BELLSOUTH

BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214-6301
Fax 615 214-7406

RECEIVED
REGULATORY AUTH.
'00 JUN 30 AM 11 05
OFFICE OF THE
EXECUTIVE SECRETARY

June 30, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Tariff Filings by Local Exchange Companies to Comply with FCC Order 96-439, Concerning the Reclassification of Pay Telephones*
Docket No. 97-00409

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Comments of BellSouth Telecommunications, Inc. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

POSTED 7-6-00

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

COMMENTS OF
BELLSOUTH TELECOMMUNICATIONS, INC.

INTRODUCTION

On June 22, 2000, the Tennessee Payphone Providers Association ("TPOA") filed a Motion for Interim Relief ("Motion") in the above-captioned docket. The Motion requested extraordinary relief, an immediate "interim" reduction in the payphone line rates charged by BellSouth Telecommunications, Inc. ("BellSouth"), without the benefit of pre-filed testimony, cross-examination or a hearing of any kind. No other Local Exchange Company's ("LECs") rates were subject to this request. The Tennessee Regulatory Authority ("TRA"), by Notice of Filing Schedule and Pre-Hearing Conference ("Notice") dated June 23, 2000, invited interested parties to file comments by Noon on Friday, June 30, 2000. As explained below, TPOA's request is unwarranted, procedurally improper, and should be denied.

BACKGROUND

The Telecommunications Act of 1996 (the "Act") specifically addressed the provision of public pay telephone service. 47 U.S.C. 276. The Federal Communications Commission ("FCC" or the "Commission") was directed to prescribe regulations that accomplished several goals in the provision of pay telephone service. 47 U.S.C. 276(b)(1).

Specifically, Section 276(b)(1)(B) requires the FCC 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." To effectuate that mandate, the FCC determined that payphones should be treated as deregulated and detariffed CPE. *First Payphone Order*, 11 FCC Rcd at 20611, ¶ 142. The FCC also concluded that "incumbent LECs must offer individual central office coin transmission services to PSPs [Payphone Service Providers] 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 FCC 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.*[1] In addition, the FCC 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.

The FCC specifically rejected the proposal that it apply "the pricing regime under Section 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

---

[1] 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, including BellSouth, filed CEI plans that were approved in 1997. The

require the application of Sections 251 and 252 to LEC payphone services. In addition, the elements and services to be offered under Section 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 Reconsideration*, 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 FCC 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.*

Commission declined to impose these requirements on non-BOC LECs. *Id.* At 20641-42, ¶ 201.

DISCUSSION

The basis for TPOA's Motion is an order of the FCC Common Carrier Bureau in a Wisconsin case.[2] The Wisconsin Order is at odds with prior FCC Orders, including those outlined above. The Wisconsin Order is not a Final Order of the FCC, and its very application is subject to a request for Stay, filed by the LEC Coalition on April 3, 2000.[3] Moreover, the LEC Coalition has also applied for review of the Common Carrier Bureau's Order, and has replied to oppositions to its application for review and stay.[4] The TPOA conveniently fails to mention that the Wisconsin Order is applicable only to the Wisconsin LECs identified in the Order. (Wisconsin Order ¶ 13).

The TPOA's reliance on the Wisconsin Order as support for a drastic rate reduction, as is proposed in the Motion, is therefore misplaced. Other than the Wisconsin Order and attached affidavits, TPOA offers no support for the unprecedented rate reduction advocated by TPOA.

Turning to the affidavits, TPOA asserts that they demonstrate that "payphone owners are suffering severe economic harm as a result of the unforeseen, three year delay in fixing cost-based rates." (Motion, p. 3). A closer look at TPOA's own affidavits shows a clearer picture of what is really happening to the payphone industry: evolution and change in the telecommunications marketplace. Take, for example, the following excerpts from three separate affidavits attached to TPOA's Motion:

To Whom it May Concern:

---

[2] Order, Wisconsin Public Service Commission Order Directing Filings, CCB/CPD No. 00-1; DA 00-347 (rel. March 2, 2000). (hereinafter referred to as "Wisconsin Order")

[3] A copy of the LEC Coalition Request for Stay is attached as Exhibit 1.

[4] Copies of the LEC Coalition's Application for Review and Reply in Support of its Application and Request for Stay are attached as Exhibit 2 and 3.

The last three years have been a devasting and disappointing time for our payphone company. Revenues have dropped at least 25 to 30% **due to the proliferation of cellphones and prepaid calling cards**. Although there are mechanisms in place designed to collect "dial-around compensation" for payphone owners, I estimate that less than half of what we are due comes our way. (emphasis added).

Robert Kitchener, Owner
Cumberland Telecom

Comes now Affiant, Robert E. Wilson and states and deposes as follows:

3. In the past three years the cost of our payphone lines have gone up significantly due to increases in EULC and PICC charges (approximately \$6.00 per phone). We are now paying \$12.21 per month in these two charges alone. In addition, for a period of 18 months within this same time period, we paid a \$1.03 per line per month flex ANI charge. Also in this same period, we have incurred the number portability charge of \$.35 per line per month. **While costs have gone up, our revenues have decreased due to the popularity of cell phones and calling cards. This has caused our company to go from a growth company to a struggling company.** We are adding new phones but phones are being removed which have become unprofitable for the above reasons. We have removed approximately 25 phones the past two years. I believe this is common throughout our industry. A couple of companies have recently sold out and others are looking to do the same. (emphasis added).

Since March of 1999 until today, I have disconnected fifty-three (53) payphones which, at one time, were profitable, but because of reduced revenue caused by cellphones and lost long distance to 1010xxx calls and prepaid calling cards. Adding to this lost revenue was the increase of the PICC charge by BellSouth from \$1.25 to \$4.31 per payphone. I have five more payphones that have been listed as marginal that will be disconnected in the near future. Instead of a growth company, my business has become a churning company. In other words, I don't buy new payphones; I try to find locations for the ones I have to disconnect.

(emphasis added).

BILL L. GARDNER

Based on TPOA members' own statements, therefore, it is clear that there is much more to the payphone picture than the broad-brush attempt in the Motion to blame BellSouth or the "unforeseen, three year delay" for the industry's problems.

While it would be very helpful for purposes of this case to have a final order from the FCC regarding the Wisconsin situation before proceeding, BellSouth does not oppose setting a procedural schedule in this matter.[5] BellSouth does, however, strenuously oppose the draconian rate reduction requested by TPOA.

Finally, TPOA's request is also procedurally defective. TPOA is asking the TRA to make a dramatic change in interim rates (1) based on a Common Carrier Bureau Order in a Wisconsin case that is at odds with prior FCC orders, (2) without the submission of prefiled testimony, (3) without a hearing or the opportunity for cross-examination, and (4) without addressing the cost studies BellSouth and other parties have submitted in support of their rates. BellSouth objects to such a truncated process, particularly where all of the parties, including TPOA, previously agreed that prefiled testimony and an evidentiary hearing were necessary in this proceeding.[6]

In essence, TPOA is inviting the Authority to award it interim relief more extraordinary than a temporary restraining order. A temporary restraining order is designed to preserve the status quo pending resolution of the litigation. Here, the TPOA is asking the TRA to dramatically alter the status quo based solely on affidavits which, as shown above, do not even support the relief requested in the Motion. Putting aside for the

---

[5] In the TPOA's Agreed 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.

[6] See September 23, 19997 Transcript of Prehearing Conference, p. 4-7.

moment the question of whether the Authority even has the authority to grant the Motion, the Authority should decline TPOA's invitation for procedural reasons alone.

In responding to a related matter raised by TPOA in its Motion, regarding allegations that revenues for the SLC (which is more correctly identified as the End User Common Line – "EUCL") and the PICC, BellSouth denies that recovery of these charges in any way represents "double counting." The New Services Test allows BellSouth to recover its cost of providing service plus an appropriate measure of overhead. Appropriate overhead loadings are measured by reference to comparable services. In this case, public telephone access lines are comparable to business lines. Just as with payphone lines, business line subscribers must pay the federally mandated EUCL and PICC charges. Accordingly, nothing in the TPOA pleading suggests that the overhead loading on payphone lines is inappropriate; to the contrary, the loading remains comparable to the loading on business lines-as federal law clearly permits. It should also be noted that no other state in BellSouth's territory has altered its intrastate rates to reflect the federally mandated EUCL and PICC charges, as TPOA appears to advocate here. Indeed, the FCC requires LECs to charge payphone providers the EUCL.[7]

CONCLUSION

It is evident that the rate reduction advocated by TPOA is unwarranted and procedurally improper. The Authority should decline to accept TPOA's invitation to dramatically change the interim rates without an evidentiary hearing, particularly given that TPOA previously (1) agreed to an evidentiary hearing and (2) requested that this

[7] See Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996, 11 FCC Rcd 20541, ¶ 187 (1996).

proceeding be held in abeyance until after the Authority issued final orders in the 'permanent pricing' docket and in the universal service proceeding. BellSouth does not oppose re-convening this docket, however, and looks forward to presenting its evidence in a hearing before the Authority.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

R. Douglas Lackey
A. Langley Kitchings
675 W. Peachtree Street, Suite 4300
Atlanta, Georgia 30375

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 Petition for Reconsideration filed today, the *Order* mis-states the "new services" test — and therefore conflicts with prior Commission orders and oversteps the Bureau's authority. By indicating 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 Petition for Reconsideration, 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 independent payphone providers across the country are claiming that the *Order* constitutes

[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.

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 Petition for Reconsideration, 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*, 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*, 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 ... the 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 "wholesale 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 (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 Petition for Reconsideration, 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 Petition for Reconsideration, 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,

Michael K. Kellogg
Aaron M. Panner
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the LEC Coalition

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

Michael K. Kellogg
Aaron M. Panner
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the LEC Coalition

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.

---

[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*").

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.

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 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.

[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*").

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[1] 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

[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.

affected by the *Order*, because all of the members or their affiliates offe: ·tail payphone access service pursuant to state retail tariffs. 47 C.F.R. § 1.115(a). It was not : sible for the other members of the LEC Coalition to participate in the proceeding previou because the Bureau acted without providing notice or an opportunity to comment. *Id.* Inde: ident payphone service providers ("PSPs") have represented to state public service com: ssions across the country that the *Order* represents a correct statement of the federal "nev ervices test" that must be applied by those state commissions. If the Commission[2] 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.[3]

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*,[4] 11 FCC Rcd at

---

[2] 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.

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

[4] Notice of Proposed Rulemaking, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 6716

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.

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

(1996) ("*NPRM*").

cap rules." *Id.*[5] 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.

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

[5] 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.

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.[6] The LEC then shows how the price of the service reflects a reasonable overhead loading.[7] One factor to consider in determining whether the loading is reasonable is whether the loading reflects the overhead loading on similar services.[8]

---

[6] 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*").

[7] 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).

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

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 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.[9]

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,

---

[9] *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).

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 opportunity for notice and comment. *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993). [10]

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

---

[10] 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.

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 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;[11] the Commission has further recognized that the lines provided to independent PSPs are subscriber lines.[12] 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*

---

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

[12] *Id.*

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.[13] 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.[14]

---

[13] 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).

[14] 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, 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

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.

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

---

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).

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.[15] First, the Commission has *never* claimed the authority to set intrastate rates. To

[15] 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 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.

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.[16] 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 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

[16] 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.

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[17] 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

[17] 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,

Michael K. Kellogg
Aaron M. Panner
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the LEC Coalition

April 3, 2000

Exhibit A

Public Service Commission of Wisconsin

Cheryl L. Parrino, Chairman
Daniel J. Eastman, Commissioner
Joseph P. Mettner, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Mr. Andrew J. Phillips
Yakes, Bauer, Kindt & Phillips
141 N. Sawyer Street
P.O. Box 1338
Oshkosh, WI 54902-1338

Re: Investigation of Whether Telecommunications Utilities in Wisconsin are in Compliance With the Federal Communications Act, 47 U.S.C. § 151 et seq., and Chapter 196, Wis. Stats., With Respect to Pay Telephone Services Offered in This State 05-TI-156

Dear Mr. Phillips:

At its open meeting of October 28, 1997, the Commission considered the petition of Wisconsin Pay Telephone Association (WPTA) dated July 16, 1997. In the petition, WPTA requested that the Commission determine the cost basis for each network service provided by Wisconsin local exchange carriers (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, determine whether LECs are subsidizing their payphone operations with revenue from noncompetitive services, and determine the amount of refunds, if any, which are due to payphone providers who purchased network services from LECs who failed to comply with the Federal Communication Commission's mandate that network services be provided at cost-based rates.

The Commission noted that its jurisdiction to investigate the rates, terms and conditions of service offered by price-regulated telecommunications utilities under s. 196.196(3), Stats., is very narrowly circumscribed to enforcing a prohibition on cross subsidy under s. 196.204, Stats., and prohibitions on discriminatory practices under s. 196.219, Stats. The Commission observed that, while the relief requested by WPTA would reduce the local interconnection rate charged under intrastate tariffs, the aforementioned statutory remedies under Wisconsin law only address whether the retail rates charged by telecommunications utilities for a competitive telecommunications service recover the underlying cost for that service.

The Commission agreed to hold this matter in abeyance, at the request of petitioner, pending further investigation by the Federal Communications Commission (FCC) of the local exchange interconnection rates. This action will allow WPTA to petition the FCC to apply the federal New Services Test methodology to the local interconnection rates that pay telephone service providers must pay in Wisconsin.

As part of this open docket, the Commission also decided to investigate whether to conduct a rulemaking under s. 196.219(3)(h), Stats. This rulemaking could address the competitive equity

Phone: (608) 266-5481 Fax: (608) 266-3957 TTY: (608) 267-1479
Home Page: http://badger.state.wi.us/agencies/psc/

of the pay telephone market in Wisconsin and establish regulations to prevent the discrimination and undue preference prohibited by that statutory section. The Commission may then reconsider at any time the issue of its jurisdiction to investigate discrimination, cross-subsidy and the rates for network services provided to pay telephone service providers in light of any future rule or other decision of this agency or the Federal Communications Commission regarding the provision of pay telephone service.

If you have any further questions regarding this matter, please contact Dennis Klaila at (608) 267-9780.

Dated at Madison, Wisconsin, November 6, 1997

By the Commission:

Lynda L. Dorr

Lynda L. Dorr
Secretary to the Commission

LLD:DJK:t:\ss\order\05ti156 letter order

cc: Records Management, PSCW
service list

See attached Notice of Appeal Rights.

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in s. 227.53, Stats. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in s. 227.01(3), Stats., a person aggrieved by the order has the further right to file one petition for rehearing as provided in s. 227.49, Stats. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with s. 227.48(2), Stats., and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 4/22/91

Law Offices of

YAKES, BAUER, KINDT & PHILLIPS, S.C.
POST OFFICE BOX 1338
OSHKOSH, WISCONSIN 54903-1338
FAX (920) 231-5496
APPLETON-NEENAH (920) 722-6810
OSHKOSH (920) 231-1500

GARY R. YAKES
JOSEPH N. BAUER
CHRISTOPHER R. KINDT
ANDREW J. PHILLIPS
SUZANNE M. BRAYER

October 30, 1997

VIA FACSIMILE

Cheryl Parino
Daniel Eastman
Joseph Mettner
Commissioners
Public Service Commission of Wisconsin
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Re: Docket No. 05-TI-156

Dear Commissioners:

The purpose of this letter is to reiterate the importance of this docket to the Wisconsin Pay Telephone Association, Inc.

At this time, we have had the opportunity to review the issues list provided to you by the staff as well as "The Wheeler PSC Report" which set forth the contents of your Tuesday, October 28, 1997, meeting. I also spoke with Tom Moore of Pat Essie's office who was present on behalf of the WPTA during that meeting. He informs me that the contents of The Wheeler Report are consistent with the discussions at that meeting.

The WPTA and its membership are in absolute need of rate relief. We all know this to be the case. If this Commission is unable to immediately grant relief by applying the New Services test itself which would result in lowering the tariffed access rates paid by pay telephone providers, then the pay telephone providers must be allowed to turn to the FCC for help in this crucial area. The FCC's payphone order specifically gives the first "kick at the cat" to state commissions to apply the "New Services test" and analyze whether rates are cost based. The FCC specifically stated that states who are unable to review the LEC tariffs in this manner should then have the LECs file their tariffs with the FCC who will, in turn, perform the analysis.

This entire docket was based upon a petition filed by the WPTA and not based upon the Commission's own motion or any other party's prompting. As a result, the WPTA believes an obligation exists to 1) address the petition issues immediately (by taking jurisdiction and applying the New Services test), 2) specifically state that the rate relief issues will not be addressed by the Commission or, 3) specifically state that the Commission is unable to address the rate relief issues. In response to either 2) or 3), the WPTA will then be able to go to the FCC for relief. Since the primary or initial forum for relief is the state commission according to the FCC, we are required to come to you first. We do not have an option as to which venue to begin the proceedings.

In sum, these proceedings are of crucial importance to the WPTA and its membership. If the Commission merely holds the case in abeyance pending a rule-making proceeding under Section 196.219 (3)(h), Wis. Stats., and not pending further FCC action, pay telephone providers will be left in limbo to their financial detriment. That would be an unacceptable resolution to the WPTA's petition.

Copies of this letter are being provided to all parties on the service list and they are certainly entitled to respond.

Thank you.

Yours very truly,

ANDREW J. PHILLIPS

AJP:als

cc: Attorney Michael Erhard (via facsimile)
Scott Girard (WSTA) (via facsimile)
Phyllis Dube (AT&T Communications of Wis.) (via facsimile)
Grant Spellmeyer, Axley Brynelson (via facsimile)
David Hightower (GTE North Incorporated) (via facsimile)
Michael Paulson (Ameritech Wisconsin) (via facsimile)
Scot Cullen, Administrator (via facsimile)

THE WHEELER PSC REPORT

Wheeler Reports, Inc. - 121 E. Main St. #300 - Madison, WI 53703 - (608) 251-1626

Tuesday, October 28, 1997 - All Present - Next Meeting: 1:30 p.m., Thursday, October 30, 1997

1-TI-156. PAY TELEPHONE ISSUES

The commissioners agreed to investigate the need for administrative rules covering the charges telecommunications utilities levy against their own pay telephone operations and those levied to COCOTs. They also agreed to hold open the WPTA petition for an investigation, pending FCC action.

Mettner concluded the rulemaking process was the appropriate mechanism in this case. He said state law permits setting only a floor for rates, while federal law imposes a ceiling for the same. He said the commission, if it acted now, would be limited to raising the floor and would not be able to lower the rates companies charge IPPs. Mettner also concluded generally the PSC did not have the authority to investigate and change rates for services under the Federal Communications Act and FCC rules.

Mettner said the choices the commission had were to decline an investigation of the WPTA petition now and to hold further decisions on the petition in abeyance until the FCC completes its review of intrastate local exchange tariffs of LECs in Wisconsin or go to rulemaking. The focus of the rulemaking would be the relationship between rates charged to company pay phone operations and IPPs and the ability of the PSC to rule on the relationship between them.

Parrino agreed with Mettner's legal analysis, but said the more direct issue was whether there was discrimination in the two charges. She said that was the initial avenue to pursue and liked the idea of the rulemaking. She said the initial investigation should be to see if a rule is necessary if there is a difference in pricing.

Eastman said he was pretty much in concurrence, but noted the WPTA had a right to go to the FCC for relief, but he didn't want the federal government pre-empting Wisconsin. He said he preferred having the WPTA withdraw its petition to the FCC rather than having the PSC hold its case in abeyance. Eastman said the federal pre-emption issue was the risk involved in holding the WPTA petition at the PSC in abeyance.

The commissioners agreed it was up to the WPTA to decide where to go first or to pursue both avenues in tandem, but the PSC would go forward in determining whether a rule was needed. Mettner suggested the PSC needed a petition from the WPTA for rulemaking in this area because exceptions cited so far did not provide the procedure for rulemaking. Staff will prepare a scoping statement to begin the rule-making process.

6630-UR-110. WEPCO RATES. 1-IC-250. INTERVENOR COMP REQUEST

The commissioners effectively voted 2-1 to approve the staff-recommended level of $17,855 in funding for CUB to participate in the interim rate increase request for the 1998 rate case and the interim rate relief phase of the docket. While he wanted a reduction in post hearing work that would have dropped the funding level to about $16,400, Eastman said he would not dissent. Parrino said the staff revisions to the original request for $20,655 were appropriate because of limited time and issues at this point. Mettner agreed the staff revisions were reasonable and noted if intervenor compensation funding was not appropriate at these levels, none would ever be. Eastman was in general agreement with Parrino's suggestion, but felt the 32 hours of post-hearing work could be reduced to 24 hours.

(END)

Exhibit B

PROPRIETARY VERSION

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

IN THE MATTER OF THE INQUIRY INTO THE PAYPHONE TARIFFS OF BELL ATLANTIC - MARYLAND, INC.	))))	CASE NO. 8763

DIRECT TESTIMONY

OF

ANN AMALIA DEAN

on Behalf of the
Staff of the
Public Service Commission of Maryland

September 22, 1997

Q. DO YOU RECOMMEND ANY CHANGES TO THE BUSINESS MESSAGE OR MEASURED USAGE RATE ASSOCIATED WITH PAYPHONE LINES?

A. No. First, BA-MD has not requested that the MDPSC affirm to the FCC that the message or measured usage rate satisfies the federal new services test. Second, Staff had informal discussions with the FCC staff and concluded that state commissions do not need to affirm that message and measured usage that is priced identically for payphone providers and all business end users satisfy the federal new services test. Third, the measured and message usage rates for payphone providers and all business end users are subject to price cap regulation. While Staff does not believe that rate rebalancing should be an issue in the proceeding because BA-MD's existing rates are subject to price cap regulation and because these existing services are not subject to the federal new services test. Staff will respond to the direction of the Hearing Examiner in filing reply testimony.

<u>INTRASTATE PAYPHONE SUBSIDIES</u>

Q. IS STAFF AWARE OF ANY EXPLICIT INTRASTATE PAYPHONE SUBSIDY?

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-01
	)	
Order Directing Filings	)	

THE LEC COALITION'S REPLY IN SUPPORT OF ITS APPLICATION FOR REVIEW AND REQUEST FOR STAY

Michael K. Kellogg
Aaron M. Panner
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the LEC Coalition

May 30, 2000

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Wisconsin Public Service Commission	)	CCB/CPD No. 00-01
	)	
Order Directing Filings	)	

THE LEC COALITION'S REPLY IN SUPPORT OF ITS APPLICATION FOR REVIEW AND REQUEST FOR STAY

The LEC Coalition[1] hereby responds to the oppositions to its Application for Review and Request for Stay of the Order of the Deputy Chief, Common Carrier Bureau, in CCB/CPD Docket No. 00-01 (the "*Order*").

SUMMARY AND INTRODUCTION

In its Application for Review, the LEC Coalition demonstrated that the *Order* violates the 1996 Act and prior Commission orders by requiring state rates for payphone lines be set using TELRIC costs and UNE-comparable overheads. The LEC Coalition also demonstrated that requiring the provision of retail services at UNE rates forecloses competition in the local exchange market, a result that is bad policy and antithetical to the Act. Finally, and in any event, the LEC Coalition demonstrated that the Commission has no authority to review and prescribe *state* payphone rates.

[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 Communications Inc., Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), and U S WEST Communications, Inc.

1. The independent payphone providers ("IPPs") concede that the Bureau could not require LECs to provide payphone lines at UNE-comparable rates. They admit that the *Bureau* could not lawfully apply TELRIC methodology to payphone line rates; they admit that the *Bureau* cannot require overhead allocations at levels comparable to UNEs; and they admit that, if these requirements are applied, that would violate prior Commission orders. Moreover, they have no credible response to the point that the *Order* turns the pro-competitive goals of the Act upside down.

Instead, the IPPs defend the *Order* by insisting that it does not mean what it says. They claim that, although the *Order* refers to an "economic cost methodology that is consistent with the principles the Commission set forth in the Local Competition First Report and Order" (*Order* ¶ 9), the *Order* did not mean to refer to TELRIC. And, although the *Order* states that, "[f]or purposes of justifying overhead allocations, UNEs appear to be 'comparable services' to payphone line services" (*id.* ¶ 11), the IPPs insist that this does not actually mean that ILECs must apply UNE overhead allocations in reviewing payphone line rates.

This is hypocrisy pure and simple. IPPs across the country are busy telling state commissions that the *Order* means exactly what it says and that the States are required to price payphone lines at TELRIC rates, with UNE overhead allocations. For example, the Tennessee Payphone Owners Association informed the Tennessee Regulatory Authority 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.*" *See* Request for Stay at 4 (emphasis added). Similarly, the Independent Payphone Association of New York has said 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." *Id.* at 4-5. And other IPPs are saying much the same thing.

A stay of the *Order* will forestall the possibility that States will adopt this admittedly incorrect interpretation of federal law. The costing methodology adopted in the *Local Interconnection Order*[2] was adopted *solely* for purposes of interpreting the cost standard of sections 251 and 252. This is precisely the methodology that the Commission has explicitly held is *not* applicable to retail payphone line rates — as the IPPs concede. The statement in the *Order* that that pricing methodology must now be used to determine the costs associated with the provision of payphone line services is thus contrary to prior Commission orders. The same is true of the *Order*'s statement that UNEs are "comparable services" to retail payphone lines. UNEs are not comparable to retail subscriber lines in any relevant sense. Accordingly, because the *Order* articulated cost and overhead allocation standards for payphone lines that had never been the subject of notice and comment and because those standards conflict with prior Commission orders, the *Order* should be withdrawn.

2. The IPPs' arguments in defense of the Commission's jurisdiction over intrastate payphone line rates simply emphasize the basic infirmity of that assertion of jurisdiction. Although the IPPs claim that section 276 gives the Commission explicit authority over LECs' intrastate payphone rates, that claim is wrong; the actual language of the 1996 Act includes no such grant of authority. To the contrary, where Congress wished to give the Commission

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

authority over intrastate payphone matters, it knew how to do so explicitly, and it did not do so with regard to payphone line rates.

The IPPs' effort to suggest that the Act's reference to *Computer III* can save the Commission's assertion of jurisdiction is equally unpersuasive, for two basic reasons. First, *Computer III* applies only to interstate services, as the IPPs concede. Second, the reference to *Computer III* was made in the context of regulation of *RBOC* payphone services — not LEC payphone services generally. That is not a distinction that was obscure to the drafters of the 1996 Act. In any event, the Commission implemented *Computer III* non-structural safeguards by requiring LECs to file CEI plans. Those plans have been filed and approved.

Nor do the comments address the LEC Coalition's Tenth Amendment argument. The Commission may not order that a rate be filed in an intrastate tariff, because those tariffs have the status of state law. If the Commission wishes to preempt a state tariff rate, it must adopt a federal tariff rate; it cannot change the content of state law. That is the lesson of *New York v. United States*, 505 U.S. 144 (1992).

ARGUMENT

I. THE *ORDER* VIOLATES THE 1996 ACT AND COMMISSION PRECEDENT

Despite the IPPs' super-heated rhetoric, there is considerable unanimity both about what the new services test requires and about what it does not require. It does require that rates be based on costs, plus a reasonable allocation of overhead. *See* American Public Communications Council ("APCC") at 8. It cannot, however, be read to require that payphone lines be provided at UNE-comparable rates. *See id.* (conceding that, if the *Order* had "tried to superimpose upon

ILEC payphone line rates the entire unbundled network element . . . pricing regime of the Commission's *Local [Interconnection] Order*," it would be unlawful).

In light of the IPPs' concession, the Commission should, in fairness, stay the *Order* — at least that portion of the *Order* that purports to describe the appropriate methodology for calculating payphone access line rates — because the *Order* appears to do precisely what the IPPs concede is unlawful.

A. The "New Services Test" Does Not Require Use of TELRIC

As the LEC Coalition explained in its application, the *Order* states that the new services test requires use of the costing methodology "set forth" in the *Local Interconnection Order*. The only methodology "set forth" in that order is TELRIC, which was adopted as a standard for determining forward-looking economic costs *for purposes of sections 251 and 252*. But the Commission has already said that the cost regime of section 251 and 252 does not apply to the services that LECs provide to payphone service providers ("PSPs"). *First Payphone Order*,[3] 11 FCC Rcd at 20615, ¶ 147 ("Section 276 does not refer to or require the application of Sections 251 and 252 to LEC payphone services.").

The APCC attempts to argue that the reference to the *Local Interconnection Order* was actually intended to refer to the pricing principles of *Computer III* — that is, the new services test. *See* APCC at 9. That argument makes no sense. Plainly, the *Local Interconnection Order* was a departure from prior Commission practice and is in no way intended to reflect the requirements

[3] 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*").

of the new services test. Indeed, the Commission's sole reference to the "new services test" in the *Local Interconnection Order* was to say that it "*roughly approximates* the results of a forward-looking economic cost study" in some circumstances. 11 FCC Rcd at 15911, ¶ 825. Moreover, the Commission expressly noted that at least one aspect of the TELRIC pricing methodology — use of best-available technology — is *not* a component of the "new services test."[4]

In an effort to argue that the reference to the *Local Interconnection Order* does not imply a reference to the pricing standards of sections 251 and 252, the IPPs identify four supposed differences. *See*, *e.g.*, NCPA at 8:

> Had the *Order* imposed the UNE pricing regime, then (1) the Wisconsin ILECs would have been ordered to offer payphone service elements on an unbundled basis, (2) the ILECs would have been ordered to exclude retail costs from their tariffs for payphone services, (3) the ILECs would have been ordered to include unbundling costs, and (4) rate structures that the ILECs would have to apply to payphone services would have been prescribed.

But these arguments cannot save the *Order*. As to the first and third points, they simply have nothing to do with the pricing methodology for payphone access lines. As to the second and fourth points, the IPPs simply have identified two ways in which the pricing principles set forth in the *Local Interconnection Order* cannot be applied to payphone lines; in so doing, they simply emphasize that the *Order* was mistaken on this point.

---

[4] The Commission stated that, in the cases of services that are "completely new," the costs would be based on "best-available technology." 11 FCC Rcd at 15911, ¶ 825. If the new services test itself required use of best available technology, that qualification would not be necessary. In the case of payphone lines, the services are *not* new, but have been offered for many years and are provided using existing plant.

The IPPs also argue that prior Commission decisions applying the new services test mandate forward-looking methodology (*e.g.*, APCC at 10; Wisconsin Pay Telephone Association ("WPTA") at 15), but this hardly justifies the *Order* for at least two reasons. First, the fact that forward-looking cost studies were appropriate in determining "the costs a profit maximizing firm would consider in making a business decision *to provide a new service*" (*see* APCC at 10 (emphasis added); WPTA at 15 (same)) does not necessarily mean that the same costs are relevant to determining the appropriate price for a service that has been offered, using existing plant, over the course of a decade or more. Second, and more importantly, the *Local Interconnection Order* does not simply say that any appropriate forward-looking methodology would suffice; it specifically dictates a new methodology intended to drive down the costs of wholesale components to be provided to competitors in the local exchange market. This is a clear departure from prior Commission practice in tariffing retail rates.[5]

The point here is not that it would never be appropriate to use a forward-looking cost study to justify existing rates under the new services test.[6] Rather, the point is that, in stating that the costing methodology "set forth" in the *Local Interconnection Order* is required under the "new services test," the *Order* both adopts a new rule not consistent with the scope of its

---

[5] *See*, *e.g.*, Memorandum Opinion and Order, *Local Exchange Carriers' Payphone Functions and Features*, 12 FCC Rcd 17996, 18002, ¶ 13 (1997) (approving "overhead loadings . . . comparable with other tariffed services").

[6] The South Carolina Public Communications Association ("SCPCA") points out that some LECs have used TELRIC-type studies to demonstrate that payphone rates cover the direct costs associated with payphone line service. SCPCA at 11. But whether a LEC could *choose* in the first instance to use a TELRIC-type study to measure direct costs for purposes of the new services test is an entirely different question from whether the *Order* correctly *required* LECs to use TELRIC — and no other costing methodology — to satisfy the new services test.

delegated authority and misstates prior Commission orders. That error requires withdrawal of the *Order*.

B. UNEs Are Not "Comparable Services" for Purposes of Determining Overhead Loading Factors

The requirement that the price charged for a service cover at least its direct costs is intended to ensure that new services are not priced at a predatory level. But a provider is not required to price new services at economic cost. Rather, consistent with prior applications of the new services test, the provider also can recover an overhead allocation that is comparable to the overhead recovered from "comparable services." *See* Application for Review at 8.

The *Order* is inconsistent with these established principles in two respects. First, the *Order* indicates that overhead must be cost-justified, rather than calculated by using a loading factor derived from other services. Second, the *Order* indicates that UNEs are "comparable services" to payphone access lines for purposes of applying the test. Both points are wrong, and the IPPs' efforts to defend the *Order* simply emphasize its infirmity.

1. First, the IPPs argue that "overhead allocations are 'costs' and must necessarily be justified with a [forward-looking economic cost] methodology, just as the direct costs for the service must be." NCPA at 8. But the Commission has never suggested that overhead allocations must be justified based on cost, as opposed to justifying the overhead allocations by reference to overhead recovered in the rates for comparable services. *See* Application for Review at 11-12.

Indeed, any other approach would be almost unimaginably complicated, and would seem to require a comprehensive cost model covering everything that the LEC does. As the

Commission has pointed out, "all costs not treated as direct costs are classified as overheads."[7] The NCPA does not suggest a methodology for eliminating all direct costs from the overall costs of the network. This would present an impossible task.

In any event, Commission precedent makes clear that that is not the way the new services test works. Even the APCC admits that overhead allocations are justified if they are "consistent" with the allocations for "comparable services." APCC at 8. Therefore, if business lines are comparable services to payphone lines — and they are — the two services should have comparable overhead allocations.

For these reasons, the IPPs' arguments about "subsidies" have the matter backwards. The APCC argues that, because business rates include a higher allocation of overhead than do residential rates, these rates include a "subsidy" and cannot be "cost-based" within the meaning of the Commission's *Payphone Orders*. *Id.* at 7.[8] This is not correct: as the Commission has explained in other contexts, the fact that rates must be cost-based simply means that costs must be recovered in the same manner as they are incurred — that is, fixed costs must be recovered through fixed charges, and usage-sensitive costs through usage-sensitive charges. Application

---

[7] Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 10 FCC Rcd 244, 345-46, ¶¶ 217-220 (1994).

[8] The APCC ironically relies on the definition of "based on cost" in the *Local Interconnection Order* for justification of its claim that a rate that recovers universal service subsidies cannot be "cost-based." APCC at 7. Again, this is not a proceeding about pricing under sections 251 and 252, it is about satisfying the new services test.

for Review at 17.[9] Accordingly, the amount of overhead costs that are recovered in the rate does not affect whether the rate is based on cost. Contrary to the arguments of the IPPs, a rate can make a "contribution" to the recovery of the joint and common costs of the network and still be cost-based.

However, if a State were to set a payphone line rate that recovered significantly *less* overhead than is recovered through comparable services, the Commission would arguably be creating a situation in which the payphone line was *being subsidized by* the other services that the LEC offers to non-payphone end-users. In contrast to the situation where a payphone line is priced comparably to business lines, subsidizing payphone lines through other local exchange services *is* flatly barred by the terms of section 276. As the Commission has recognized, payphone services must be priced in a way that "remov[es] . . . subsidies from exchange and exchange access services." *Order on Recon.*,[10] 11 FCC Rcd at 21308, ¶ 163; *see* 47 U.S.C. § 276(b)(1)(B).

2. In an effort to preserve the *Order*, the IPPs now insist that it does not *require* LECs to treat UNEs as comparable services for purposes of calculating a reasonable overhead allocation. APCC at 12 ("[T]he *March 2 Order* does not force the ILECs to adopt the same overhead allocations as for UNEs."). That concession is welcome — but it cannot erase the

---

[9] The SCPCA calls this point "remarkable and inscrutable" (at 4), apparently without recognizing that it was quoted from a Commission brief.

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

fundamental mistake in the *Order*, that is, holding that UNEs appear to be "comparable services" to payphone lines.[11]

In defending the *Order*, the IPPs simply repeat the points already set out in the order. They do not become more persuasive with repetition. As for the argument that payphone subscriber lines are comparable to UNEs because IPPs compete with LEC payphone service providers, this ignores the fact that UNEs are provided to competitors *in the local exchange market*. IPPs do not compete in that market; rather, they are retail purchasers of local exchange service. The Commission has specifically held that UNEs are not available to competitors in *vertical* markets — like enhanced service providers ("ESPs') and IPPs — that are not competitors in the local exchange market; rather, UNEs are available only to competing telecommunications carriers. Indeed, ESPs are required to purchase their links to the local network out of intrastate business tariffs, and pay the EUCL — just like PSPs. This reinforces the argument that business lines are comparable to payphone access lines.[12]

---

[11] The APCC attempts to argue that LECs have taken the position in state proceedings that any overhead allocation at all is a reasonable one for purposes of the new services test, so long as the rate covers the direct costs of the service. APCC at 13-14. This is simply a distraction: the LEC Coalition's argument here is that to treat UNEs as comparable services to payphone lines is wrong as a matter of law. Moreover, the LEC Coalition maintains that business lines are comparable services to payphone lines, but even that issue is beside the point for present purposes. Rather, the question is the propriety of the *Order*, which the IPPs cannot defend.

[12] The APCC argues that "the Commission lacked a statutory mandate to address the level of intrastate service rates paid by ESPs." APCC at 15 n.6. Without getting into a debate about Commission jurisdiction to regulate ESP access to the local network, suffice it to say that the APCC's supposed distinction is no distinction at all. In justifying allocation of overhead, LECs may consider business lines comparable to payphone access lines in part because ESPs — which also compete with LECs in vertical markets — also purchase their links to the local network from the same intrastate tariffs. The IPPs do not and cannot refute this basic comparison.

The IPPs have no good answer to this. The APCC argues that other subscriber services do not provide a valid comparison to the subscriber lines provided to PSPs, because they "may be allocated a disproportionate amount of overhead." APCC at 18. This is circular: the question under the new services test is what constitutes an appropriate amount of overhead, and the answer is that the amount of overhead must be determined by reference to comparable services. Because payphone lines are functionally identical to business lines, are used in a way that is analogous to business lines, and have traditionally been priced at the same rate as business lines, it is entirely reasonable to argue that payphone lines are comparable to business lines, and that the overhead allocation used for business lines is appropriate for payphone lines as well.

Significantly, the Commission need not endorse the argument that business lines are comparable to payphone lines to reverse the *Order*. Rather, it need only recognize that the statement in the *Order* indicating that UNEs are comparable services to payphone line services is unprecedented and incorrect.[13] The IPPs can offer no credible arguments to refute this basic point.

C. **The *Order* Would Preclude Competition in the Market for Retail Services to Payphone Providers**

The requirement that LECs calculate the direct costs of payphone lines using TELRIC and overhead allocations by analogy to UNEs would establish payphone line rates at a level that would virtually foreclose facilities-based competition for these services. This result is flatly inconsistent with the most basic goals of the 1996 Act.

[13] Likewise, the Commission need not consider whether the new services test has been properly applied by individual States; the IPPs' criticisms of individual state commission proceedings is therefore purely a distraction here.

Indeed, the IPPs' entire argument — that the *Payphone Orders* and section 276 were intended to effect a profound change in the way that payphone service rates are set — is inconsistent with the Commission's explicit recognition that no such profound change was necessary under its rules. Rather, the explicit focus of the *Payphone Orders* was to ensure that LEC and non-LEC PSPs would have the same features and functions available for provision of service using smart and dumb payphones. The notion that existing payphone rates were in need of reform, by contrast, simply does not appear. To the contrary, the Commission has recognized that existing tariffs might well be "consistent with the requirements of" the *Payphone Orders*. *Order on Recon.*, 11 FCC Rcd at 21308, ¶ 163. It is therefore entirely in keeping with those earlier orders for States to maintain payphone service rates that are consistent with the rates for equivalent business services.

II. THE *ORDER* EXCEEDS THE COMMISSION'S JURISDICTION

The *Order* has two jurisdictional infirmities. First, the Commission is wrong to claim the authority to set intrastate payphone tariffs under the 1996 Act. Such authority over intrastate matters is denied to the Commission except where Congress explicitly authorizes it. Section 276 contains no such authorization.

Second, by claiming the authority to prescribe the contents of *state* tariffs, the *Order* claims an authority that the Commission has never endorsed — indeed, if the Commission were to attempt to dictate the content of state law, it would violate the Tenth Amendment of the Constitution.

1. In attempting to defend the Commission's authority over intrastate payphone access line rates, the IPPs rely on an inaccurate reading of section 276. That section simply does not authorize the Commission to set intrastate payphone rates. To the contrary, section 276 carefully defines the scope of Commission authority over intrastate matters, and it does not extend to this area of core state authority.[14]

Where Congress intended to give the Commission authority over intrastate matters, it did so explicitly, and it did so in two areas. First, Congress required the Commission to "prescribe regulations" that "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed *intrastate* and interstate call." 47 U.S.C. § 276(b)(1)(A). It is hard to imagine a more explicit grant of authority over intrastate matters, but this grant does not extend to the rates that LECs charge PSPs.[15] Second, the 1996 Act proscribes intrastate subsidies *in favor of* payphone operations, authorizing the Commission to adopt regulations that "discontinue the *intrastate* and interstate carrier access charge payphone

---

[14] The APCC suggests that the LEC Coalition's challenge to the Commission's authority over intrastate payphone rates is untimely. It is not. This is the first time that the Commission has required a LEC to file cost information to justify an intrastate payphone service tariff, and it is settled that one may challenge an administrative rule upon enforcement. *See NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987) (indirect attacks on the substantive validity of rules may be brought where those rules are applied to the party, such as in an enforcement proceeding) (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958)); *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979) ("Had the Commission applied one or more of the 1972 regulations [which were not attacked during the statutory limitations period] to the detriment of some individual, he would clearly have been in a position to complain of the order doing so."). Though the Commission claimed certain authority over intrastate payphone rates in the *Payphone Orders*, the fact of the matter is that the Commission backed down and left regulation of intrastate payphone line rates to the States — until now. *Order on Recon.*, 11 FCC Rcd at 21308, ¶ 163.

[15] It was this grant of authority that members of the LEC Coalition defended in opposing a petition for a writ of certiorari challenging the decision of the D.C. Circuit in *Illinois Public Communications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). The LEC Coalition never argued that Congress had preempted all state authority over matters touching on the payphone industry.

service elements . . . and all *intrastate* and interstate payphone subsidies." *Id.* § 276(b)(1)(B); *see also id.* § 276(a)(1) (barring BOCs from subsidizing their payphone operations "from its telephone exchange service operations"). Again, this clear prohibition on intrastate subsidies in favor of payphone operation simply cannot be read to authorize the Commission to *lower* state payphone service rates — if anything, it only authorizes the Commission to ensure that payphone service rates are not *too low*.

Finally, section 276(c) — which provides for preemption of state regulations inconsistent with Commission regulations adopted under section 276 — does not purport to provide the Commission with any independent regulatory authority. *Id.* § 276(c).

The APCC and WPTA attempt to rely on section 276(b)(1)(C) to support the Commission's authority over intrastate payphone rates. APCC at 21-22; WPTA at 6. That provision authorizes the Commission to

> prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III . . . proceeding.

47 U.S.C. § 276(b)(1)(C). As an initial matter, that provision does not apply to all LECs, but only to BOCs, a distinction that was not lost on the drafters of the 1996 Act. Accordingly, it cannot provide the authority for the Commission to preempt state regulation over LEC payphone rates generally.

More important, however, this reference to *Computer III* and the proscription of discrimination in favor of affiliated payphone operations cannot be read to provide the Commission with authority to set intrastate payphone line rates in any circumstances. As the

APCC admits, "the original Computer III 'new services test' safeguard applied only to interstate services." APCC at 22. The APCC argues that the Commission is free to ignore that limitation because "Section 276 specifically directs the Commission to apply its regulations to both interstate and intrastate services." *Id.*; *see also* WPTA at 6 ("the Act specifically directed the Commission to apply the *Computer III* safeguards to pay telephone services both on an interstate and intrastate basis"). As noted, however, this is simply false. The 1996 Act gives the Commission authority over intrastate payphone compensation and the related authority to eliminate intrastate payphone subsidies. It does not give the Commission authority to regulate the rates for intrastate payphone services beyond this.

Moreover, to the extent that the 1996 Act gives the Commission authority to prevent discrimination between LEC-affiliated and independent payphone service providers generally, that non-discrimination rule cannot support the Commission in pre-empting intrastate rates. Rather, the Commission has directly required that LECs make available "any basic network services or unbundled features used by a LEC's operations to provide payphone services . . . to independent payphone providers on a nondiscriminatory, tariffed basis." *Order on Recon.*, 11 FCC Rcd at 21308, ¶ 162. In addition, the FCC has implemented section 276(b)(1)(C) by requiring that BOCs file CEI plans (*First Payphone Order*, 11 FCC Rcd at 20640-41, ¶ 199), which the Bureau has approved. But none of this supports the claim that section 276 permits the Commission to oversee admittedly *nondiscriminatory* intrastate rates.

2. The IPPs claim that the *Order* provides the States a choice — regulate payphone tariffs or see their tariffs preempted. *See* WPTA at 9. But that is not what the *Order* says. Rather, it purports to claim the authority not to preempt state tariffs, but to *modify* state tariffs, which will nonetheless continue to be filed with the State, not with the Commission.[16] But the federal government may not "commandee[r]" a state process in this way — it may not require that the content of *state* tariffs be altered to meet the requirements of a federal regulatory program. Application for Review at 21-22. The IPPs never come to grips with this issue.

III. THE COMMISSION SHOULD STAY THE *ORDER*

The LEC Coalition explained in its Request for Stay that the *Order* threatens irreparable harm because state commissions may rely on the erroneous standards set forth in the *Order* in setting intrastate rates. The IPPs' one answer to this is to argue that this claimed harm is too "speculative" to support a stay. APCC at 25. But IPPs *are* urging state commissions to act quickly to modify intrastate tariffs in reliance on the *Order*; there is something ironic about the IPPs arguing that a stay should not be granted because their state-level advocacy efforts are likely to fail.

The IPPs' claims that a stay threatens them with harm is inconsistent with their underlying position in this proceeding. The IPPs' defense of the *Order* is based on the claim that the *Order* is a faithful restatement of Commission precedent. If this were true, then the IPPs would be perfectly able to pursue state proceedings, even if a stay of the *Order* were granted. Accordingly, they can demonstrate no likelihood of harm that would militate against a stay of the *Order*.

---

[16] This is precisely the distinction that the RBOC/GTE Coalition relied upon in arguing that the Commission's decision to preempt inconsistent state regulations was constitutional. *Cf.* WPTA at 10. If the Commission, instead of informing States that they must adopt a certain regime or see it preempted by federal regulation, had told the States that they would be *forced* to adopt a federally mandated rule as *their own law*, there is no question that such action would violate the Tenth Amendment. Yet this is what the *Order* purports to claim the authority to do.

In a related filing, the APCC and WPTA have argued that the Bureau's decision to extend, on its own motion, the filing date for the required submissions under the *Order* effectively granted the LEC Coalition's request for stay and is subject to review by the Commission for error. But that limited relief is not a stay, and it is inconceivable that the Bureau decision to extend a filing schedule that it set could possibly violate the law. Moreover, it would be extremely unfair if the Commission were to shorten the period for filing, given the burdens associated with preparing the required cost studies. For these reasons, the LEC Coalition opposes the APCC's "Application for Review of the Bureau's Grant of a Stay of ILEC Compliance with the Payphone Order" (filed Apr. 26, 2000).[17]

[17] The LEC Coalition did not receive a service copy of this filing and first became aware of it when the LEC Coalition collected the Oppositions filed to the LEC Coalition's Application for Review. Accordingly, the LEC Coalition asks that the Commission waive the timing requirements of 47 C.F.R. § 1.115(d) and take notice of the LEC Coalition's opposition to the APCC's application.

CONCLUSION

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

Respectfully submitted,

Michael K Kellogg /amg

Michael K. Kellogg
Aaron M. Panner
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for the LEC Coalition

May 30, 2000

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of May 2000, I caused copies of the foregoing document -- The LEC Coalition's Reply in Support of Its Application for Review and Request for Stay -- to be served by hand delivery (as indicated by asterisk) or by first-class mail, postage prepaid, on the following parties:

Federal Communications Commission

Magalie Roman Salas (original + 4) *
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Jane Jackson *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A225
Washington, D.C. 20554

Lynne Milne *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A365
Washington, D.C. 20554

Lenworth Smith, Jr. *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A461
Washington, D.C. 20554

Jon Stover *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-A341
Washington, D.C. 20554

Lawrence Strickling *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C450
Washington, D.C. 20554

Yog Varma *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5-C352
Washington, D.C. 20554

American Public Communications Council	Albert H. Kramer Robert F. Aldrich Dickstein, Shapiro, Morin & Oshinsky, L.L.P. 2101 L Street, N.W. Washington, D.C. 20037-1526
Arizona Payphone Association	Raymond S. Heyman Randall H. Warner Roshka, Heyman & DeWulf, P.L.C. Two Arizona Center 400 North 5th Street, Suite 1000 Phoenix, Arizona 85004
Indiana Payphone Association	Pamela H. Sherwood Sommer & Barnard, P.C. 111 Monument Circle, Suite 4000 P.O. Box 44363 Indianapolis, Indiana 46244-0363
New England Public Communications Council	Paul C. Besozzi Patton Boggs L.L.P. 2550 M Street, N.W. Washington, D.C. 20037
North Carolina Payphone Association	Wade H. Hargrove Marcus W. Trathen David Kushner Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. First Union Capitol Center, Suite 1600 P.O. Box 1800 Raleigh, North Carolina 27602

South Carolina Public Communications Association	John F. Beach John J. Pringle Beach Law Firm, P.A. 1321 Lady Street, Suite 310 P.O. Box 11547 Columbia, South Carolina 29211-1547
Wisconsin Pay Telephone Association, Inc.	Andrew J. Phillips Yakes, Bauer, Kindt & Phillips, S.C. 141 N. Sawyer Streeet P.O. Box 1338 Oshkosh, Wisconsin 54903-1338
International Transcription Services	ITS * 1231 20th Street, N.W. Washington, D.C. 20036

Aaron M. Panner

Aaron M. Panner

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2000, a copy of the foregoing document was served on the parties of record, via hand delivery, addressed as follows:

[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Richard Collier, Esquire Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37243-0505
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	Vincent Williams, Esquire Consumer Advocate Division 426 5th Avenue, N., 2nd Floor Nashville, TN 37243
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	T. G. Pappas, Esquire Bass, Berry & Sims 2700 First American Center Nashville, TN 37219-8888
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	James Wright, Esquire United Telephone - Southeast 14111 Capitol Blvd. Wake Forest, NC 27587
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	Richard Tettlebaum, Esquire Citizens Telecommunications 1400 16th St., NW, #500 Washington, DC 20036
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	Jon Hastings, Esquire Boult, Cummings, et al. 414 Union St., #1600 P. O. Box 198062 Nashville, TN 37219-8062
[ ] Hand [✓] Mail [ ] Facsimile [ ] Overnight	Val Sanford, Esquire Gullett, Sanford, Robinson & Martin 230 Fourth Ave., N., 3d Fl. Nashville, TN 37219-8888

82249

[ ] Hand
[✓] Mail
[ ] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union St., #1600
P. O. Box 198062
Nashville, TN 37219-8062