed on BellSouth if a stay is not granted; 3) the hardship or injury which may be imposed on others if a stay is granted; and 4) the public interest.

BellSouth argues that it will prevail on appeal because the TRA incorrectly applied the new services test, determined that the test creates a price ceiling, found that the .70 and .67 cost-price ratios submitted by BellSouth were the only relevant comparable services, found that payphone rates should be based on jurisdictionally separated costs, and applied the seventy-five percent (75%) separations factor. Moreover, BellSouth argues that the rates adopted by the TRA could result in resale prices that are below actual cost. Lastly, BellSouth argues that the TRA incorrectly awarded "prejudgment interest" because the TRA does not have the power to award such interest under Tenn. Code Ann § 47-14-123 and the FCC did not provide for an award of prejudgment interest.

BellSouth next contends that it will be irreparably injured unless the proposed rate reductions are stayed. BellSouth argues that, because retroactive ratemaking is prohibited, BellSouth will never be able to recoup any lost revenues resulting from the imposition of the December 19th rates if those rates are found on appeal to be too low. Furthermore, BellSouth argues that the payment of the reimbursement will irreparably harm BellSouth because the PSPs may not be financially able to return any of the reimbursement amount that might be found to be improper, given the precariousness of the PSPs' financial condition. BellSouth asserts that a stay will not harm the PSPs or other interested parties because BellSouth is obligated by its agreement with the TPOA to reimburse the PSPs the difference between the existing rate and any new, lower rate going back to April 15, 1997.

BellSouth argues that public interest weighs heavily in its favor. Specifically, BellSouth contends that the TRA must issue a stay in order to afford BellSouth the opportunity for full and complete relief on appeal.

**B. UTSE**

UTSE fully supports the reasons underlying BellSouth's Petition for Stay. In addition, UTSE argues that, if the TRA grants a stay, the TRA should also stay its decision to set the permanent rates for BellSouth as interim rates for UTSE.

**C. TPOA**

Initially, the TPOA argues that any appeal of the TRA's decision in this case should be before the FCC or a court sitting in review of the FCC.[2] The TPOA contends that there is no reasonable likelihood that BellSouth will prevail before the FCC. As to the application of the new services test, the TPOA points out that the TRA's interpretation of the test as imposing a price ceiling is consistent with the testimony of Sandy Sanders from BellSouth. Likewise, the TPOA notes that Mr. Sanders' testimony that the cost-price ratio need only fall within a range of ratios approved by the FCC also supports the adoption of the .67 cost-price ratio because .67 falls within the range provided by Mr. Sanders. The TPOA next contends that BellSouth admitted it recovered interstate costs in both its direct costs as well as through recovery of the End User Common Line ("EUCL") and Primary Interexchange Carrier ("PICC") charges and that the TRA chose a reasonable means to

[2]The TRA did not address the appellate jurisdiction issue raised by the TPOA. Instead, the TRA considered the TPOA's underlying arguments as to whether BellSouth was likely to prevail on appeal.

avoid the resulting double recovery. Lastly, as to reimbursement, the TPOA argues that any authority to order refunds must necessarily include the authority to include "interest," otherwise its relief is not complete.

The TPOA argues that BellSouth inaccurately claims that it will be irreparably harmed. The TPOA states that the prohibition against retroactive ratemaking is inapplicable to this proceeding because the FCC has held that the permanent rates revert to April 15, 1997 and the FCC has preemptive jurisdiction. Moreover, the TPOA utilizes BellSouth's claim that it has the right to raise non-basic service rates to offset any reduction in payphone rates to argue that any such offset would negate the resulting financial harm.

The TPOA contends that PSPs will be harmed if the stay is granted. The TPOA notes that some PSPs have gone out of business and payphones have been taken out of service due, in large part, to BellSouth's excessive rates since April 15, 1997. The TPOA also points out that the TRA itself has noted that further delay in setting permanent rates harms competition in the payphone market.

**D. Consumer Advocate**

The Consumer Advocate contends that the TRA should deny the Petition for Stay because BellSouth failed to establish that a stay is warranted or show that further delay promotes widespread payphone deployment and competition. The Consumer Advocate argues that the record demonstrates that BellSouth's existing rates and the delay of this docket have lessened competition and reduced the deployment of payphones. Any stay, asserts the Consumer Advocate, will continue this result.

The Consumer Advocate also argues that the TRA should be presumed to have authority to assess interest and cites Tenn. Code Ann. § 65-4-106 in support of this argument. The Consumer Advocate next argues that any ruling preventing the TRA from ordering interest would result in an inefficient two-tiered process. Lastly, the Consumer Advocate contends that the TRA must be able to grant complete relief under § 276 of the Act and such complete relief includes reimbursement of the proceeds accruing from BellSouth's use of the overpayment.

The Consumer Advocate states that BellSouth's contentions that the TRA's decision will force BellSouth to charge rates that are below actual costs is unsupported by any calculations. Additionally, the Consumer Advocate contends that this argument is not relevant and is misleading.

## III. Findings and Conclusions

### A. *Tennessee Consumers' Motion to Submit Response in Opposition to BellSouth's Petition for Stay*

There appears to be good cause for the Consumer Advocate's failure to file a response as directed in the December 28, 2000 *Notice of Filings*. In its motion, the Consumer Advocate argued that it believed that the filing of BellSouth's *Motion to Stay Decision of the Tennessee Regulatory Authority* with the Court of Appeals suspended any further action by the TRA. These arguments constitute good cause for the delay in filing the response. For the foregoing reasons, the Directors voted unanimously to grant the *Tennessee Consumers' Motion to Submit Response in Opposition to BellSouth's Petition for Stay*.

B. *BellSouth Telecommunications, Inc.'s Petition for Stay*

1) BellSouth correctly cites TRA Rule 1220-1-12-.19(3) as the appropriate standard to use in reviewing this Petition for Stay. This rule provides that when disposing of a petition for stay the TRA should consider: 1) the likelihood of the success of the petitioner on appeal; 2) the hardship or injury which may be imposed on the petitioner if a stay is not granted; 3) the hardship or injury which may be imposed on others if a stay is granted; and 4) the public interest. BellSouth failed to satisfy these factors.

2) The December 19, 2000 decision was well-reasoned and supported by the record, federal and state law, and the FCC's orders and rules.

3) The use of jurisdictionally unseparated costs caused BellSouth to twice recover certain interstate costs. As a result, an adjustment was necessary, and the use of the seventy-five percent (75%) separations factor as the adjustment mechanism was supported by the fact that the FCC utilized this same factor to separate non-traffic sensitive costs between interstate and intrastate jurisdictions.

4) The new services test was correctly applied.

5) The cost-price ratio of .6666 is supported by the record and was based on BellSouth's own evidence.

6) The TRA had authority to order the payment of reimbursement consisting of the overpayment along with an adjustment for inflation and the time value of money. This decision is consistent with the intent of § 276 of the Act, state law, and BellSouth's March 4, 1998 agreement to reimburse PSPs as ordered by the FCC.

7) BellSouth will not be harmed if a stay is denied, but PSPs will suffer if a stay is granted. The proof demonstrates that BellSouth collected significantly more from

PSPs than it would have collected had the rates determined in this proceeding on December 19, 2000 become effective on April 15, 1997. BellSouth had the use and benefit of these funds, while at the same time, the PSPs experienced financial strain and hardship. If a stay is granted, PSPs will continue to be harmed.

8) A stay is not in the public interest because it may result in the loss of payphones. Such a result hampers payphone competition and is inconsistent with the provisions of § 276 of the Act, FCC orders, and Tenn. Code Ann. § 65-4-123, which sets forth the general policy of Tennessee to foster the development of telecommunications by permitting competition in all telecommunications service markets.

9) Granting a stay would be inconsistent with previous orders in this docket wherein the TRA or Pre-Hearing Officer recognized the financial strain on payphone owners and the need for an expedited proceeding.[3]

10) BellSouth failed to support its claim that the rates adopted at the December 19th Authority Conference could result in resale prices that are below costs.

For the foregoing reasons, the Directors voted unanimously to deny BellSouth's Petition for Stay.[4]

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[3] *Order of Pre-Hearing Officer Denying Motion for Interim Relief, Requesting Comments from Parties to Docket No. 97-00409 and Setting Procedural Schedule*, p. 8 (entered July 21, 2000); *Order Affirming Pre-Hearing Officer's Orders of July 21, 2000 and July 31, 2000*, p. 9 (entered January 5, 2001).

[4] Given the conditional nature of UTSE's request in its January 3, 2001 letter and the decision of the Authority on BellSouth's Petition, UTSE's request is denied as well.

**IT IS THEREFORE ORDERED THAT:**

1) The *Tennessee Consumers' Motion to Submit Response in Opposition to BellSouth's Petition for Stay* is granted.

2) *BellSouth Telecommunications, Inc.'s Petition for Stay* is denied.

Sara Kyle, Chairman

H. Lynn Greer, Jr., Director

Melvin J. Malone, Director

ATTEST:

K. David Waddell, Executive Secretary