BASS, BERRY & SIMS PLC
A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

R. DALE GRIMES
TEL: (615) 742-6244
FAX: (615) 742-2744
dgrimes@bassberry.com

AMSOUTH CENTER
315 DEADERICK STREET, SUITE 2700
NASHVILLE, TN 37238-3001
(615) 742-6200

www.bassberry.com

OTHER OFFICES:
NASHVILLE MUSIC ROW
KNOXVILLE
MEMPHIS

'03 APR 3 PM 2 38

TN REGULATORY AUTHORITY
DOCKET ROOM

April 3, 2003

VIA HAND DELIVERY

Ms. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: ***Small Telephone Companies Tariff Filings Regarding Reclassifications of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128, TRA Docket No. 97-01181***

Dear Chairman Kyle:

Pursuant to the March 13, 2003 Notice of Rescheduled Pre-Hearing Conference, enclosed please find the original and 13 copies of the Reply Brief of Coalition of Tennessee Small Local Exchange Companies to the Attorney General's Supplemental Brief Concerning Cost-Based Rates and Removal of Subsidies Pursuant to 47 U.S.C. § 276(b)(1)(B) for filing in the above-referenced docket. Also enclosed is an additional copy of the Reply Brief, which I would appreciate your stamping as "filed," and returning to me by way of our courier.

Should you have any questions with respect to this filing, please do not hesitate to contact me at the telephone number listed above.

Very truly yours,

R. Dale Grimes / by gci

R. Dale Grimes

RDG/gci
Enclosures
cc: Certificate of Service List
Lynn Questell, Esq. (via hand-delivery)
Mr. Bruce H. Mottern
Ms. Desda Hutchins
Mr. Gregory Eubanks
Mr. Herb Bivens
Ms. Susan W. Smith
Mr. Terry M. Wales

2371041.1

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

'03 APR 3 PM 2 38

TN REGULATORY AUTHORITY
DOCKET ROOM

IN RE:	)	
	)	
SMALL TELEPHONE COMPANIES	)	
TARIFF FILINGS REGARDING	)	**Docket No. 97-01181**
RECLASSIFICATION OF PAY TELEPHONE	)	
SERVICE AS REQUIRED BY FEDERAL	)	
COMMUNICATIONS COMMISSION (FCC)	)	
DOCKET 96-128	)	

REPLY BRIEF OF COALITION OF TENNESSEE SMALL LOCAL EXCHANGE COMPANIES TO THE ATTORNEY GENERAL'S SUPPLEMENTAL BRIEF CONCERNING COST-BASED RATES AND REMOVAL OF SUBSIDIES PURSUANT TO 47 U.S.C. § 276(b)(1)(B)

I. INTRODUCTION

The Coalition of Tennessee Small Local Exchange Companies[1] (the "Coalition"), pursuant to the Order of the Pre-Hearing Officer issued March 12, 2003, and amended by Notice issued March 13, 2003, hereby responds to the Supplemental Brief Concerning Cost-Based Rates and Removal of Subsidies Pursuant to 47 U.S.C. § 276(b)(1)(B) filed by the Consumer Advocate and Protection Division of the Attorney General's Office ("CAPD") on February 26, 2003, and adopted by the Tennessee Payphone Owners Association.

The CAPD's Supplemental Brief was filed to respond to two questions posed by the TRA: (1) does 47 U.S.C. § 276(b)(1)(B) require cost-based rates, and (2) have the previous actions of the TRA removing subsidies satisfied the requirements of 47 U.S.C. § 276(b)(1)(B)?

[1] The Coalition consists of the following companies: (1) Ardmore Telephone Company, Inc.; (2) the CenturyTel, Inc. Companies in Tennessee consisting of (a) CenturyTel of Adamsville, Inc., (b) CenturyTel of Claiborne, Inc., and (c) CenturyTel of Ooltewah-Collegedale, Inc.; (3) Loretto Telephone Company, Inc.; (4) the TDS Telecom Companies in Tennessee consisting of (a) Concord Telephone Exchange, Inc., (b) Humphreys County Telephone Company, (c) Tellico Telephone Company, Inc., and (d) Tennessee Telephone Company; (5) the Telephone and Electronics Corp. ("TEC") Companies in Tennessee consisting of (a) Crockett Telephone Company, Inc., (b) Peoples Telephone Company, Inc., and (c) West Tennessee Telephone Company, Inc.; (6) United Telephone Company, Inc.; and (7) Millington Telephone Company, Inc.

The CAPD argued that 47 U.S.C. § 276(b)(1)(B) does require non-BOC LECs such as the Coalition members to adopt cost-based payphone access line rates, and that the actions of the TRA in Docket No. 97-00409 adopting such rates for the large LECs satisfied the requirements of 47 U.S.C. § 276(b)(1)(B). On both counts, the CAPD's positions are without merit.

II. ARGUMENT

A. 47 U.S.C. § 276(b)(1)(B) Does Not Require The Coalition Members To Implement Cost-Based Rates.

It is undisputed that the plain language of § 276(b)(1)(B) only requires the *FCC to prescribe regulations* that:

> (B) 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, in favor of a compensation plan as specified in subparagraph (A) . . . .

Thus, compliance with this subsection is totally dependent on the actions of the FCC in prescribing such regulations. Moreover, this subsection, the only portion of § 276 that even arguably applies to the non-BOC LECs, *only requires the elimination of subsidies of LEC payphone operations*, but does not regulate the *setting of payphone rates* at all. In other words, the issue addressed by § 276(b)(1)(B) is not whether the rate a LEC charges a competing payphone service provider ("PSP") for a payphone access line is somehow subsidizing LEC operations, but rather whether LEC payphone services are being subsidized by other rates charged by the LEC. This is made crystal clear by the FCC's recent Order in which it explained how it discharged its responsibility under § 276(b)(1)(B):

> To discontinue access charges and subsidies under section 276(b)(1)(B), we concluded that, in order to receive compensation for completed calls originating from its payphones, a LEC PSP "must be able to certify" that it has complied with several requirements, including the institution of "effective intrastate tariffs reflecting the removal of charges that recover the costs of

> payphones and any intrastate [payphone] subsidies." We also required that all incumbent LEC payphones be treated as deregulated and detariffed customer premises equipment (CPE).

In the Matter of Wisconsin Public Service Commission Order Directing Filings, CPD No. 00-01 (Memorandum Opinion and Order, ¶ 11) (January 31, 2002) (hereinafter "2002 Wisconsin Order"). The FCC's actions under § 276(b)(1)(B) did not include, or even mention, the setting or regulation of payphone access line rates.

In its Supplemental Brief, the CAPD argues, without citation of any authority or explanation of any kind, that the use of cost-based rates for payphone service lines to competing payphone service providers ("PSPs") is the best available means to eliminate subsidies as required under § 276(b)(1)(B). This represents a fundamental misunderstanding of the requirements and meaning of § 276(b)(1)(B) as set forth above.

Moreover, in making this argument, the CAPD blurs the distinction between § 276(b)(1)(B) and § 276(b)(1)(C). While the former applies only to the elimination by all LECs of subsidies of their payphone operations, the FCC has construed the latter to require "cost-based" payphone service line rates only with respect to the BOCs. The FCC apparently appreciated the broader application of § 276(b)(1)(B) to interstate and intrastate subsidies with respect to all LECs' payphone operations; at the same time it recognized its lack of authority to regulate the payphone service line rates of the non-BOC LECs by requiring use of the "new services test" or some other cost-based test for the setting of those rates. If implementation of the new services test is necessary or somehow serves the goal of eliminating subsidies as required under § 276(b)(1)(B), surely the FCC would not have failed to mandate non-BOC LECs to apply cost-based rates to eliminate any such subsidies in the 2002 Wisconsin Order. Rather than doing so, however, the FCC expressly found that it did not have jurisdiction over the payphone line rates of non-BOC LECs, thereby making it clear that cost-based rates are not relevant to the elimination of the subsidies addressed in § 276(b)(1)(B. *Id.* at ¶ 31. Thus, the FCC's failure to impose cost-based payphone access line rates on non-BOC LECs -- where, according to the CAPD, the FCC would have had the authority and opportunity to do so in order to eliminate subsidies -- necessarily disproves the CAPD's argument.

The CAPD further bases its arguments on the fact that in the *Interim Order* issued in Docket No. 97-00409, the TRA applied a cost-based methodology to the payphone access line rates of certain non-BOC LECs, and asserts that in the name of consistency the same methodology must be applied here. This reasoning is without merit.

First, the TRA separated the Coalition members from Docket No. 97-00409 and created this Docket for the very reason that small rate-of-return companies should be "spared the expense of preparing and producing cost studies for the sole purpose of establishing pay telephone rates." *See Order of Pre-Hearing Officer Continuing Separation of the Docket No. 97-01181, Granting the Tennessee Small Local Exchange Companies Petition to Intervene in Docket No. 97-00409*, TRA Dockets No. 97-00409 and 97-01181 (July 31, 2000). Requiring the Coalition members now to prepare cost studies for this purpose ironically flies in the face of the very precept that governed the establishment of this Docket. Moreover, the same rate making methodology used with large LECs operating under price regulation plans does not even apply to the small rate-of-return telephone companies.

Second, the TRA entered the *Interim Order* prior to the ruling by the FCC in the 2002 Wisconsin Order, which set forth the critical distinction between BOCs and other LECs for purposes of establishing payphone access line rates under § 276. Pursuant to that Order, BOCs must set such rates according to a cost-based methodology, such as the "new services test," but non-BOC LECs are arguably required only to eliminate any subsidies of their own payphone operations by other rates. This distinction was not clear from the FCC's earlier Orders pertaining to payphone issues. The CAPD bases its arguments almost exclusively on Orders of the FCC and TRA entered prior to the 2002 Wisconsin Order. Such Orders simply have no relevance to the issues now under consideration in this Docket. An effort to maintain consistency with those Orders where the circumstances have changed is unjustified and misguided and will harm the Coalition members.

In addition, it is clear that the FCC and Congress found a distinction between the BOCs and the other LECs with respect to their payphone line services. Allowing "consistency" with the treatment of a BOC in Docket No. 97-00409 to dictate the resolution of the issue with respect to non-BOC LECs in this Docket would override this distinction and interfere with the legislative intent of Congress in enacting § 276.

B. <u>The TRA's Previous Actions Have Satisfied The Requirements of 47 U.S.C. § 276(b)(1)(B).</u>

The Coalition has explained how the actions of the TRA in 1997 satisfied the requirements of 47 U.S.C. § 276(b)(1)(B) to eliminate subsidies. *See Brief of Coalition of Tennessee Small Local Exchange Companies Regarding the Requirements of and Compliance with 47 U.S.C. § 276(b)(1)(B)*, (filed February 26, 2003). The CAPD argues that it was the actions taken more recently in Docket No. 97-00409 that complied with this statute. This is incorrect. The latter rulings of the TRA have no bearing on the issues presently before this agency. Neither consistency with rulings issued before the landmark decision in the 2002 Wisconsin Order, nor consistency with the resolution of issues with other LECs prior to the 2002 Wisconsin Order, provide appropriate guidance for the TRA in this matter.

In compliance with § 276(b)(1)(B) and FCC rulings, Coalition members filed tariffs with the TRA in 1997 for the purpose of eliminating subsidies. In addition, some members of the Coalition reduced their Common Carrier Line Rates to remove subsidies specifically identified by the TRA. Thus, the purpose and requirements of § 276(b)(1)(B) have been met.

III. CONCLUSION

For all of the foregoing reasons, the actions of the TRA and the Coalition's compliance with the TRA's rulings fully satisfy the mandate of § 276(b)(1)(B). Accordingly, the Coalition respectfully requests the TRA to dismiss this Docket in order to spare them the further burden and expense of regulatory proceedings on this issue.

DATED: April 3, 2003.

Respectfully submitted,

R. Dale Grimes (BPR No. 6223)
Andrea McKellar (BPR No. 19618)
BASS, BERRY & SIMS, PLC
AmSouth Center
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238-3001
Telephone: (615) 742-6244

Attorneys for the Coalition of Tennessee Small Local Exchange Companies

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on the following, by hand delivery, postage prepaid, this the 3 day of April, 2003:

Guy M. Hicks, III, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300

James B. Wright, Esq. (via regular mail)
United Telephone-Southeast, Inc.
14111 Capital Boulevard
Wake Forest, North Carolina 27587-5900

Timothy C. Phillips, Esq.
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202

Henry M. Walker, Esq.
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, Tennessee 37219-8062

Guilford F. Thornton, Jr., Esq.
Stokes, Bartholomew, Evans & Petree
Suntrust Center
424 Church Street, Suite 2800
Nashville, Tennessee 37219-2386

J. Richard Collier, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Jon Hastings, Esq.
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, Tennessee 37219-8062

R. D. Mennies

5036383.2