Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation	)	
Provisions of the Telecommunications	)	
Act of 1996	)	

OPPOSITION OF BELLSOUTH
TO APPLICATIONS FOR REVIEW

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"), through undersigned counsel and pursuant to § 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, hereby oppose the Applications for Review ("Applications") filed by Excel Telecommunications, Inc. ("Excel") and Telco Communications Group, Inc. ("Telco") on May 5, 1997 and May 15, 1997. The Excel and Telco applications are substantively identical and were filed by the same counsel on the same dates. Therefore, BellSouth files this consolidated opposition to all four Applications.

I. Introduction.

The May 5 Applications challenge the *Waiver Order* released by the Common Carrier Bureau on April 4, 1997.[1] In that order, the Bureau waived the Commission's deadline for local exchange carriers ("LECs") to file federal tariffs for unbundled features and functions that "are

[1] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order, DA 97-679, released April 4, 1997 ("*Waiver Order*").

payphone-specific, network-based features and functions used in configuring unregulated payphone operations provided by PSPs or LECs."[2] The Order provided that:

> Any LEC that files federal tariffs for unbundled functionalities, as clarified herein, within 45 days of the release date of the instant Order will be eligible to collect the payphone compensation provided in the Payphone Reclassification Proceeding on April 15, 1997, as long as that LEC has complied with all of the other requirements set forth in paragraph 131 (and paragraph 132 for the BOCs) of the Order on Reconsideration.[3]

The May 15 Applications challenge the *Second Waiver Order* released by the Common Carrier Bureau ("Bureau") on April 15, 1997.[4] The *Second Waiver Order* permits LEC payphone operations to begin receiving interim compensation as of April 15, 1997, conditioned on the LECs filing any necessary intrastate tariffs to meet the requirements of that order no later than May 19, 1997.[5]

The Applications contend that the Bureau orders violate the Commission's prior payphone orders which, according to Excel and Telco, conditioned LEC receipt of interim compensation on compliance with certain Commission requirements for implementing § 276 of the Telecommunications Act of 1996. As BellSouth demonstrates below, the Commission could not lawfully condition LEC receipt of interim payphone compensation on the pricing of intrastate network services, and its attempt to do so was arbitrary and capricious and in excess of the Commission's jurisdiction. The waivers granted by the Bureau had the effect of correcting the legal error committed by the Commission. If the Commission were now to reverse the waiver

---

[2] *Waiver Order*, ¶ 17.

[3] *Waiver Order*, ¶ 21.

[4] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order, DA 97-805, released April 15, 1997 ("*Second Waiver Order*").

[5] *Second Waiver Order*, ¶ 19.

orders of the Bureau, and deny LECs the right to receive the payphone compensation mandated by the statute, the Commission would commit reversible error.

II. The Commission has no statutory authority to condition the receipt of fair compensation by LEC payphone operations on the pricing of intrastate network services.

In § 276, Congress spelled out precisely those areas in which the Commission was to prescribe rules. Indeed, § 276(b)(1) is entitled "Contents of Regulations." There Congress spelled out five areas in which the Commission was to prescribe regulations: (A) establish a per call compensation mechanism to ensure that payphone providers "are fairly compensated for each and every completed intrastate and interstate call using their payphone" with certain exceptions; (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); (C) prescribe a set of nonstructural safeguards to enforce the nondiscrimination and cross-subsidy prohibition imposed on the Bell operating companies ("BOCs") in § 276(a), "which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III" proceeding; (D) to permit the BOC payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider over the selection of the prescribed interexchange carrier from the BOC's payphones (unless the Commission finds that such right is not in the public interest), and (E) to provide for all payphone service providers to have the right to negotiate with location providers over the selection of the prescribed interexchange carrier. Section 276(c) permits the Commission to preempt any state requirements that are inconsistent with its regulations.

Thus, the Commission was authorized to adopt rules to eliminate the subsidy elements supporting LEC payphone operations contained in access and other charges for network services, be they intrastate or interstate in nature. Nothing in § 276, however, confers jurisdiction on the Commission over intrastate rates and charges except as required to carry out the specific responsibilities described above. Specifically, the Commission is empowered to ensure a subsidy-free, non-discriminatory environment for LEC payphone operations and the independent payphone providers, and to ensure that LECs do not subsidize their payphone operations from their exchange and exchange access operations. However, if a state commission determines that both LEC and independent payphone providers should pay a price for local exchange services, including the payphone lines, that makes a contribution to universal service, nothing in § 276 authorizes the Commission to preempt that judgment. Under such circumstances, § 2(b) of the Communications Act fences off such state commission decisions from FCC jurisdiction. The ongoing regulation of intrastate rates for payphone lines is beyond the Commission's jurisdiction. There was thus no lawful basis for the FCC to dictate ratemaking standards for pricing intrastate lines and other network services.

III. The Commission confuses its statutory responsibility to ensure fair compensation to payphone service providers with a grant of preemptive authority over the pricing of intrastate network services.

The orders in question seem to confuse the Commission's authority to ensure just compensation for payphone service providers with jurisdiction to mandate prices for intrastate network services. While § 276 does not confer on the Commission jurisdiction to prescribe the pricing applicable to the local exchange services utilized by payphone providers, BellSouth acknowledges the Commission's jurisdiction to preempt the local coin rate that was previously subject to state commission regulation. The Commission's authority over the local coin rate is necessary to ensure that the deregulated payphone operators are "fairly compensated for each and every completed intrastate and interstate call using their payphone."[6] Preemption of the local coin rate is necessary since that rate will be charged by the deregulated payphone operations and must be adequate if subsidies are to be eliminated and widespread deployment of payphones encouraged. Thus, § 276(b)(1)(A) confers jurisdiction over the local coin rate charged by payphone providers. But nothing in § 276 confers FCC jurisdiction over intrastate exchange services or exchange access services that remain regulated after payphone operations are segregated and deregulated.

Section 2(b) of the Communications Act fences off from FCC reach intrastate ratemaking except where there is an express grant of such jurisdiction to the Commission. Since § 276 does not expressly grant to the Commission jurisdiction over the pricing of intrastate exchange and exchange access services, except to the extent necessary to eliminate subsidies flowing to LEC payphone operations, the Commission has no jurisdiction to require the states to apply the federal "new services test" in pricing intrastate payphone lines and related features and functions.

IV. Even if the Commission has jurisdiction, the application of the federal "new services test" to intrastate services that are not "new" is arbitrary and capricious.

Even if the Commission could lawfully preempt intrastate ratemaking over payphone lines and related features (which it cannot), the federal "new services test" would not apply by its own terms, since the basic payphone lines were already tariffed in the states, and therefore did not

[6] 47 U.S.C. § 276(b)(1)(A).

constitute a "new" service. The Commission's decision to require the states to apply the federal "new services test" to existing, intrastate services therefore was arbitrary and capricious.[7]

The waiver orders treat the federal "new services test" as if that mechanism establishes a bright-line standard to evaluate tariff filings. However, the federal "new services test" is not really a test at all: it simply requires carriers to document that the rates charged for new services cover the direct cost of providing the service and make a reasonable contribution to joint and common costs. Federal regulators must still evaluate the reasonableness of the level of contribution and make a value judgment in that regard. Even if the states apply the federal "new services test", state regulators remain free under the statute to price intrastate services, including payphone lines, to make a contribution level the state regulators deem appropriate. The only limitation on that jurisdiction countenanced by § 276 is that the resulting revenues may not be used to subsidize the deregulated payphone operations. Since the application of the federal "new services test" does not constrain the judgment of state regulators as to the appropriate level of contribution to be made by payphone lines and related services, it was arbitrary and capricious for the Commission to require the evaluation of the charges for intrastate payphone lines using the federal "new services test".

The Commission justifies its imposition of federal tariffing requirements and the application of the federal "new services test" to intrastate payphone lines as necessary "to avoid possible subsidies and discrimination."[8] The application of the federal "new services test" to

---

[7] The federal "new services test" is a creature of the Commission's price cap rules. See 47 C.F.R. § 61.49(g)(2). Thus, even in the interstate jurisdiction, the "new services test" is not applied to the rates charged by non-price cap LECs.
[8] *Waiver Order*, ¶ 15.

intrastate services is not necessary to accomplish that purpose.[9] The Commission's cost accounting rules, including the Part 32 and Part 64 rules, are more than sufficient to ensure that the deregulated payphone operations are not the beneficiaries of any contribution generated from LECs' regulated network operations, including the regulated payphone access line and associated features and functions tariffed at the state level.[10] Similarly, nothing in § 276 authorizes the Commission to require tariffing intrastate exchange services or exchange access services in the federal jurisdiction.

V. The Bureau's Orders have saved the Commission from a serious legal challenge by the LECs, and should be affirmed.

Despite the lack of Commission jurisdiction to impose intrastate and interstate tariffing requirements, including the imposition of a federal ratemaking standard on state regulators, BellSouth has voluntarily filed state and federal tariffs that meet the requirements of the Bureau orders. BellSouth did so in order to remove any uncertainty regarding the right of its payphone subsidiary to receive interim compensation as of April 15, 1997. Contrary to the arguments advanced by Excel and Telco, the right of BellSouth's payphone subsidiary to receive fair compensation "on each and every completed intrastate and interstate call" is a creature of statute, and the Commission cannot deny or delay that right. Having ordered the elimination of the federal and state subsidy mechanisms that previously were the source of that compensation, the Commission must allow the LEC payphone operations to receive their statutorily mandated compensation through the new compensation mechanism as of April 15, 1997. Thus, the

---

[9] As discussed above, the federal "new services test" establishes a cost floor (direct cost plus a reasonable share of joint and common costs) to ensure that the service being offered is not priced too low. It does not establish a ceiling on the prices for new services.

[10] State regulators generally follow the Commission's Part 32 and Part 64 Rules for intrastate ratemaking purposes.

arguments advanced by Excel and Telco favoring delaying the receipt of interim compensation are without merit, and any Commission action in that direction would be ultra vires.[11]

Excel and Telco have been receiving a windfall from BOC payphone operations. While they have received the revenues from calls placed from BOC payphones, they have had no obligation to pay compensation for the use of those payphones in the past. While it is clearly in the financial self-interest of these carriers to try to delay paying for what they have previously received free, Congress has prohibited the continuation of that inequity.

In light of the segregation and deregulation of the LEC payphone operations, there is no possibility that those operations can be receiving subsidies after April 15, 1997. The Bureau correctly waived Commission requirements that would have blocked the receipt of the compensation required by the statute as of that date. Indeed, had the Bureau not entered the waivers in question, BellSouth would have had no alternative but to challenge the Commission's payphone orders, as interpreted by the Bureau, in court. The waivers avoided a legal challenge to

[11] This is not to suggest that the Commission is powerless to enforce its orders. The Commission has ample enforcement mechanisms at its disposal under the Communications Act. BellSouth simply submits that withholding statutorily mandated compensation is not among those mechanisms.

the Commission's jurisdiction to impose the requirements contained in the payphone orders by the BOCs and other LECs. The Commission should deny the Applications for Review of Excel and Telco.

Respectfully submitted,

BELLSOUTH CORPORATION and
BELLSOUTH TELECOMMUNICATIONS, INC.
By their attorneys:

M. Robert Sutherland
Theodore R. Kingsley
1155 Peachtree Street N.E., Suite 1700
Atlanta GA 30309
(404) 249-4839

May 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of MAY, 1997, serviced all parties to this action with the foregoing OPPOSITION OF BELLSOUTH TO APPLICATIONS FOR REVIEW, filed May 5, 1997 and May 15, 1997, by hand service or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.

Julia W. Spires

Julia W. Spires

CC DOCKET NO. 96-128

AT&T
Mark C. Rosenblum
Peter H. Jacoby
Richard H. Rubin
Room 325213
295 North Maple Avenue
Basking Ridge, NJ 07920

MCI Telecommunications Corporation
Mary J. Sisak
Donald J. Elardo
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Sprint Corporation
Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
1850 M Street, N.W.
Washington, D.C. 20036

Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
(Attorneys for Inmate Calling Services
Providers Coalition)
2101 L Street, N.W.
Washington, D.C. 20037-1526

Albert H. Kramer
Robert F. Aldrich
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
(Attorneys for American Public
Communications Council)
2101 L Street, N.W.
Washington, D.C. 20037-1526

Office of the People's Counsel for the
District of Columbia
Michael A. McRae
Julie E. Rones
1133 15th Street, N.W.
Suite 500
Washington, D.C. 20005

Southwestern Bell Telephone Company
Robert M. Lynch
Durward D. Dupre
Mary W. Marks
J. Paul Walters, Jr.
One Bell Center, Room 3520
St. Louis, Missouri 63101

National Telephone Cooperative Association
David Cosson
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Cable & Wireless, Inc.
Rachel J. Rothstein
8219 Leesburg Pike
Vienna, VA 22182

David L. Hill
Audrey P. Rasmussen
O'Connor & Hannan, L.L.P.
Attorneys for PageMart II, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006-3483

Oklahoma Corporation Commission
Lawrence R. Edmison, OBA #2621
Cece L. Wood, OBA #12937
P O Box 52000-2000
Oklahoma City, OK 73152-2000

InVision Telecom, Inc.
C. Dougla McKeever
1150 Northmeadow Parkway
Suite 118
Roswell, GA 30076

Danny E. Adams
Steven A. Augustino
KELLEY DRYE & WARREN, LLP
Attorneys for LDDS World Com
1200 Nineteenth Street, N.W.
Sutie 500
Washington, D.C. 20036

Public Utilities Commission of the
State of California
Peter Arth, Jr.
Edward W. O'Neill
Patrick S. Berdge
505 Van Ness Avenue
San Francisco, CA 94102

Andrew J. Phillips
YAKES, BAUER, KINDT & PHILLIPS, S.C.
Counsel for Wisconsin Pay Telephone Association, Inc.
141 North Sawyer Street
P. O. Box 1338
Oshkosh, WI 54902-1338

Personal Communications Industry Association
Robert L. Hoggarth
Senior Vice President,
Paging and Narrowband
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

R. Michael Senkowski
Katherine M. Holden
Stephen J. Rosen
WILEY, REIN & FIELDING
Attorneys for Personal Communications
Industry Association
1776 K Street, N.W.
Washington, D.C. 20006

Albert H. Kramer
Robert F. Aldrich
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
Special Attorneys for the
New Jersey Payphone Association
2101 L Street, N.W.
Washington, D.C. 20037-1526

Dennis C. Linken
STRYKER, TAMS & DILL
Attorney for the New Jersey Payphone Association
Two Penn Plaza East
Newark, NJ 07105

Public Utilities Commission of Ohio
Betty D. Montgomery
Duane W. Luckey
Johnlander Jackson-Forbes
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793

New York State
Department of Public Service
Maureen O. Helmer
General Counsel
Three Empire State Plaza
Albany, NY 12223-1350

AirTouch Paging
Mark A. Stachiw
12221 Merit Drive
Suite 800
Dallas, TX 75251

Carl W. Northrop
E. Ashton Johnston
Paul, Hastings, Janofsky & Walker LLP
Attorneys for AirTouch Paging
1299 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2400

Ameritech
Alan N. Baker
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196

Alabama Public Service Commission
Stanley W. Foy
Post Office Box 991
Montgomery, AL 36101-0991

Michael K. Kellogg
Jeffrey A. Lamken
KELLOGG, HUBER, HANSEN, TODD & EVANS
Counsel for the RBOC Payphone Coalition
1301 K Street, N. W.
Suite 1000 West
Washington, D.C. 20005

Consumers Union
Southwest Reginal Office
Janee Briesemeister
Senior Policy Analyst
1300 Guadalupe
Suite 100
Austin, TX 78701

Judith St. Ledger-Roty
Wendy I. Kirchick
REED SMITH SHAW & McCLAY
Attorneys for Paging Network, Inc.
1301 K Street, N.W.
Suite 1100 East Tower
Washington, D.C. 20005

Public Citizen, Texas
1800 Rio Grande
Austin, TX 78701

Center for Economic Justice
1905 Kenwood Avenue
Austin, TX 78704-3633

Maine Public Utilities Commission
Joel B. Shifman, Esq.
Peter G. Ballou, Deputy General Counsel
242 State Street
18 State House Station
Augusta, Maine 04333-0018

Texas Citizen Action
1714 Fortview Road
Suite 103
Austin, TX 78704-7659

Vermont Public Service Board
George E. Young, Esq.
112 State Street
Drawer 20
Montpelier, VT 05620-2701

Maryland Public Service Commission
Susan Stevens Miller
Assistant General Counsel
6 Saint Paul Street
Baltimore, Maryland 21202

Public Utility Commission of Texas
Pat Wood, III
Robert W. Gee
Judy Walsh
1701 N. Congress Avenue
Austin, TX 78711-3326

Public Service Commission of the District of Columbia
Lawrence D. Crocker, III
Acting General Counsel
450 5th Street, N.W.
Washington, D.C. 20001

The Intellicall Companies
B. Reid Presson, Vice President
Regulatory Affairs
2155 Chenault, Suite 410
Carrollton, TX 75006-5023

USTA
Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005

SDN Users Association
Reginald R. Bernard
P. O. Box 4014
Bridgewater, NJ 08807

Eric A. Eisen
Counsel for the Indiana Utility
Regulatory Commisison
Eisen Law Office
10028 Woodhill Road
Bethesda, MD 20817

New Mexico State Corporation Commisison
David M. Kaufman
General Counsel
P. O. Drawer 1269
Sante Fe, NM 87504

Budget Rent a Car Corporation
John D. Lee
Senior Corporate Attorney
4225 Naperville Road
Lisle, Illinois 60532-3662

1-800 Flowers
Christopher G. McCann
Vice President
1600 Stewawrt Avenue
Westbury, NY 11590

Danny E. Adams
Steven A. Augustino
KELLY DRYE & WARREN, LLP
Attorneys for
The Competitive Telecommunications Association
1200 Nineteenth Street
Suite 500
Washington, D.C. 20036

Dana Frix
Pamela S. Arluk
Attorneys for
Excel Telecommunications, Inc.
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Dana Frix
Pamela S. Arluk
Attorneys for Telco Communications Group, Inc.
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Sylvia Lesse
Thomas J. Moorman
Margaret D. Nyland
Attorneys for
The New York State Telephone Association, Inc.
Kraskin & Lesse, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

GTE Service Corporation
Richard McKenna, HQE03J36
P. O. Box 152092
Irving, TX 75015-2092

GTE Service Corporation
David J. Gudino
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

*International Transcription Services, Inc.
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037