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February 27, 2001

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

RE: *All Telephone Companies Tariff Filings Regarding Reclassification Of Pay Telephone Service As Required By Federal Communications Commission (FCC) Docket 96-439*
Docket No. 97-00409

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to TPOA's Petition for Clarification and Reconsideration. 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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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

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO TPOA'S PETITION FOR CLARIFICATION AND RECONSIDERATION

TPOA's petition for reconsideration raises three issues. First, TPOA challenges the charge imposed under BellSouth's payphone access line tariff for touch-tone service. Second, TPOA asks the TRA to reconsider its treatment of federal EUCL payments. Finally, TPOA argues that it should not be required to pay Directory Assistance charges until BellSouth files a new tariff.

TPOA's petition is without merit. First, its challenge to the touch-tone charges is procedurally barred, because TPOA raised no challenge to the touch-tone charges -- which have always been included in BellSouth's payphone access line tariffs -- at any time during this proceeding. The reason that TPOA raised no challenge is obvious: the challenge is substantively frivolous. Indeed, TPOA reluctantly acknowledges -- as it must, since BellSouth brought the relevant provision to the attention of TPOA's counsel *before* TPOA filed its petition -- that the FCC has specifically held that touch-tone service is *not* subject to the new services test under section 276.

Second, TPOA's claim that its federal EUCL payments should offset intrastate payphone line costs is an argument that the TRA properly rejected

already. Indeed, by asking that its EUCL payments offset its intrastate obligations, TPOA is effectively seeking a partial exemption from the EUCL, in violation of federal law. The TRA properly took account of the EUCL charges -- which the FCC has mandated for the recovery of interstate costs -- by determining the payphone access line rate based exclusively on intrastate costs. TPOA has offered no valid reason for the TRA to revisit that determination.

Finally, TPOA's challenge to BellSouth's Directory Assistance charges is likewise out of place in this proceeding, because the payphone access line tariff does not impose such charges. TPOA concedes that when a directory assistance call is made from a payphone, BellSouth should be able to charge for it. Because directory assistance is not payphone-specific and is not a basic service, the charge for that service when accessed from a payphone should be the same as for the same service when accessed using any other subscriber line. BellSouth, consistent with prior commitments, will not impose such charges until its new tariff is approved.

I. THE TPOA FORFEITED ANY CHALLENGE TO BELLSOUTH'S TOUCH-TONE RATE, WHICH IS ENTIRELY CONSISTENT WITH FEDERAL LAW AS SPECIFICALLY DECLARED BY THE FCC IN ANY EVENT

TPOA's challenge to BellSouth's rate for touch-tone service is frivolous for two reasons. First, the challenge is clearly barred by the TRA's rules. TPOA did not seek to raise any issue concerning touch-tone charges during the original hearing. TPOA does not claim that the TRA made an error of law with respect to this issue, nor does it claim that the TRA misinterpreted the evidence before it.

Instead, TPOA seeks to inject a whole new set of legal and factual matters into this proceeding. Such tactics run afoul of Section 1220-1-2-.20, which provides that a petition for reconsideration may be based on "new evidence" only if the petitioning party can demonstrate "good cause" for its "failure to introduce the new evidence at the original hearing."

TPOA's only excuse for failing to challenge the touch-tone charges (and the directory assistance charges) that it seeks to challenge now is that, during the nearly four years in which this proceeding has been pending, it "focused on" other issues and "did not notice" the charges it now seeks to challenge. Petition at 1 n.2. TPOA's claim that it had "assumed" that charges for touch-tone service had been incorporated into PTAS rates (Petition at 4) hardly excuses its failure to read the language of the tariffs at issue. TPOA's suggestion that the TRA -- which carefully reviewed and revised BellSouth's initial tariff filing -- was similarly inattentive (*See* Petition at 4) is presumptuous, to say the least.

The TPOA's failure to examine the tariffs at issue in this proceeding hardly amounts to "good cause." Charges for touch-tone service have been included in BellSouth's payphone service tariffs from the start, and it was TPOA's obligation to raise any challenge to those touch-tone rates in the course of the original proceeding. It cannot inject this new issue into this proceeding now. It has therefore forfeited any challenge to that aspect of BellSouth's tariff.

Second, even if the challenge were not barred, it is frivolous on the merits. As the TRA noted in its interim order, the purpose of this docket is to establish

payphone rates "[a]s provided by § 276 of the Act." Interim Order at 14 (rel. Feb. 1, 2001). But the FCC has specifically held that section 276 has *nothing* to say about the rate that LECs charge payphone providers for non-payphone specific services like touch-tone. In the original *Payphone Orders*, the FCC required LECs to file tariffs for the "the basic payphone service and unbundled functionalities in the intrastate and interstate jurisdictions."[1] The Commission clarified that this requirement "applies only to *payphone-specific*, network-based, unbundled features and functions provided to others or taken by a LEC's operations."[2] Touch-tone service is plainly not a payphone-specific feature or function. Indeed, the FCC *specifically* held that its tariffing requirement does not apply to "features and functions that are generally available to all local exchange customers and are only incidental to payphone service, such as touchtone services."[3]

Remarkably, TPOA filed its petition on this point despite the fact that BellSouth specifically informed TPOA's counsel that this issue was foreclosed by prior FCC orders, and despite the fact that TPOA *acknowledges in its Petition* that its argument is inconsistent with prior FCC orders. *See* Petition at 4 ("touchtone service [is] . . . not covered by the New Services test"). Yet it argues that it "bases its objections to the Touch-Tone charge on Section 276" (Petition at 4) --

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[1] Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996) ("*Order on Recon.*").

[2] Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 20997, 21005, ¶ 18 (Com. Car. Bur. 1997) ("*Waiver Order*").

[3] *Id.*

even thought the FCC has already held that section 276 does *not* authorize a payphone-specific rate for touch-tone service. Indeed, section 276 makes clear that payphone providers may not be subsidized by other telecommunications services. *See* 47 U.S.C. § 276(b)(1)(B).[4] TPOA argues that it should receive exactly the same touch-tone service as other users but without having to pay for it. This is precisely the type of subsidy that section 276 prohibits.

The FCC's prior ruling on this subject forecloses TPOA's claims. In any event, each of TPOA's arguments is unpersuasive on its own terms. The payphone-specific "network components" required to offer payphone service (Petition at 3) do *not* include generally available switch functions like touchtone service and "various custom calling features"[5] -- this is in keeping with the FCC's prescribed methodology. BellSouth was accordingly under no obligation to present any cost support for the charge for touch-tone service, which is not subject to the New Services Test as a matter of governing federal law. And, contrary to TPOA's suggestion (Petition at 5), *it* has the burden on reconsideration to explain why it failed to present evidence on this issue -- BellSouth had no obligation to present evidence on an issue that was not even the subject of this proceeding.

It is simply false to claim that the TRA did not approve the touch-tone charge, which was included in the tariff approved by the TRA on February 6, 2001.

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[4] TPOA's unsubstantiated suggestion that the FCC may "clarif[y]" this issue (Petition at 4) is not only baseless, it's false. The cited proceeding concerns clarification of application of the new services test to payphone rate elements that are subject to it; it does not involve subjecting touch-tone service to that test.

[5] *Waiver Order*, 12 FCC Rcd at 21005, ¶ 18.

And TPOA's observation that payphone service providers require touch-tone service simply has no bearing on this issue -- as the FCC has held, where such a functionality is generally provided to all local exchange customers, section 276 has nothing to say about how such service should be tariffed.[6] (Presumably all payphone providers require intraLATA toll calling capability, but even TPOA does not argue that there should be a payphone-specific rate for intraLATA toll service.)[7]

In sum, TPOA's plea for the TRA to suspend BellSouth's touch-tone charges as applied to payphone providers is without merit.

II. TPOA HAS GIVEN THE TRA NO REASON TO REVISIT ITS DETERMINATION CONCERNING TREATMENT OF INTERSTATE CHARGES AND COSTS

TPOA claims that the TRA erred in its treatment of federal EUCL charges. According to TPOA, the TRA should have subtracted the entire amount of the EUCL charge from the costs of the payphone access line before determining the applicable intrastate payphone line rate. That argument not only is wholly without support in law; it is directly *contrary* to federal law. The TRA was right to reject it before, and it should reject it again.

On this much there can be no dispute: the FCC has ordered BellSouth to charge payphone providers -- affiliated and unaffiliated alike -- the federal End User

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[6] The FCC specifically rejected the analogy to call blocking and screening, offered by TPOA in its petition. *Compare id.* at 21005, ¶ 18 & n.49 (holding that touch-tone service is not like call blocking and screening) *with* TPOA Petition at 3 ("Touch-Tone is like central office blocking and screening").

[7] TPOA refers to T.C.A. §65-5-208(1) but does not explain its relevance. Again, as a matter of federal law, touchtone service is not subject to the new services test under section 276, not because it is or is not "optional," but because

Common Line charge.[8] Moreover, it should be equally undisputed that the EUCL charge relates exclusively to the recovery of *interstate* costs. Indeed, the FCC has explicitly held that "the application of a SLC to payphone lines is necessary to recover regulated costs *assigned to the interstate jurisdiction*."[9]

Accordingly, a state commission cannot simply subtract the EUCL from unseparated costs and use the resulting costs as the basis for the intrastate rate -- to do so would create a mis-match between costs and revenues and overstep the bounds of state authority. If TPOA believes that the federal EUCL charge over-recovers interstate costs, it should address its complaints to the FCC. [10] In effect, TPOA seeks to use a portion of its EUCL payments to offset intrastate costs. This would amount to a partial exemption from the EUCL, in violation of federal law.

Despite the TPOA's protestations, it cannot be argued that the TRA failed to eliminate any possibility of "double recovery." To the contrary, by calculating the payphone access line rate solely on the basis of costs that it found to be intrastate, the TRA went well beyond anything required by the FCC's *Payphone Orders* and

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it is a network feature that is available on the same terms to all end-users, including payphone providers.

[8] *See* Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20634, ¶ 187 (1996) ("the multiline business [Subscriber Line Charge ("SLC") *must apply* to subscriber lines that terminate at both LEC and competitive payphones") (emphasis added).

[9] *Order on Recon.*, 11 FCC Rcd at 21324, ¶ 207.

[10] TPOA argues that "TRA knows exactly the amount of NTS costs that BellSouth has allocated to the interstate jurisdiction: $7.85 per month." Petition at 7. That argument is nonsensical. The $7.85 is *revenue*; it is not a measure of costs. Again, if TPOA believes that the EUCL "over-recovers" interstate costs

reduced payphone access line rates well below the rate prevailing in other states. As BellSouth has explained, because business subscribers pay the EUCL -- just as payphone providers do -- the TRA would have ensured that the line rate satisfied the new services test simply by setting the rate at a level similar to that for comparable business lines. Instead, the TRA sharply limited BellSouth's ability to recover intrastate costs, providing a very low overhead margin on jurisdictionally *separated* costs. Not only did this go beyond anything that federal law requires, it arguably creates a subsidy for payphone providers prohibited by federal law.

Being that as it may, TPOA's argument that the current rate provides for double recovery is laughable.[11] The TRA excluded *all* interstate costs from its calculation of the final rate; accordingly, the final rate did not recover any such costs. TPOA's contrary claim -- based solely on the unsupported assertion of its expert witness -- is no argument at all.[12]

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associated with the payphone line, it should address its concerns to federal regulators, not the TRA.

[11] TPOA's unreasonableness is on prominent display in requesting that the TRA reduce the basic payphone line rate to less than $7.00 per month, an amount that is far *less* than the intrastate costs of the payphone line by any measure. Again, to create this type of subsidy for payphone service providers would violate federal law and would be senseless as a matter of policy.

[12] Contrary to TPOA's claim, nothing in either the *Wisconsin Order* or the cited order by the Massachusetts Department of Telecommunications and Energy supports TPOA's argument. Both orders simply say that the state commission should take account of federal EUCL charges, which the TRA did by using separated, rather than unseparated, costs as the basis for its calculations.

III. BELLSOUTH'S CHARGES FOR DIRECTORY ASSISTANCE ARE NOT AT ISSUE IN THIS PROCEEDING

TPOA acknowledges that when directory assistance calls are made from payphones, BellSouth is entitled to charge for those calls. In keeping with prior commitments, however, BellSouth will impose such charges on payphone providers only when a new tariff setting forth such charges is approved by the TRA.

Accordingly, the TRA has nothing to reconsider or to clarify with respect to this issue. At the same time, it is worth noting that, to the extent TPOA suggests that BellSouth's directory assistance charges should be restricted to some measure of costs, that suggestion is wholly without merit. Directory assistance is not a payphone specific service. To the contrary, the same directory assistance platform provides service whether the call is placed from a payphone or from any other line. Directory assistance therefore is not subject to the new services test requirement imposed by the FCC under section 276. *See supra* at 3-4. Moreover, directory assistance is a non-basic service, and therefore subject to less stringent regulatory oversight under state law than basic services. *See* T.C.A. 65-5-208. For these reasons, there is no reason that BellSouth should not be able to collect the same charge for its directory assistance services from a payphone service provider as from any other subscriber; particularly because the rate that payphone providers charge *their* customers for this service is entirely unregulated.

CONCLUSION

For the foregoing reasons, the TRA should deny TPOA's petition for reconsideration.

Respectfully submitted,

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I hereby certify that on February 27, 2001, a copy of the foregoing document was served on the parties of record, as follows:

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