Sprint.

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May 11, 2000

Director Lynn Greer, Jr.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: Docket No. 97-00409
All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service As Required by Federal Communications Commission in FCC Docket 96-128

Dear Director Greer,

This letter is addressed to you as Hearing Officer in the above captioned proceeding.

United Telephone-Southeast, Inc. (UTSE), which is joined in this letter by Citizens Telecommunications Company of Tennessee and Citizens Telecommunications Company of the Volunteer State (together, Citizens), is in receipt of two letters from Henry Walker on behalf of the Tennessee Payphone Owners Association (TPOA). The first letter, dated March 21, 2000, asked the TRA to reconvene docket 97-00409 ("Payphone Docket"). The second letter, dated April 27, 2000, asks among other things that the non-BellSouth ILECs prepare and file cost studies to determine pay telephone rates. The TPOA further asks that the cost studies be consistent with the methodology used by BellSouth and the adjustments ordered by the Authority in Docket 96-01262.

UTSE and Citizens object to the TPOA's requests on several grounds. First, the request to reconvene the docket is premature. As stated in the TPOA's Agreed to Motion for Continuance, dated March 4, 1998, the TPOA requested that the Payphone Docket "be postponed **until *after the TRA has issued final orders*** in the 'permanent pricing' docket (TRA 97-01262) and in the 'universal service' proceeding" (emphasis added). The TRA has not issued final orders in either docket. According to the TPOA's own words in its Motion for Continuance "it makes little sense, therefore, to proceed with the pay telephone docket." UTSE and Citizens agreed with the postponement then and believes that the postponement should continue because there is still no final order in either docket.

Second, UTSE and Citizens believe the TPOA's heavy reliance on the FCC's Wisconsin Payphone Order[1] (Wisconsin Order) is misplaced. Indeed, the FCC states, "this order only applies to

[1] In the Matter of Wisconsin Public Service Commission Order Directing Filings, CCB/CPD Docket No. 00-1, Order, adopted March 1, 2000.

the LECs in Wisconsin specifically identified herein."[2] The FCC exercised jurisdiction over the payphone issue only because the Wisconsin Public Service Commission found that it lacked jurisdiction "under state law to address whether the rates, terms and conditions applicable to the provision of basic payphone lines complies with Section 276 of the Act."[3] Due to the fact that the TRA has accepted jurisdiction in the Payphone Docket and given the FCC's self-proclaimed, limited scope of its Order, UTSE and Citizens believe the TPOA's reliance on the FCC Wisconsin Order is misguided.

Third, USTE and Citizens disagree with Mr. Walker's characterization of the Wisconsin Order. As noted by the Common Carrier Bureau, the FCC's jurisdiction is based on Section 276 of the Telecommunications Act. Section 276 gave rise to the Payphone Order[4] and later the Order on Reconsideration[5]. These require retail payphone line rates to be cost based and to comply with the FCC's new services test. They do not, however, require use of UNE cost elements in setting these cost-based rates. Contrary to Mr. Walker's suggestion, the Wisconsin Order does not add such a requirement. Instead, the FCC limited its consideration of UNE cost elements to overhead costs, and then only as a point of reference because of the assumed comparability of overhead costs for UNEs and retail payphone lines. In fact, the FCC specifically allowed the Wisconsin carriers to justify overhead costs that differ from the overhead costs that were identified in the context of setting UNE rates. Thus, Tennessee remains free to use whatever methodology it deems appropriate to set cost-based rates in accordance with the FCC's new services test.

Fourth, even if we assumed that Mr. Walker's interpretation were correct (which we do not), the analysis provided by the FCC Common Carrier Bureau in its Wisconsin Order is questionable. The Bureau's flaws are clearly set forth by the LEC Coalition in the Application for Review and Stay filed in opposition to the Wisconsin Order (See Attachments A and B). The LEC Coalition points out that the Bureau has erred to the extent that it effectively required LECs to set payphone rates at UNE-based rates. If indeed the Wisconsin Order does so, it is in direct contravention of the1996 Telecom Act, FCC precedent and sound policy. Thus, the TRA should not take action to set payphone rates at UNE levels before the FCC has an opportunity to rule on the application for review.

Fifth, the TPOA's reliance upon the Wisconsin Order is premature because the order has not been finalized. As noted above, a coalition of LECs has filed a Petition for Stay and An Application for Review of the FCC's Wisconsin Payphone Order.[6] In addition, upon the FCC's own motion, the FCC has extended the time for submission of tariffs consistent with its Order.[7] Thus, even if the Wisconsin Order is viewed as authority, it will be months, if not years, before the Order is finalized.

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[2] *Id.* at ¶ 13.

[3] Id. at ¶ 3.

[4] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, *Report and Order*, FCC 96-388 (rel. Sept. 20, 1996).

[5] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, *Order on Reconsideration*, FCC 96-439 (rel. Nov. 8, 1996).

[6] *See*, Public Notice, LEC Coalition Files a Petition for Stay and An Application for Review of the Common Carrier Bureaus' Order Directing the Four Largest Incumbent LECs in Wisconsin to File State Basic Payphone Rates with the FCC for Review, DA 00-823, rel. April 12, 2000.

[7] *See*, Public Notice, In the Matter of Wisconsin Public Service Commission Order Directing Filings, DA 00-824, rel. April 12, 2000.

Sixth, the TPOA's request that non-BellSouth LECs prepare and file cost studies for the determination of pay telephone rates is unreasonable and harmful to UTSE and Citizens. This request assumes that the Wisconsin Order operates as authority that UNEs must be used for determining pay telephone rates. As discussed above, the TPOA's heavy reliance on the Wisconsin Order is misplaced and premature. In essence, the TPOA is attempting to force a UNE proceeding just for the purpose of determining pay telephone rates. There are other less onerous methods for determining cost-based rates that still satisfy Section 276 of the 1996 Telecom Act.

Finally, UTSE and Citizens strongly oppose the TPOA's alternate suggestion that any LEC electing not to file UNE cost studies shall be presumed to have the same UNE costs as BellSouth on a proxy rate basis until a carrier files its own cost studies. Both UTSE and Citizens are different companies and have different costs than BellSouth. In addition, UTSE and Citizens have previously filed and have in effect interim rates. There is no reason to have another proxy rate set based on costs or methodologies that may not be applicable to United or to Citizens.

For all of the above reasons, the TPOA requests should be denied.

Very truly yours,

James B Wright

James B. Wright
Senior Attorney
United Telephone-Southeast, Inc.

John B. Adams by JBW with permission

John B. Adams
Senior Attorney
Citizens Telecommunications Company of Tennessee
Citizens Telecommunication Company
of the Volunteer State

Attachments
Cc: parties of record

CERTIFICATE OF SERVICE; DOCKET 97-00409
(Pay Telephone Service Reclassification)

The undersigned hereby certifies that on May 11, 2000 the foregoing document was served upon the following parties of record addressed as follows:

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#18179

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-1
	)	
Order Directing Filings	)	

THE LEC COALITION'S APPLICATION FOR REVIEW OF THE COMMON CARRIER BUREAU'S "NEW SERVICES TEST" ORDER

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April 3, 2000

EXECUTIVE SUMMARY

In the order on review,[1] the Deputy Chief of the Common Carrier Bureau made two fundamental errors. First, the *Order* states that, under the "new services test," basic payphone access line services are to be treated as UNEs and provided to payphone service providers at TELRIC rates. Second, the *Order* concludes that the Bureau has the authority, not merely to determine the methodology for pricing basic payphone lines, but to prescribe state-tariffed, intrastate retail rates for those lines. Both these conclusions are wrong.

The 1996 Act specifically limits LECs' obligation to provide unbundled network elements to "telecommunications carrier[s]." 47 U.S.C. § 251(c)(3). In keeping with that legislative command, the FCC specifically determined in its *First Payphone Order*[2] that "the pricing regime under Sections 251 and 252" did not apply to "Section 276 payphone services." 11 FCC Rcd at 20615, ¶ 147. Instead, the Commission decided to apply the more flexible "new services" test regime to payphone services. For the Bureau now to suggest that payphone services must fit the TELRIC model is directly contrary to Commission precedent and to the 1996 Act. For the Bureau to go even further and purport to prescribe state-tariffed, intrastate retail rates for payphone access lines is contrary to Commission precedent, the 1996 Act, and the Tenth Amendment. The *Order* should be withdrawn.

I. Insofar as the *Order* requires LECs to offer payphone access line services to PSPs at TELRIC rates, the *Order* is inconsistent with prior Commission precedent and with the 1996 Act.

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[1] Order, *Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-1; DA 00-347 (rel. Mar. 2, 2000) ("*Order*").

[2] First Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*").

A. The *Order* states that, for purposes of satisfying the new services test, direct costs should be determined "by the use of an . . . economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order" (*Order* ¶ 9) — an evident reference to TELRIC. The *Order* further provides that "[f]or purposes of justifying overhead allocations, UNEs appear to be 'comparable services' to payphone line services." *Order* ¶ 11.

Both these statements are inconsistent with prior Commission orders. First, the Commission has made clear that the new services test does not necessarily require that direct costs be based on forward-looking economic cost estimates, much less the particular methodology articulated in the *Local Interconnection Order*. Rather, the Commission has left it to LECs, in the first instance, to develop and justify costing methodologies for the new services test. Second, it is not true that overhead loadings for payphone services must be comparable to UNE overhead loading. To the contrary, the Commission has already approved payphone service rates with overhead loadings far in excess of these levels. Again, it is for the LECs, in the first instance, to justify a reasonable allocation of overhead.

B. By effectively requiring LECs to set payphone service prices at UNE-based rates, the *Order* conflicts with the 1996 Act, with prior Commission orders, and with sensible policy.

The Act provides that UNEs are available only to "telecommunications carrier[s] for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). As the Commission has held, independent PSPs are not telecommunications carriers, but retail subscribers. *See Local Interconnection Order*,[3] 11 FCC Rcd at 15936, ¶ 876. Accordingly, to extend the pricing

[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Interconnection Order*").

standard applicable to UNEs to payphone services conflicts with section 251(c)(3). Recognizing this conflict, the Commission itself has explicitly *rejected* the suggestion that it apply the "pricing regime under Sections 251 and 252 . . . to all Section 276 payphone services offered by incumbent LECs." *First Payphone Order*, 11 FCC Rcd at 20615, ¶ 147. That prior determination is impossible to square with the *Order*.

Indeed, the *Order* conflicts with the very animating spirit of the 1996 Act, which is to promote competition in all telecommunication service markets. If incumbent LECs were required to provide payphone services at UNE rates, it would virtually foreclose competition in the market for payphone service and establish a regulated monopoly — a result anathema to competition.

II. In addition, the Order exceeds the Commission's jurisdiction.

A. First, the Commission has never claimed the authority to dictate intrastate retail rates for basic payphone lines, the power the Bureau claims here. Moreover, nothing in the Act gives the Commission the authority to federalize the regulation of basic payphone services. Section 2(b) of the Act forecloses Commission jurisdiction over such intrastate services unless another provision of the Act is "so unambiguous or straightforward as to override the command of § 152(b)." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986). Nothing in the Act satisfies that standard here.

B. Even if the Commission had the authority to pre-empt state payphone line tariffs, it does not have the authority to prescribe a rate in a filed state tariff. To dictate the content of state tariffs in this way would violate the Tenth Amendment of the Constitution. *See New York v. United States*, 505 U.S. 144 (1992).

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-1
	)	
Order Directing Filings	)	

THE LEC COALITION'S APPLICATION FOR REVIEW OF THE COMMON CARRIER BUREAU'S "NEW SERVICES TEST" ORDER

Pursuant to section 1.115 of the Commission's rules, 47 C.F.R.§ 1.115, the LEC Coalition[4] hereby files an application for review of the Order of the Deputy Chief, Common Carrier Bureau, in CCB/CPD Docket No. 00-1 (the "*Order*"). The Deputy Chief's ruling that LECs should offer retail payphone access line services at rates comparable to UNE rates violates the 1996 Act and past Commission orders. Moreover, the Deputy Chief's assertion that the Commission has the power to prescribe intrastate payphone access line rates for services offered pursuant to state tariff not only goes beyond the Commission's jurisdiction under the Act, but it also violates the Tenth Amendment of the Constitution. Accordingly, the Commission should withdraw the *Order*.

Wisconsin Bell (d/b/a/ Ameritech Wisconsin) and GTE North Inc. ("GTE") are parties to this proceeding. The interests of the remaining members of the Coalition have been adversely affected by the *Order*, because all of the members or their affiliates offer retail payphone access

[4] The members of the LEC Coalition are: Ameritech Corporation, the Bell Atlantic telephone companies (Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company), BellSouth Telecommunications, Inc., GTE Service Corporation, SBC Telecommunications, Inc., Wisconsin Bell (d/b/a Ameritech Wisconsin), and U S WEST Communications, Inc.

service pursuant to state retail tariffs. 47 C.F.R. § 1.115(a). It was not possible for the other members of the LEC Coalition to participate in the proceeding previously because the Bureau acted without providing notice or an opportunity to comment. *Id.* Independent payphone service providers ("PSPs") have represented to state public service commissions across the country that the *Order* represents a correct statement of the federal "new services test" that must be applied by those state commissions. If the Commission[5] does not immediately stay and then correct the *Order*, those state commissions may set state rates in accordance with the Order's unlawful standard, causing Petitioners irreparable harm.[6]

BACKGROUND

This dispute concerns the federal standards governing the retail rates that local exchange carriers may charge payphone service providers for local service. In the years before the 1996 Act, independent PSPs were restricted to provision of payphone service using "smart" phones — that is, payphones with sufficient computer intelligence to perform most of the coin control and supervision functions required to provide coin payphone service. *See NPRM*,[7] 11 FCC Rcd at 6720, ¶ 5. Most LECs, in contrast, provided payphone service using "dumb" payphones connected to "smart" lines; in that arrangement, the LEC central office performed the coin control and rating functions. *NPRM*, 11 FCC Rcd at 6739, ¶ 43.

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[5] The LEC Coalition believes that a Petition for Reconsideration is inappropriate in this case because the *Order* is evidently interlocutory. *See* 47 C.F.R. § 1.102(b)(2). However, in the event the Commission determines that this is a final order subject to reconsideration, and if an application for review is an inappropriate procedural vehicle, the LEC Coalition asks that the Commission refer this pleading to the Bureau for treatment as a Petition for Reconsideration pursuant to 47 C.F.R. § 1.106.

[6] The Coalition is filing a separate Request for Stay along with this Application for Review. *See* 47 C.F.R. § 1.102(b)(3).

[7] Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716 (1996) ("*NPRM*").

The Commission's Payphone Orders. Section 276 of the Telecommunications Act requires the Commission to "discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues." 47 U.S.C. § 276(b)(1)(B). To effectuate that mandate, the Commission determined that payphones should be treated as deregulated and detariffed CPE. *First Payphone Order*, 11 FCC Rcd at 20611, ¶ 142. The Commission recognized that even after unbundling CPE from the underlying transmission services, LEC-affiliated PSPs would continue to use "dumb" phones to provide payphone service. *NPRM*, 11 FCC Rcd at 6740, ¶ 46. Accordingly, the Commission concluded that "incumbent LECs must offer individual central office coin transmission services to PSPs under nondiscriminatory, public, tariffed offerings if the LECs provide those services for their own operations." *First Payphone Order*, 11 FCC Rcd at 20614, ¶ 146. The Commission further determined that "[b]ecause the incumbent LECs have used central office coin services in the past, but have not made these services available to independent payphone providers for use in their provision of payphone services, . . . incumbent LEC provision of coin transmission services on an unbundled basis [must] be treated as a new service under the Commission's price cap rules." *Id.*[8] In addition, the Commission held that "any basic transmission services provided by a LEC to its own payphone operations must be available under tariff to other payphone providers." *Id.* at 20616, ¶ 148.

[8] In addition, in the case of BOCs only, the FCC required the filing of CEI plans "describing how they will comply with the *Computer III* unbundling, CEI parameters, accounting requirements, CPNI requirements as modified by Section 222 of the 1996 Act, network disclosure requirements, and installation, maintenance, and quality nondiscrimination requirements." *First Payphone Order*, 11 FCC Rcd at 20641, ¶ 199. All of the BOCs filed CEI plans that were approved by the Bureau in 1997. The Commission declined to impose these requirements on non-BOC LECs. *Id.* at 20641-42, ¶ 201.

The Commission specifically rejected the proposal that it apply "the pricing regime under Sections 251 and 252 . . . to all Section 276 payphone services offered by incumbent LECs." *Id.* at 20615, ¶ 147. The Commission noted that "Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services. In addition, the elements and services to be offered under Sections 251 and 252 are not available to entities that are not telecommunications carriers, and many PSPs are not telecommunications carriers." *Id.* Instead, the Commission found that the "*Computer III* tariff procedures and pricing" — including the new services test — "are more appropriate for basic payphone services provided by LECs to other payphone providers." *Id.*

In the *Order on Recon.*, the Commission confirmed that LECs were required to "file with the Commission tariffs for unbundled features consistent with the requirements established in the *Report and Order*." 11 FCC Rcd at 21308, ¶ 163. The Commission also determined, however, that "LECs are not required to file tariffs for the basic payphone line for smart and dumb payphones with the Commission." *Id.* Instead, the Commission chose to "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* The Commission stated: "[w]here LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of [the *Order on Recon.*], the [*First Payphone Order*], and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the [*First Payphone Order*] as revised herein; and 2) that in such case no further filings are required." *Id.*

The Order on Review. In July 1997, the Wisconsin Pay Telephone Association ("WPTA") filed a petition with the Wisconsin Public Service Commission ("WPSC") "request[ing] that the [WPSC] determine the cost basis for each network service provided by

Wisconsin [LECs] to payphone providers under the federal New Services Test, determine whether the network services provided by LECs to payphone providers discriminate in favor of the LEC's own payphone operations, [and] determine whether LECs are subsidizing their payphone operations with revenue from noncompetitive services." *See WPSC Letter Order*, Docket No. 05-TI-156, November 6, 1997 (copy attached as Exhibit A). The WPSC replied that "its jurisdiction to investigate the rates, terms and conditions of service offered by price-regulated telecommunications utilities under [state law] is very narrowly circumscribed to enforcing a prohibition on cross subsidy. . . and prohibitions on discriminatory practices." *Id.* It further noted that state remedies "only address whether the retail rates charged by telecommunications utilities for a competitive telecommunications service recover the underlying cost for that service." *Id.*

The WPTA subsequently asked the Bureau to review the WPSC's order. The Bureau determined that "the [WPSC] has found that it lacks jurisdiction under state law to ensure that the rates, terms, and conditions applicable to providing basic pay phone services comply with the requirements of Section 276 . . . and the FCC's implementing rules." *Letter to Joseph P Mettner, Chairman, Public Service Commission of Wisconsin, from Kathryn C. Brown, Chief, Common Carrier Bureau*, 13 FCC Rcd 20865, 20866 (1998). The Bureau informed the WPSC that it would "need to require the federal tariffing and federal review of payphone services offered by the four largest LECs operating in Wisconsin." *Id.*

In the Order on review, however, the Deputy Chief did *not* order the filing of federal tariffs for payphone services. Instead, the Deputy Chief directed these four LECs to "submit currently effective intrastate tariffs that set forth the rates, terms, and conditions associated with payphone services to the Commission, along with the supporting documentation in compliance with the requirements of section 276 and the Commission's implementing rules, including the new services test." *Order* ¶ 5. Further, the *Order* stated that "[i]f we find an incumbent LEC's payphone line rate is not in compliance with the new services test or other section 276 requirements, we have authority, pursuant to section 205 . . . and our general authority under section 4(i) of the Act . . . to make a determination as to the maximum permissible rate and to require the incumbent LEC to charge no more than that rate." *Id.* ¶ 6. The Order added that "we may prescribe a payphone line rate, if necessary, and ensure compliance with such a prescription order, even though the prescribed rate may be filed in a state tariff." *Id.* ¶ 6 n.14.

The Deputy Chief did not stop at taking upon the Bureau the task of reviewing state tariffs. The *Order* also purported to "set forth briefly . . . some of the methodological principles applied under Computer III and other relevant FCC proceedings addressing the application of the new services test and cost-based ratemaking principles to services and facilities offered by incumbent LECs to providers of services that compete with incumbent LEC services." *Id.* ¶ 8. In so doing, the Deputy Chief ignored the terms of the Act and prior Commission orders and misstated the new services test.

First, the Deputy Chief made no reference to the prior Commission holding that the pricing applicable to elements and services provided pursuant to sections 251 and 252 is inapplicable to the pricing of retail payphone services. Instead, the Deputy Chief held that the opposite is true: "[c]osts must be determined by the use of an appropriate forward-looking, economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order" (*id.* ¶ 9) — plainly referring to the TELRIC pricing applicable to pricing of elements provided pursuant to sections 251 and 252.

Nor was this all. The Deputy Chief observed that, under the new services test, "[a]bsent justification, LECs may not recover a greater share of overheads in rates for the service under review than they recover in rates for comparable services." *Id.* ¶ 11. The Deputy Chief then held that "[f]or purposes of justifying overhead allocations, UNEs appear to be 'comparable services' to payphone line services, because both provide critical network functions to an incumbent LEC's competitors and both are subject to a 'cost-based' pricing requirement." *Id.* ¶ 11. Thus, in direct contradiction to clear Commission precedent, the Deputy Chief essentially held that payphone lines would have to be provided to PSPs based on UNE-type rates — even though UNEs are not services at all, are not sold at retail, and are provided to competitors in the local exchange market, not end-user subscribers.

ARGUMENT

I. THE ORDER VIOLATES THE ACT AND PRIOR COMMISSION PRECEDENT

The fundamental issue presented here is whether the Common Carrier Bureau can require LECs to tariff their intrastate payphone lines at UNE-equivalent rates. Because such a result violates the terms of section 251(c)(3), prior Commission orders, and the animating spirit of the 1996 Act, the Deputy Chief's Order must be set aside.

A. The Deputy Chief Misconstrued the New Services Test

The occasion for the Deputy Chief's error was a purported interpretation of the Commission's new services test. That test — intended to provide price-cap LECs with "additional pricing flexibility" — provides that when a LEC introduces a new service, it must set the rates for that service based on direct costs plus a reasonable allocation of overhead. Accordingly, in applying the test, a LEC must first demonstrate the direct costs of providing the service.[9] The LEC then shows how the price of the service reflects a reasonable overhead loading.[10] One factor to consider in determining whether the loading is reasonable is whether the loading reflects the overhead loading on similar services.[11]

Beyond these general guidelines, the Commission has done little to define further the requirements of the new services test. Indeed, that reticence has been deliberate: the Commission has emphasized repeatedly that the new services test is intended to give LECs greater pricing flexibility, not less. It has not required any particular costing methodology under the test — to

[9] Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4531, ¶ 42 (1991) ("*ONA Order*").

[10] Memorandum Opinion and Order, *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5187, ¶ 118 (1994) ("*Expanded Interconnection Order*"); 47 C.F.R. § 61.49(f)(2).

[11] *See Expanded Interconnection Order*, 9 FCC Rcd at 5189, ¶ 128.

the contrary, it has left it to LECs to develop their own costing methodologies and to justify the overhead loading used for a particular service.[12]

In the Order, the Deputy Chief took the opposite approach, establishing rigid rules to govern this proceeding. In particular, the *Order* held — though the Commission had never provided notice or the opportunity to comment on the issue — that the only measure of direct cost that is permitted for a new services filing is one based on a "methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order" (*Order* ¶ 9) — an evident reference to TELRIC. And it further determined — again without notice and comment — that "UNEs appear to be 'comparable services' to payphone line services." *Order* ¶ 11. Put more plainly, the Deputy Chief appeared to say that payphone lines must be tariffed at UNE-based rates.

On procedural grounds alone, the *Order* must be withdrawn. The Deputy Chief's pronouncements with respect to both direct cost and overhead loading are without precedent, and the *Order* cites none. Accordingly, the Bureau may not promulgate such requirements, because the Bureau lacks any authority to "act on any applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 C.F.R. § 0.291(a)(2). Indeed, under the circumstances, the Commission itself could not promulgate a new legislative rule like the one at issue here without providing an

[12] *ONA Order*, 6 FCC Rcd at 4531, ¶ 42; *see also NPRM*, 11 FCC Rcd at 6740-41, ¶ 46 (stressing flexibility of the new services test); Second Further Notice of Proposed Rulemaking, *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, 878, ¶ 41 (1995) (same); Second Report and Order, *Provision of Access for 800 Service*, 8 FCC Rcd 907, 911, ¶ 30 (1993) (same); Memorandum Opinion and Order on Second Further Reconsideration, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 7 FCC Rcd 5235, 5238, ¶ 19 (1992) (same); *ONA Order*, 6 FCC Rcd at 4531, ¶ 44 (same).

opportunity for notice and comment. *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993).[13]

These procedural defects are fatal to the order, but that is not all. The Deputy Chief's pronouncements are also plainly wrong as a matter of settled law. First, it is simply incorrect to claim that the new services test requires that direct costs be calculated based on "the use of the most efficient telecommunications technology currently available and the lowest cost network configuration." 47 C.F.R. § 51.505(b)(1). To the contrary, the FCC has stated that direct costs would be a function of a variety of cost factors, including accounting, as opposed to forward-looking costs:

> Under our approach, a LEC introducing new services will be required to submit its engineering studies, time and wage studies, or other cost accounting studies to identify the direct costs of providing the new service, absent overheads.

ONA Order, 6 FCC Rcd at 4531, ¶ 42. Moreover, the FCC made clear that it is for the LEC to develop and to justify, in the first instance, an appropriate calculation of direct costs: "LECs may develop their own costing methodologies, but they must use the same costing methodology for all related services." *Id.*

Moreover, as discussed in detail below, the statement that direct costs must be calculated in a manner consistent with TELRIC stands in direct contradiction to the Commission's statement in the *First Payphone Order* that "the pricing regime under Sections 251 and 252" would *not* apply to payphone services. Indeed, the Commission contrasted that regime with "*Computer III* tariff procedures and pricing" — a clear reference to the new services test. For the Deputy Chief

[13] There can perhaps be no clearer indication of the extent to which the *Order* departs from prior Commission precedent than the alacrity with which independent payphone providers have brought it to the attention of state commissions across the country. To cite just three examples, independent PSPs in Tennessee, Colorado, and New York have all informed their state commissions that the FCC has now required that payphone lines be provided to PSPs at UNE rates. These pleadings are attached as exhibits to the LEC Coalition's Request for Stay.

now to state that the pricing regime under sections 251 and 252 and the new services test require the same calculation of direct costs thus directly conflicts with the *First Payphone Order.*

Likewise the Deputy Chief's holding that permissible overhead loadings for payphone services would be comparable to UNE overhead loading also conflicts with prior orders. As with calculation of direct costs, the Commission has been flexible in its evaluation of overhead loading and has permitted LECs to justify, in the first instance, an appropriate factor.

The Bureau has had occasion in the past to consider what would be an appropriate overhead loading for payphone services. Governed by past Commission precedent, it approved federal tariffs for unbundled payphone features and functions with rates up to 3.4 times direct costs and implicitly approved loadings as high as 4.8 times direct cost:

> With respect to Bell Atlantic's rates, we find no basis in the revised cost data to find that these overhead loadings are unreasonable or produce unreasonable rates in this case . . . . Bell Atlantic has explained that its overhead loadings used to develop the rates for its payphone features and functions are comparable with other tariffed services offered by Bell Atlantic. We also note that Bell Atlantic's overhead loadings are comparable to those of other LECs. Bell Atlantic's ratio of rates to direct costs for payphone features range from a low of zero times greater than the direct costs to a high of 3.4 times greater than the direct costs while the ratio of rates to direct costs for the payphone features offered by other LECs ranges from a low of zero times greater than the direct costs to a high of 4.8 times greater than the direct costs.

Memorandum Opinion and Order, *Local Exchange Carriers' Payphone Functions and Features*, 12 FCC Rcd 17996, 18002 ¶ 13 (1997). The crucial point here is not merely that the Bureau has previously approved overhead loadings factors far greater than those that are permitted for UNEs. Just as important, the Bureau approved the justification of overhead loading by reference to other *tariffed services* — not UNEs, as the *Order* would have it. Nor did the Bureau require that overhead allocations "be based on cost" (*Order* ¶ 11) — it instead approved the use of a loading factor, just as the Commission has done in the past. Yet the *Order* did not explain away any of these inconsistencies, or even cite these prior orders.

B. Requiring the Provision of Retail Payphone Services at TELRIC Rates Violates the Act

The Deputy Chief's holding that LECs must provide payphone services at UNE rates conflicts with the 1996 Act and prior orders in more basic ways as well.

Payphone services are retail services. *See Local Interconnection Order*, 11 FCC Rcd at 15936, ¶ 876. Like business lines, they are provided to "subscribers who are not telecommunications carriers." *Id.* Accordingly, LECs that provide payphone services are subject to competition by facilities-based CLECs, who may purchase necessary elements of the incumbent network at TELRIC rates in order to provide such services. *See generally*, 47 U.S.C. § 251(c)(3); *Local Interconnection Order*.

UNEs, by contrast, are not retail services — indeed, they are not services at all. Instead, they are the "physical facilities of the network, together with the features, functions, and capabilities associated with those facilities." *Local Interconnection Order*, 11 FCC Rcd at 15631, ¶ 258. They are not made available to subscribers, but only to telecommunications carriers for the provision of telecommunications service. *See* 47 U.S.C. § 251(c)(3). That limitation is not accidental. Congress recognized that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service." H.R. Conf. Rep. No. 104-458, at 148 (1996) ("Conf. Rep."). Accordingly, Congress determined that it could promote competition in the local exchange market by permitting competitors access to necessary portions of the incumbent's network at rates "based on . . . cost." 47 U.S.C. § 252(d)(1)(A). In interpreting that requirement, the Commission held that it would apply a new "TELRIC" cost standard to UNEs; it found that its "adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents." *Local Interconnection Order*, 11 FCC Rcd at 15846, ¶ 679.

But the flip-side of this standard is that requiring the provision of retail services to end users at UNE rates would virtually foreclose competitive entry in that retail market — unless the competitor can duplicate the entire network at costs lower than the costs that would be incurred by an ideally efficient provider. This is almost theoretically impossible in many circumstances, and the Commission has already implicitly found this is impossible in the case of loop-based services like retail payphone lines. In its recent UNE remand order, the Commission specifically found that "self-provisioning [loops] is not a viable alternative to the incumbent's unbundled loops." *UNE Remand Order*, ¶ 182. If the incumbent LEC is required to provide the payphone line at UNE rates, in other words, payphone lines will be available only from one, heavily regulated monopoly provider.

That result is antithetical to the Act. If there is a single animating principle behind the 1996 Act, it is the promotion of competition in all telecommunications markets. *Id.* The Act rejects the view that local telephone service is a natural monopoly, and proceeds instead on the understanding that "meaningful facilities-based competition is possible." The goal of the statute is "to promote competition and reduce regulation." Pub. L. No. 104-104, 110 Stat. 56 (1996). To seek to entrench a monopoly in any retail service market is contrary to the Act.

Yet that is precisely what the *Order* sets out to do. By limiting the direct costs of the payphone line to costs comparable with UNE costs, and the overhead loading to costs comparable to UNE overhead loading, the Deputy Chief appears to suggest that payphone rates must be set at UNE prices. This is contrary to law.

First, it is contrary to the statute. Section 251(c)(3) limits the obligation to provide UNEs to telecommunications carriers. 47 U.S.C. § 251(c)(3). As discussed above, that limitation is essential to permit competitive entry into the retail service market. Given the intent of Congress to limit the obligation of section 251(c)(3) to telecommunications carriers, the Commission may not expand that obligation beyond the limits set by Congress.

Second, the Order violates prior Commission orders that recognize this very point. In the *First Payphone Order*, the Commission specifically rejected the suggestion that it require that "the pricing regime under Sections 251 and 252 apply to all Section 276 payphone services offered by incumbent LECs." *First Payphone Order*, 11 FCC Rcd at 20615, ¶ 147. The Commission there held that "the elements and services to be offered under Sections 251 and 252 are not available to entities that are not telecommunications carriers, and many PSPs are not telecommunications carriers." *Id.* Indeed, "Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services." *Id.* In light of these plain statements, the Deputy Chief's contrary holding is incomprehensible.

As noted, the Deputy Chief offered no precedent whatsoever to justify this approach, because there is none. And the only supposed policy justification for its holding is the claim that payphone services are "comparable" to UNEs because both are provided "to an incumbent LEC's competitors and both are subject to a 'cost-based' pricing requirement." *Order* ¶ 11. These points are specious.

First, and more important, PSPs do *not* compete with LECs in the local exchange market, but in the unregulated market for payphone services. The Commission has consistently held that

PSPs are end-users subject to the EUCL;[14] the Commission has further recognized that the lines provided to independent PSPs are subscriber lines.[15] By contrast, UNEs are provided precisely in order to promote competition in the local exchange market — not in the payphone market or any other adjacent market. As noted above, the Commission has already concluded as much; the Deputy Chief's contrary conclusion violates that finding.

The Deputy Chief's conclusion is all the more mystifying because the Commission has already indicated that the services that are "comparable" to payphone services are the services provided by LECs in unregulated, adjacent markets — like the information services market. *See NPRM*, 11 FCC Rcd at 6741, ¶ 46 (payphone services comparable to enhanced services); *see also*, *First Payphone Order*, 11 FCC Rcd at 20613, ¶ 145 (payphone services comparable to provision of CPE). Enhance Service Providers ("ESPs") also compete with LECs — in adjacent markets — just as independent PSPs do. ESPs purchase local exchange service out of local business tariffs.[16] Accordingly, LECs may justify overhead loading on payphone services by reference to the overhead loading on business services. Indeed, that appears to be the conclusion compelled by the Bureau's earlier orders approving federal tariffs for payphone features by reference to "other tariffed services." 12 FCC Rcd at 18002, ¶ 13.[17]

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[14] *See First Payphone Order*, 11 FCC Rcd at 20632, ¶ 180.

[15] *Id.*

[16] In addition, ESPs are permitted to purchase exchange access for interLATA information services out of local business tariffs. First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16132, ¶ 343 (1997).

[17] To the extent the reference in the *Order* to "usage-sensitive elements . . . cross-referenced to another tariff" (*Order* ¶ 7) is intended to refer to ordinary local usage or message units standing alone, the suggestion that such non-payphone-specific elements in state tariffs must satisfy the new services test has no basis in prior orders. The Bureau has identified two categories of offerings that are subject to the new services test. The first is the "basic network payphone line." Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 20997, 21005, ¶ 17 (1997). The second cateogy is "payphone-specific, network-based features and functions used in configuring unregulated payphone operations provided by PSPs or LECs." *Id.* at 21004-05, ¶ 17. Ordinary local usage charges do not fall in the latter category,

Second, to say that UNEs provide the appropriate overhead loading for payphone services because both are "cost-based" is comparable to requiring airbags on push mowers because they are gas-powered. As the Commission has explained before, the agency's use of the term "cost-based" may mean only that "rates should reflect cost causation principles, not that rates must be based upon forward-looking, as opposed to historical, costs." Brief for FCC, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, at 83 (8th Cir. filed Dec. 16, 1997). In other words, the use of that term simply implies that "fixed (or non-traffic sensitive) costs should be recovered through flat charges." *Id.* But the use of that term therefore says *nothing* about the proper amount of overhead loading. And it accordingly provides no support for the Deputy Chief's conclusion that the overhead loading permitted under TELRIC is appropriate for payphone services.

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which includes "call blocking, coin supervision additive, coin signaling transmission additive, coin rating, original line number screening, and IDDD blocking" (*id.* at 21005 n.49) — that is, vertical features of the switch, not usage of the network. Nor is local usage "payphone specific" — rather, usage is "generally available to all local exchange customers and [is] only incidental to payphone service" — like touchtone service, which the Bureau has specifically held is not subject to the new services test. *Id.* at 21005, ¶ 18. And while under certain circumstances — as, for example, with a flat-rated line — a LEC might qualify the basic payphone line under the new services test including some measure of usage, there is nothing in prior orders that requires a LEC to qualify local usage charges alone.

Informally, the Bureau has answered this question inconsistently. Initially, it informed the Maryland PSC that "[l]ocal business usage rates applied non-discriminatorily to all business users and determined by a state commission to be just and reasonable are not subject to the federal new services test." *See* Staff's Response to First Set of Data Requests from People's Telephone Company, *Inquiry into the Payphone Tariffs of Bell Atlantic-Maryland, Inc.*, Case No. 8763 (copy attached as Exhibit B). Later, the Bureau issued a letter that seemed to indicate that a contrary result might be appropriate, though it did not address the matter clearly and did not distinguish its prior statement. *See Letter from Yog R. Varma, Deputy Chief, Common Carrier Bureau to Caroline Vachier, Deputy Attorney General of New Jersey*, 14 FCC Rcd 17091 (1999).

II. THE COMMISSION LACKS JURISDICTION TO SET INTRASTATE PAYPHONE RATES

Sections 1 and 2(a) of the Act give the FCC rate-making authority over interstate service, but section 2(b) provides that "nothing in [the Act] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b). To ensure an appropriate division of regulatory responsibility, Congress empowered the FCC to promulgate separations rules apportioning telephone companies' assets between state and federal rate bases. *See* 47 U.S.C. § 221. In accordance with the FCC's separations manual, the costs of the local loop (for example) are allocated between the interstate and intrastate jurisdictions. The FCC then regulates interstate rates — including the access charge elements that recover the interstate costs of the local loop. The intrastate portion of such costs must be recovered through state rates.

Basic payphone service is subject to this same scheme. The FCC imposes the same access charge elements on independent PSPs (and their providers of interexchange service) as it imposes on other subscribers. Independent PSPs (and LEC PSPs) pay the EUCL; and IXCs pay the PICC and access charges. By contrast, the recovery of intrastate costs through intrastate retail subscriber tariffs remains within the jurisdiction of the states — just as it does with ordinary business lines or residential subscriber lines.

In the Order on review, the Deputy Chief has purported to claim the authority — not to preempt state regulation of retail payphone lines — but to prescribe *intrastate* rates pursuant to its authority under section 276. That claim of authority exceeds the Commission's jurisdiction.[18]

[18] The Commission has indicated in the past that it believes it has jurisdiction to require the filing of payphone tariffs in the interstate jurisdiction. *See First Payphone Order*, 11 FCC Rcd at 20614-16, ¶¶ 146-148; *Order on*

First, the Commission has *never* claimed the authority to set intrastate rates. To the contrary, the Commission held that if state commissions are "unable to review these [payphone service] tariffs" then the state commission could "require the LECs operating in their state to file these tariffs with the Commission." *Order on Recon.*, 11 FCC Rcd at 21308, ¶ 163.[19] But the Deputy Chief explicitly declined to require the filing of a federal tariff. *Order* ¶ 6 ("The submissions we require these incumbent LECs to make are not official tariff filings subject to or required by section 203 of the Act.").

Instead, the *Order* states that the Bureau will "review the incumbent LECs' rates, terms and conditions for a local service, payphone line service, that is normally tariffed in the intrastate jurisdiction." *Order* ¶ 6. But the Bureau may not arrogate to itself the state's power to review state tariffs. The Commission has never authorized such an action in this or in any other context. Again, even if the *Commission* could create such a novel arrangement pursuant to section 276 — and for the reasons we will discuss below, it could not — the Bureau may not take such a novel step. 47 C.F.R. § 0.291(a)(2).

Because the Deputy Chief's action is unlawful and unauthorized by prior Commission orders, the question whether the Commission would have jurisdiction to *preempt* non-discriminatory payphone tariffs on the ground that they are not set sufficiently close to forward-looking costs — and instead require the filing of federal tariffs — does not arise here. In any event, despite past contrary indications by the Commission and the Bureau, the Act confers no

Recon., 11 FCC Rcd at 21307-08, ¶ 162. However, the FCC backed off its determination to require tariffing of the basic payphone line. To the contrary, the Commission made clear that it would "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Order on Recon.*, 11 FCC Rcd at 21308, ¶ 163.

[19] None of the *Payphone Orders* address what action the Commission may take in the case where a state declines to review the tariffs for consistency with the Act.

such power. As noted, section 2(b) of the Act limits Commission jurisdiction over intrastate rates. As a result, the Supreme Court has held that no provision of the Act should be read to confer jurisdiction on the Commission over intrastate rates unless it is "so unambiguous or straightforward as to override the command of § 152(b)." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986).

No provision of the Act grants such authority to the Commission. In the *Payphone Orders*, the Commission claimed that its authority to set rates was derived from "*Computer II*, Section 201, 202, and 276." 11 FCC Rcd at 20614, ¶ 146. But *Computer II* merely stands for the proposition that the FCC may order the detariffing of CPE and preempt any contrary state rule. *See Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982). No one challenges the FCC's authority to detariff payphone CPE, but that is not at issue here. As for section 201 and 202, they apply only to interstate communications — that is the meaning of section 2(b). Thus, if the authority for preemption of state payphone rates arises from the Act, it must come from section 276. But nothing in section 276 can even arguably be read to authorize the Commission to set intrastate[20] payphone line rates for all LECs — much less does any provision do so unambiguously. Accordingly, the Commission lacks jurisdiction to oust traditional state authority over retail subscriber rates — which is, as the Commission has recognized, a local service. *First Payphone Order*, 11 FCC Rcd at 20632, ¶ 180.

This case illustrates the fallacy underlying the Bureau's approach. The WPSC has made clear that it *does* review local rates in order "to enforc[e] a prohibition on cross subsidy . . . and prohibitions on discriminatory practices." *WPSC Letter*. Accordingly, the WPSC *has* ensured

[20] To be sure, the Commission *does* have the authority to require federal tariffing of LEC services used in the provision of interstate telecommunications services. But the basic payphone line tariff recovers costs incurred only in the provision of intrastate services — that is the whole point of separations.

that all intrastate subsidies for payphone services have been eliminated. The Act requires no more.

B. Prescribing a Rate To Be Filed in a State Tariff Violates the Tenth Amendment

In Wisconsin, as elsewhere, tariffs have force and effect of law: the rates that are contained in filed tariffs are lawful rates, and the carrier must charge rates in accordance with its tariff. *See* Wis. Stat. § 196.499(2) (1999); *Minneapolis, St. P. & S.S.M. Ry. Co. v. Menasha Wooden Ware*, 150 N.W. 411, 413-14 (Wisc. 1914), *aff'd*, 245 U.S. 633 (1917); *see also, e.g.*, *Trammell v. Western Union Tel. Co.*, 57 Cal.App.3d 538, 550 (1976) ("[I]t is the PUC, empowered by the Legislature, and not the parties to the transaction, which by approving the tariff fixed the terms and conditions upon which a telegram message is sent."). Accordingly, to say that the Commission can prescribe a rate "even though the prescribed rate may be filed in a state tariff" (*Order* ¶ 6 n.14), is to claim the ability to dictate the content of state law. Such an assertion of power is plainly unconstitutional.

As the Supreme Court has clearly held, the federal government "may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Just as Congress may not require the states to enact a law, the Commission may not require state commissions to accept the terms of a tariff dictated by the federal government. Thus, even if one assumed for the sake of argument that the Bureau could *preempt* state tariffs by requiring the filing of federal tariffs, the course that the Deputy Chief charted in the Order is improper. The Commission may not modify the terms of state tariffs to suit its taste any more than Congress may modify the content of state statutory law. In either case, the federal government exceeds the power granted to it and violates the Tenth Amendment of the Constitution.

CONCLUSION

For the foregoing reasons, the Commission should set aside the Bureau's *Order*, issue a notice, and seek comment on the appropriate course of action in this case.

Respectfully submitted,

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April 3, 2000

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-1
	)	
Order Directing Filings	)	

THE LEC COALITION'S REQUEST FOR A STAY OF THE COMMON CARRIER BUREAU'S "NEW SERVICES TEST" ORDER

The LEC Coalition[1] hereby requests that the Bureau — or, in the alternative, the Commission — grant a stay of the order of the Deputy Chief, Common Carrier Bureau, in CCB/CPD Docket No. 00-1 (the "*Order*"). As described in detail in the Application for Review filed today, the *Order* mis-states the "new services" test — and therefore conflicts with prior Commission orders and oversteps the Bureau's authority. By suggesting that LECs must make retail payphone services available to payphone service providers ("PSPs") at UNE rates, the *Order* violates both the Act — which provides that UNEs shall be made available only to telecommunications carriers — and prior Commission orders. In addition, the Bureau's effort to set state tariff rates exceeds the Commission's jurisdiction and violates the Constitution.

For the reasons set forth in the Application for Review, the LEC Coalition is likely to prevail on its legal challenges to the *Order*. The Commission (or the Bureau) should accordingly grant a stay, because, in its absence, LECs are likely to suffer irreparable harm. Associations of

[1] The members of the LEC Coalition are: Ameritech Corporation, the Bell Atlantic telephone companies (Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company), BellSouth Telecommunications, Inc., GTE Service Corporation, SBC Telecommunications, Inc., Wisconsin Bell (d/b/a Ameritech Wisconsin), and U S WEST Communications, Inc.

independent payphone providers across the country are claiming that the *Order* constitutes specific FCC guidance as to how the states should set rates for retail payphone service offerings. If, in response to the independent payphone providers' representations, state commissions lower state payphone tariffs to TELRIC rates, this will permanently deprive LECs of revenues without any justification and foreclose facilities-based competition in this market for the foreseeable future. A stay is therefore required to ensure that state commissions are not misled into the belief that the *Order* represents a new, binding Commission pronouncement.

By contrast, a stay will not cause any harm to payphone service providers. And because a stay will help to preserve competition in the market for local services — a principal goal of the 1996 Act — a stay is emphatically in the public interest. The Bureau or the Commission should therefore grant the LEC Coalition's request for a stay.

ARGUMENT

In determining whether a stay is appropriate under its rules, the Commission has found it "helpful to rely on the guidelines set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), to determine whether a stay is warranted." Memorandum Opinion and Order, *Complaint of Dianne Feinstein*, 9 FCC Rcd 2698, 2698, ¶ 6 (1994). Under that familiar standard, the Commission will grant a stay if the petitioner can demonstrate 1) that it is likely to prevail on the merits; 2) that the petitioner would be irreparably harmed in the absence of a stay; 3) that the issuance of a stay will not substantially harm other parties; and 4) that a stay is in the public interest. *Id.*; *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

"The test is a flexible one." *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if the moving party demonstrates "either a high likelihood of success and some injury, or *vice versa*." *Id.* In addition, although recoverable monetary loss usually does not constitute "irreparable injury" for stay purposes, *see Wisconsin Gas*, 758 F.2d at 674, this is so only where "adequate compensatory or other corrective relief" is available "in the ordinary course of litigation," *id.* (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925). In other words, unrecoverable monetary loss does qualify as irreparable harm.

I. THE LEC COALITION HAS DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

For the reasons set forth in the LEC Coalition's Application for Review, the *Order* is directly contrary to prior Commission precedent and plainly exceeds the Bureau's authority and the Commission's jurisdiction. There is, therefore, a strong likelihood that the Bureau or the Commission will decide to withdraw the *Order*.

II. THE MEMBERS OF THE LEC COALITION WILL LIKELY SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY

Permitting the *Order* to stand would risk significant and irreparable harm to LECs — and not merely (or even primarily) the LECs who are subject to the filing obligations it imposes. To be sure, the cost in terms of time and human resources that such a filing obligation imposes is real, and whatever the outcome of the proceeding, that expense cannot be recovered. But that harm pales in comparison to the threat that the *Order* poses in *state* regulatory proceedings over which the Commission has no control.

There can perhaps be no clearer indication that the *Order* has departed from prior Commission precedent than the alacrity with which independent payphone providers have brought it to the attention of state commissions across the country. The Tennessee Payphone Owners Association ("TPOA"), for example, has informed the Tennessee Regulatory Authority ("TRA") that "the FCC has just released a decision" that "makes clear that, absent unusual circumstances, payphone rates should be the same as, or consistent with, cost-based UNE prices." *Letter from Henry Walker, Counsel for TPOA to H. Lynn Greer, Jr., TRA*, at 2 (March 21, 2000) (copy attached as Exhibit A). Not surprisingly, the TPOA urges speed — "the parties should reconvene now to determine the impact of the Order and how to implement the Order" (*id.*) — presumably so that the state authority will set payphone rates at UNE levels before the Commission has an opportunity to correct the Bureau's error.

The approach of the Colorado Payphone Association has been similar. "I am writing to report to you that the FCC has now issued more specific guidance to state utility commissions . . . . The Order provides specific guidance to state commissions." *Letter from Craig D. Joyce, Counsel to the Colorado Payphone Association to Bruce N. Smith, Colorado Public Utilities Commission*, at 1 (March 7, 2000) (copy attached as Exhibit B). The Colorado Association insisted that the state commission is only permitted to allow US WEST "the same percentage mark up over cost as is allowed in rates for UNEs . . . . [T]he FCC order now makes clear that the position urged by the Colorado Payphone Association is correct and should be adopted." *Id.* at 3.

The Independent Payphone Association of New York has offered more of the same. They have told the New York Public Service Commission that, the "FCC Order" requires that "[w]holesale pay telephone service rates be established using the same TELRIC methodology as UNE rates, not business rates" with "[o]verhead allocations . . . comparable to the allocations utilized to develop TELRIC based UNE rates." Reply Comments of the Independent Payphone Association of New York, Inc., Cases 99-C-1684 and 96-C-1174, at 11 (N.Y.P.S.C. filed Mar. 20, 1999) (copy attached as Exhibit C).

As the LEC Coalition has explained, the proposition that payphone services must be supplied at "UNE prices" is contrary to the explicit language of prior Commission orders and antithetical to the pro-competitive policies of the Act. But if the independent payphone providers are successful in convincing state commissions that the *Order* constitutes a binding declaration of federal law, state commissions, acting pursuant to state authority, may wrongly require that LECs offer retail payphone services at UNE rates. Once such rates are established under state law, a LEC may have significant difficulty — after the *Order* is corrected — in restoring the appropriate retail rate. And the LEC can never recover the amounts lost because the state commission set a tariff too low in reliance on the *Order*'s incorrect articulation of the requirements of federal law.

By staying the *Order*, the Commission (or the Bureau) can forestall this irreparable harm and send a proper message to state commissions that they should not rely on the *Order* as a correct statement of existing federal law.

III. A STAY WOULD NOT HARM INDEPENDENT PSPs

As the Coalition shows in its Application for Review, the Bureau has no power to address "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." 47 C.F.R. § 0.291(a)(2). Accordingly, staying the Bureau order cannot harm independent PSPs, because the *Order* cannot legitimately change the legal standards applicable to the issues that the independent PSPs are litigating before the state commissions. In other words, if the *Order* were a legitimate restatement of existing law — which it is not — the independent PSPs would be able to establish their positions based on the legal materials that antedate the *Order*. There can thus be no harm in a stay.

IV. A STAY IS STRONGLY IN THE PUBLIC INTEREST

As the Coalition has demonstrated in its Application for Review, the *Order*'s determination that retail payphone services must be provided at UNE rates is antithetical to the spirit of the 1996 Act. UNEs are provided at TELRIC rates to CLECs in order to facilitate competitive entry into markets for retail local exchange services. If retail services are provided at UNE rates, competitive entry is virtually foreclosed — instead, such a policy entrenches a single monopoly provider.

For this reason, a stay of the *Order* — which may help to forestall state commission decisions lowering payphone rates to the TELRIC rates that independent PSPs are advocating — is emphatically in the public interest. So long as payphone line rates are comparable to other comparable business subscriber line rates — which, under the law, they should be — efficient CLECs may offer service using UNEs, either in whole or in part. Staying the *Order*, in other words, helps to promote competition. And there is no goal that is more clearly in the public interest, as defined by Congress in the 1996 Act.

CONCLUSION

The Bureau, or the Commission, should stay the *Order* pending reconsideration or review.

Respectfully submitted,

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