BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 3, 2000

IN RE:	)	
	)	
TARIFF FILING BY BELLSOUTH	)	
TELECOMMUNICATIONS, INC.,	)	**DOCKET NO.**
TO REDUCE GROUPING RATES	)	**00-00041**
IN RATE GROUP 5 AND IMPLEMENT	)	
A 3 PERCENT LATE PAYMENT CHARGE	)	

INITIAL ORDER RELATIVE TO OBJECTION TO SECOND REPORT AND RECOMMENDATION

This matter came before the Tennessee Regulatory Authority ("Authority") at a regularly scheduled Authority Conference held on June 6, 2000, prior to the consideration of the *Second Report and Recommendation of the Pre-Hearing Officer* ("Second Report"). The Second Report was filed on May 26, 2000 and is attached to this Order as Exhibit 1. On May 31, 2000, the Consumer Advocate Division ("CAD") filed an *Objection to Report and Recommendation of Hearing Officer* ("CAD's Objection"). On June 2, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a *Response of BellSouth Telecommunications, Inc. to the Consumer Advocate Division's "Objection to Report and Recommendation of Hearing Officer"* ("BellSouth's Response to CAD's Objection").

At the June 6th Authority Conference, the CAD requested the opportunity to reply to BellSouth's Response to CAD's Objection and made an oral motion to continue the consideration of the Second Report until after filing such a reply. After reviewing the

Second Report as well as the filings of the parties and hearing the parties arguments during the June 6th Conference, a majority of the Directors of the Authority granted the CAD's request to file a reply and motion to continue.[1] The Directors then remanded to the Pre-Hearing Officer the determination of the CAD's Objection, BellSouth's Response to CAD's Objection, and any subsequent reply filed by the CAD no later than 12:00 Noon on June 8, 2000. On June 8, 2000, the CAD timely filed a *Reply to BellSouth's Response to Tennessee Consumer's Objection to Second Report and Recommendation* ("CAD's Reply"). Filed pursuant to the remand of the Authority, this Initial Order memorializes the Pre-Hearing Officer's determination of the objections in these filings.

Background

On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville metropolitan areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills. At the February 15, 2000 Authority Conference, the Directors appointed a Pre-Hearing Officer to prepare this matter for hearing. A Pre-Hearing Conference was held on March 15, 2000.

As a consequence of this first Pre-Hearing Conference, BellSouth and the Consumer Advocate Division jointly submitted the following prime issues on March 22, 2000, which were subsequently approved by the Directors at the April 11, 2000 Authority Conference:

1. Does the late payment charge proposed in BellSouth's Tariff 00-00041 constitute an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209?

[1] Director Greer voted to approve the Pre-Hearing Officer's report and against the CAD's motion.

2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

In response to various objections to discovery and motions to compel by both parties, a second Pre-Hearing Conference was held on May 16, 2000, before Gary Hotvedt, Counsel, designated as Pre-Hearing Officer. The parties in attendance were:

> BellSouth Telecommunications, Inc. – **Patrick Turner, Esq.**, 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300;
>
> Consumer Advocate Division of the Office of the Attorney General – **L. Vincent Williams, Deputy Attorney General**, Consumer Advocate Division, 425 Fifth Avenue, North, Second Floor, Nashville, TN 37243.

During the second Pre-Hearing Conference, the Pre-Hearing Officer determined that the two-agreed-upon prime issues in this matter were essentially legal in nature and that resolution of threshold legal questions would dictate the direction of this proceeding and may determine the result of this docket. The Pre-Hearing Officer determined that the Authority's decision relative to these legal questions would determine the parties' need for certain disputed discovery responses. To that end, the Pre-Hearing Officer directed that briefs be filed addressing these threshold legal questions and determined that resolution of outstanding discovery disputes be held in abeyance until all briefs were filed and the Authority addressed the legal questions raised in this matter.

In addition to the two previously agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification. Pursuant to a filing of May 18, 2000, BellSouth submitted the following proposed sub-issue:

Does any action the Public Service Commission may have taken with regard to costs associated with late payments during the 1993 rate case involving BellSouth (Earnings Investigation of South Central Bell Telephone Company, 1993-1995, TPSC Docket 92-13527) have any bearing on the application of T.C.A. § 65-5-209 to BellSouth's proposed late payment charge?

On May 18, 2000, the CAD submitted the following proposed sub-issues:

1. Did the General Assembly, when it compelled incumbent and local exchange companies applying for price regulation to add services to the basic local exchange classification, change or diminish the relationship between the then existing service provided and the rates for those services provided?

2. Does Tenn. Code Ann. § 65-5-208(a)(1)'s inclusion of all recurring and nonrecurring charges existing in rates, mean that all recurring and nonrecurring charges associated with basic local exchange service are covered, including but not limited to rates or charges associated with billing, collection and late payments for basic local exchange service?

3. Were the basic local exchange service rates in effect for BellSouth on June 6, 1995 based in part upon the consideration of recurring and nonrecurring expenses arising from billing, collection and late payments for those services?

4. Were the provisions of Tenn. Code Ann. § 65-5-209(f) enacted for the purpose of preserving the relationship between the rates for basic local exchange service and also the service provided at those rates?

5. When a telecommunications service provider enters into a contract with a consumer and sells that contract to BellSouth or BellSouth purchases that contract, does BellSouth's purchase of the contract unilaterally create any relationship with the customer other than BellSouth's right to receive payments in accordance with the contract?

At the second Pre-Hearing Conference, the Pre-Hearing Officer determined that both parties file briefs relative to the above prime issues and sub-issues with the Authority by 2:00 p.m., Tuesday, May 30, 2000, and reply briefs were to be filed with the Authority by 2:00 p.m., Monday, June 5, 2000. On May 30, 2000, BellSouth filed a *Brief of BellSouth Telecommunications, Inc Addressing the Issues Presented in this Docket* ("BellSouth Brief") and the CAD filed *Briefed Issues* ("CAD's Brief"). On June 5, 2000, BellSouth filed a *Reply of BellSouth Telecommunications, Inc. to the CAD's Briefed Issues* ("BellSouth's Reply Brief"). On June 6, 2000, the CAD filed a *Motion for Extension of Time to File Reply Brief*, which was granted as a result of the Authority's granting of the CAD's motion to continue. The CAD then filed a *Response to Brief of BellSouth* ("CAD's Response Brief").

Determination of the Pre-Hearing Officer

In essence, both the CAD's Objection and the CAD's Reply (to the Second Report) argue that the Pre-Hearing Officer did not permit discovery because he "believed that discovery of facts are not necessary to the resolution of those issues." (CAD's Reply, p. 1) Begging to differ with the CAD, but as stated in the Second Report and earlier in this Initial Order, the Pre-Hearing Officer is of the opinion that resolving certain questions of law will circumscribe the issues in this docket, and thereby determine what discovery "is relevant to the subject matter in the pending action." Rule 26.02(1), Tenn. R. Civ. P. Throughout Section II of BellSouth's Response to CAD's Objection, BellSouth agrees with the Pre-Hearing Officer; to wit, the title of Section II: "Requiring briefs on the controlling legal issues prior to ruling on the discovery disputes in this docket is as appropriate as it is logical, and it certainly does not infringe upon the due process rights of any party to this docket."[2]

The first prime issue in this docket requires a determination of how a statute, Tenn. Code Ann. § 65-5-209, applies to a tariff, and that tariff's subsequent compliance with the

[2] BellSouth's Response to CAD's Objection, p. 2. While referring to the first threshold legal issue in this docket -- whether the proposed tariff constitutes an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209 -- BellSouth states: "This issue, therefore is a purely legal one involving the application of law to the undisputed language of the tariff." *Id.* at 3.

law hinges on an interpretation of certain terms contained in that statute. In *Schleicher v. Founders Security Life Insurance Co.,* the court remarked that "[i]t is well settled that compliance or noncompliance with a statute is a question of law" 1999 WL 64233 (Tenn. Ct. App.); *see e.g., Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998)(citing *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 924 (Tenn. 1998)). "The content meaning and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities." *Dempsey v. Correct Mfg. Corp.*, 755 S.W.2d 798, 806 (Tenn.App.1988). The Pre-Hearing Officer finds that certain issues in this docket are legal in nature, and should be decided as a matter of law prior to ruling on the outstanding motions to compel discovery. Therefore, pursuant to Tenn. Code Ann. § 4-5-306(b), the Pre-Hearing Officer has considered the arguments raised in both BellSouth's and the CAD's Brief as well as the rejoinders raised in BellSouth's Reply Brief and the CAD's Response Brief, and hereby renders this Initial Order on certain threshold questions of law raised in this docket.

In its Brief, BellSouth denies that "the late payment charge is a rate for a telecommunications service to which price regulation statutes apply" (BellSouth Brief, p. 2). To support that contention, BellSouth argues that "the late payment charge is not a rate or charge for any telecommunications service" (*Id.*, footnote 2). The Pre-Hearing Officer disagrees. First, this adjunct charge is intertwined and inextricably linked to BellSouth's telecommunications services. The late payment charge, as proposed by BellSouth, is derived from and then applied as a charge to its telecommunications services, and therefore must be considered part of such telecommunications services.

Next, late charges do not stand-alone and could never be imposed upon customers without first providing the underlying, interrelated communications services.[3] Further, if the tariff were approved, a customer could not refuse to abide by the imposition of late charges and still be entitled to receive telecommunication service. Finally, failure to pay the late charge, if imposed, could result in termination of the telecommunications service. Therefore, the Pre-Hearing Officer finds that the late payment charge proposed in BellSouth's tariff is a "telecommunications service" to which Tenn. Code Ann. § 65-5-208 and 209 apply.

The next legal issue to determine is whether a late payment charge is a rate increase. The answer to this question is obvious. If the late charge is not imposed, it is not a rate increase; however, once it is imposed, it is an increase. A hypothetical example shows this best: assume that for the past four years, John Smith has been billed $12.15 a month, which is billed on the 1st of each month. Mr. Smith's payment is not late until the 1st of the following month. Mr. Smith receives his salary at the end of each month and

[3] The argument that late charges do not stand alone, but are inextricably related to the underlying telecommunications service, is best analogized by the following questions asked last August by BellSouth's counsel:

BellSouth:	Mr. Buckner, you've bought a car in the past, haven't you?
A:	Yes, sir.
BellSouth:	And when you buy a car, you usually have options you can add to the car; right?
A:	Yes, sir.
BellSouth:	Now, you can buy a car and put on antilock brakes, or power windows, or a rear defogger, can't you?
A:	I've heard about 'em.
BellSouth:	But you don't hear about many people walking into a car dealership and saying, I would like to buy a power window, please, do you?
A:	No, sir.
BellSouth:	You've kind of got to have a car to make that power window mean something, don't you?
A:	Typically.

In re: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc., in Tennessee, Transcript of Proceedings, p. 278 (August 18, 1999).

promptly mails his payment for his previous month's phone bill, which arrives at BellSouth a few days after it was late. To date, BellSouth has given him the benefit of the "float".[4] If the proposed tariff in this docket is approved, as of the 1st of the month immediately after service was rendered, a three percent (3%) late charge will be imposed on the unpaid balance. Therefore, on the 1st of such a month, Mr. Smith will then have to pay $12.51, which obviously is an increase in his rate.

Whether or not this rate increase is considered impermissible under Tenn. Code Ann. § 65-5-209 depends on whether the charge is applied to basic or non-basic services, as set out by Tenn. Code Ann. § 65-5-208. The purpose of the charge is not relevant here, the application of the charge is what must be considered. In the hypothetical involving John Smith (above), if the $12.15 represents charges for "basic local exchange telephone service," then the charge would be a rate increase for basic local exchange service in violation of the statutory four-year freeze imposed under price regulation. *See* Tenn. Code Ann. § 65-5-209).[5] Therefore, as proposed in BellSouth's tariff, the late payment charge as it applies to basic telephone services would result in rate increases that violate the basic rate freeze in Tenn. Code Ann. § 65-5-209(f).

One last issue that needs to be addressed. While fishing is always a part of the discovery process, the Pre-Hearing Officer is of the opinion that any such fishing should be done with a pole and not with a drag net. Notwithstanding that, the burdensome nature of certain requests may be a questionable defense, but the utter lack of relevancy does prevail

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[4] As used here, "float" is the value of paying after the next billing date and before service is disconnected.

[5] In Docket No. 95-02614, *Application of BellSouth Telecommunications, Inc. for a Price Regulation Plan*, the Authority accepted BellSouth's proposal to freeze rates for basic local exchange services until December 1, 2002.

in this situation. On page 4 of BellSouth's Response to CAD's Objection, BellSouth addresses the CAD's fishing expedition:

> Similarly, the CAD has taken the position that actions the former Public Service Commission may have taken during the 1993 rate case involving BellSouth with regard to costs associated with late payments has some impact on BellSouth's tariff. In fact, many of the discovery disputes involve the relevance of this position [footnote omitted]. Whether any such action the Public Service Commission may have taken under rate-of-return regulation has any impact on BellSouth's current tariff filing under price regulation, however, is a purely legal issue. It makes great sense, therefore, to determine this legal issue prior to deciding whether BellSouth must respond to burdensome discovery requests regarding the Public Service Commission's actions during the 1993 rate case.[6]

The CAD's argument that rates set by the Public Service Commission in 1993 covered the billing and collecting expense for delinquent subscribers is simply not relevant. BellSouth's entry into price regulation in 1995/98 used a different standard for setting its rates. BellSouth's offer to offset the revenue gained by the charge for the late payment service, heretofore not separately priced, ameliorates any argument of a windfall to BellSouth. As long as late payments are charged for non-basic services and they do not exceed the aggregate revenue cap, i.e., are revenue neutral, the price regulation statute is not violated.

IT IS THEREFORE ORDERED THAT:

1. As proposed in the Tariff Filing by BellSouth Telecommunications, Inc., to Reduce Grouping Rates in Rate Group 5 and Implement a 3 Percent Late Payment, the Pre-Hearing Officer finds that as a matter of law:

[6] BellSouth's Response to CAD's Objection, p. 4.

(a) the late payment charge is a "telecommunications service" and subject to Tenn. Code Ann. § 65-5-208 and 209;

(b) when applied, the late payment charge constitutes a rate increase;

(c) when such a rate increase is applied to basic local exchange telephone service, it would violate the basic rate freeze specified in Tenn. Code Ann. § 65-5-209(f); and

(d) action by the Public Service Commission is not relevant to the application of the price regulation statute;

2. The Consumer Advocate Division's objections to the Second Report and Recommendation of the Pre-Hearing Officer are overruled;

3. This Initial Order may be appealed to the Tennessee Regulatory Authority at the July 11, 2000 regularly scheduled Authority Conference;

4. If no party appeals this Initial Order or the Authority takes no action, it will become a final order fifteen (15) days after its entry; and

5. A final order in this matter may be appealed to the Court of Appeals, Middle Section, within sixty (60) days of such order becoming final.

Gary R. Hotvedt
Pre-Hearing Officer

ATTEST:

K. David Waddell, Executive Secretary

EXHIBIT
1

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 26, 2000

IN RE: TARIFF FILING BY BELLSOUTH TELECOMMUNICATIONS, INC., TO REDUCE GROUPING RATES IN RATE GROUP 5 AND IMPLEMENT A 3 PERCENT LATE PAYMENT CHARGE	))))))))	DOCKET NO. 00-00041

SECOND REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

On January 21, 2000, BellSouth Telecommunications, Inc. ("BellSouth") filed a tariff to reduce the grouping rates in Rate Group 5 (Memphis and Nashville metropolitan areas) and to impose a three percent (3%) late charge on the unpaid balances of all customers' bills. At the February 15, 2000 Authority Conference, the Directors appointed a Pre-Hearing Officer to prepare this matter for hearing. A Pre-Hearing Conference was held on March 15, 2000.

As a consequence of this first Pre-Hearing Conference, on March 22, 2000, BellSouth and the Consumer Advocate Division ("CAD") jointly submitted the following prime issues, which were approved by the Directors at the April 11, 2000 Authority Conference:

1. Does the late payment charge proposed in BellSouth's Tariff 00-00041 constitute an impermissible rate increase for basic local exchange service under Tenn. Code Ann. § 65-5-209?

2. When BellSouth bills for services on behalf of other telecommunications companies, does it have a right, independent of its agreement with the

telecommunications companies for which it bills, to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late?

In response to various objections to discovery and motions to compel by both parties, by Notice of May 10, 2000, a second Pre-Hearing Conference was scheduled for May 16, 2000. The Notice specified that this Pre-Hearing Conference intended to address the following items:

1. Resolution of discovery disputes; and
2. Establishing a schedule to completion.

Second Pre-Hearing Conference

The second Pre-Hearing Conference was held on May 16, 2000, before Gary Hotvedt, Counsel, designated as Pre-Hearing Officer. The parties in attendance were:

BellSouth Telecommunications, Inc. – **Patrick Turner, Esq**., 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300;

Consumer Advocate Division of the Office of the Attorney General – **L. Vincent Williams, Deputy Attorney General**, Consumer Advocate Division, 425 Fifth Avenue, North, Second Floor, Nashville, TN 37243.

While attempting to resolve the various discovery disputes, it became clear to the Pre-Hearing Officer that the two agreed-upon prime issues in this matter were essentially legal in nature, and that resolution of threshold legal questions would dictate the direction of this proceeding, and may determine the result of this docket. At a minimum, the Authority's decision relative to these legal questions would determine the parties' need for certain discovery responses, which are currently in dispute. Therefore, the Pre-Hearing Officer directed that briefs be filed addressing these threshold legal questions, and determined that resolution of outstanding discovery disputes be held in abeyance until all briefs are filed and the Authority addresses the legal questions raised in this matter.

In addition to the two agreed-upon prime issues, the parties requested to brief certain sub-issues to help clarify their respective positions. After discussion with the parties, the Pre-Hearing Officer allowed for the submission and briefing of such sub-issues for purposes of clarification. Pursuant to a filing of May 18, 2000, BellSouth submitted the following proposed sub-issue:

> Does any action the Public Service Commission may have taken with regard to costs associated with late payments during the 1993 rate case involving BellSouth (Earnings Investigation of South Central Bell Telephone Company, 1993-1995, TPSC Docket 92-13527) have any bearing on the application of T.C.A. § 65-5-209 to BellSouth's proposed late payment charge?

On May 18, 2000, the CAD submitted the following proposed sub-issues:

1. Did the General Assembly, when it compelled incumbent and local exchange companies applying for price regulation to add services to the basic local exchange classification, change or diminish the relationship between the then existing service provided and the rates for those services provided?

2. Does Tenn. Code Ann. § 65-5-208(a)(1)'s inclusion of all recurring and nonrecurring charges existing in rates, mean that all recurring and nonrecurring charges associated with basic local exchange service are covered, including but not limited to rates or charges associated with billing, collection and late payments for basic local exchange service?

3. Were the basic local exchange service rates in effect for BellSouth on June 6, 1995 based in part upon the consideration of recurring and nonrecurring expenses arising from billing, collection and late payments for those services?

4. Were the provisions of Tenn. Code Ann. § 65-5-209(f) enacted for the purpose of preserving the relationship between the rates for basic local exchange service and also the service provided at those rates?

5. When a telecommunications service provider enters into a contract with a consumer and sells that contract to BellSouth or BellSouth purchases that contract, does BellSouth's purchase of the contract unilaterally create any relationship with the customer other than BellSouth's right to receive payments in accordance with the contract?

At the Pre-Hearing Conference, the Pre-Hearing Officer determined that both parties file briefs relative to the above prime issues and sub-issues with the Authority by **2:00 p.m., Tuesday, May 30, 2000**, and reply briefs are to be filed with the Authority by **2:00 p.m., Monday, June 5, 2000**.

The Pre-Hearing Officer recommends that upon receipt and review of both parties' briefs, the Authority schedule an opportunity for the presentation of oral arguments and deliberations on the legal questions raised in this docket.

Recommendations

(1) The Pre-Hearing Officer **recommends** that the Authority approve this report, and

(2) The Pre-Hearing Officer **recommends** that this tariff be re-suspended for an additional thirty (30) days to allow adequate time for hearing.

G. D. Hotvedt

Gary Hotvedt, Pre-Hearing Officer

ATTEST:

K. D. Waddell

K. David Waddell, Executive Secretary

Legdata/GRH/PHO-report-0-41