IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

MOTION TO AMEND TENNESSEE CONSUMERS' PETITION TO INTERVENE

Comes Tennessee consumers to respectfully request the Tennessee Regulatory Authority to amend Tennessee consumers's Petition to Intervene to request that BellSouth's Private Line Tariff late payment charge as described in BellSouth Tariff B2.4.1.E. For cause, Tennessee consumers would show that no hearing was held on the above referenced tariff which considered the issues presented in this case and that the tariff should be prohibited on the same grounds the current proposed late payment tariff should be prohibited.

No harm or delay is expected because the issues are similar if not identical.

Wherefore Tennessee consumers pray that this Motion to Amend be granted.

Respectfully submitted,

L. Vincent Williams
Deputy Attorney General - Consumer Advocate
Consumer Advocate Division
425 5th Avenue, North
Nashville, TN 37243
(615) 741-8723
BPR. No. 011189

Certificate of Service

I hereby certify that a true and correct copy of the forego
and mailed postage prepaid to the parties listed below this 13th

Guy Hicks, Esq.
Patrick Turner, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

David Wad
Executive S
Tennessee I
460 James I
Nashville, T

L. Vincent William

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF BELLSOUTH TO IMPLEMENT NEW AND INCREASE EXISTING LATE PAYMENT CHARGES	)))))	DOCKET NO. 00-00041

RESPONSE TO BELLSOUTH'S IMPLIED MOTION FOR SUMMARY JUDGMENT

Comes Tennessee consumers in response to the implied motion of BellSouth for Summary Judgment. In addition, Tennessee consumers refute BellSouth's assertion that it has presented the relevant and material facts and under the new procedural rules request to submit an affidavit to address the Executive Secretary's Notice. Submission of this document is not intended to waive and does not waive any objections with respect to the prior notice.

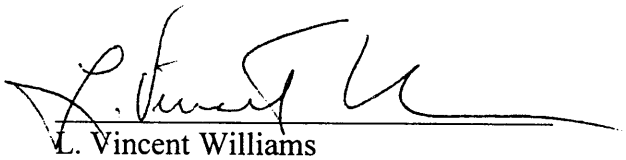
In support of its position, Tennessee consumers submit the Affidavit of R. Terry Buckner. Mr. Buckner statement of facts are relavant and material to the matters which will be heard in this proceeding.

Tennessee consumers deny that legal arguments raised by BellSouth have merit. Tennessee consumers argue that many facts are material and relevant. BellSouth's position is akin to proving that every clear fluid is drinking water without considering the

chemical composition and other facts regarding the fluid. Tennessee consumers contend that any whole is composed of relevant and material factual components.

Tennessee consumers may address BellSouth's legal arguments in a separate brief but is unable to do so now because he must be out of state for other matters.

Respectfully submitted,



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Deputy Attorney General - Consumer Advocate
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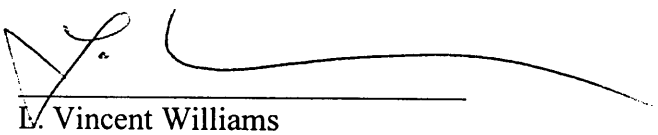
425 5th Avenue, North
Nashville, TN 37243
(615) 741-8723
BPR. No. 011189

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been faxed and mailed postage prepaid to the parties listed below this 13th day of September, 2000.

Guy Hicks, Esq.
Patrick Turner, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

David Waddell, Esq.
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505



L. Vincent Williams

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF BELLSOUTH TO IMPLEMENT NEW AND INCREASE EXISTING LATE PAYMENT CHARGES	)))))	DOCKET NO. 00-00041

AFFIDAVIT

Comes the Affiant, R. Terry Buckner, after being duly sworn who deposes and says:

1. That I am a Certified Public Accountant and Senior Regulatory Analyst of the Consumer Advocate Division Staff ("CA") in the Office of the Attorney General and Reporter for the State of Tennessee.

2. Before I joined the Office of the Attorney General and Reporter, I worked for the Tennessee Public Service Commission as an Analyst primarily handling Telecommunications matters for six (6) years prior to working on similar matters at the Office of the Attorney General and Reporter.

3. Before I joined the Tennessee Public Service Commission I was the Region Accounting Manager for TDS Telecom a company operating many local exchange companies, including four local exchange telephone companies in Tennessee.

4. I have knowledge of the manner in which ratemaking took place before and on June 6, 1995.

5. I have knowledge of utility rate design and what is associated with or included in telephone company rates before and on June 6, 1995.

6. I have knowledge of BellSouth's rate design before and on June 6, 1995.

7. I have knowledge of BellSouth's General Services Subscriber Tariff and what it included on June 6, 1995 and currently.

8. I have knowledge of tariffs and have interpreted tariffs in the context of rules and laws.

9. I have knowledge of Price Regulation.

10. I have been limited in the discovery of facts by the Hearing Officer's decision to hold discovery in abeyance and Tennessee Regulatory Authority's apparent decision not to permit discovery as a result.

11. Holding discovery in abeyance is unfairly prejudicial since the information sought is solely in the possession of BellSouth and gives BellSouth undue advantages.

12. Because discovery and Tennessee consumers' Motion to Compel have been held in abeyance, I can not determine whether the facts I state herein are all of the relevant facts.

13. I have reviewed BellSouth's proposed statement of facts and BellSouth's statement of facts is not accurate.

14. I have reviewed BellSouth's proposed statement of facts and more facts are material and relevant to the decision than stated by the company.

15. My statement of facts provided herein provide the relevant and material information for this proceeding that I am aware of given the state of discovery.

16. A portion of my opinion relies in part upon certain cases and statutes, some of which I had prior knowledge and other statutes and cases which were provided by counsel in his research. I have disclosed the statutes and cases used for this statement of facts.

17. These facts are necessary for full consideration of the issues presented by the case.

18. BellSouth bills for services in advance of their use. As a result, it suffers no damages until one month's service is performed.

Some Statutes

19. Tenn. Code Ann. § 65-4-101 (d) provides that: "Incumbent local exchange telephone company" means a public utility offering and providing basic local exchange telephone service as *defined by § 65-5-208 pursuant to tariffs* approved by the commission prior to June 6, 1995."

20. Tenn. Code Ann. § 65-5-208 (a) provides: Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows...

21. As a result, basic local exchange services and all services existing on June 6, 1995 are services described by tariffs.

22. Rates and charges are synonomous under Tenn. Code Ann. § 65-5-208 (a). As a result, when a charge increases the rate increases.

23. The rates and charges associated with basic local exchange service and nonbasic service are separate. Tenn. Code Ann. § 65-5-208 (a)(1) specifically associates recurring and nonrecurring charges of basic local exchange service with basic local exchange service rates.

24. Tenn. Code Ann. § 65-5-208 (a)(2) associates recurring and nonrecurring charges of nonbasic service with nonbasic rates.

25. Tenn. Code Ann. § 65-5-209 (f) provides in relevant part: "the initial basic local exchange telephone service ***rates*** of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation."

26. Tenn. Code Ann. § 65-5-209 (f) prohibits increases in basic local exchange service rates for four (4) years after the beginning of price regulation. Tenn. Code Ann. § 65-5-209 (h) prohibits increases in call-waiting rates for four years.

27. BellSouth is within the four year prohibition period of increases in basic local exchange service rates.

28. The General Assembly created two classifications of service in Tenn. Code Ann. § 65-5-208. The classification methodology for basic local exchange services and

nonbasic services is described in Tenn. Code Ann. § 65-5-208 (a).

29. The General Assembly also created a process for exempting basic local exchange services and nonbasic services from rate regulation in Tenn. Code Ann. § 65-5-208 (b).

30. There is no evidence that the General Assembly intended to eliminate or modify filed rate or filed tariff doctrine as it existed on June 6, 1995. Under the doctrine the published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law. The provisions of the June 6, 1995 tariffs should govern the parties.

31. The published tariffs of BellSouth on June 6, 1995 are binding upon both BellSouth and Tennessee consumers as those tariffs affect basic local exchange service rates and the recurring and nonrecurring charges.

32. In addition to the facts I set forth, I believe the legal principle in one of the cases provided by counsel for Tennessee consumers provides for a pointed review of BellSouth's tariff. That case is *Southeastern Land Company v. Louisville Gas & Electric Company*, 262 Ky. 215, 90 S.W. 2d 1 (1936). On page 3 of the case, the Court holds that "***what the utility is forbidden to do directly, it may not accomplish by indirection by way of resort to any device or subterfuge leading to the same result.***"

33. In my opinion BellSouth cannot directly implement its proposed late payment charge on all consumers directly, and the tariff seeks to accomplish indirectly, by resort to a device or subterfuge the prohibited result.

34. The devices are the use of the General Subscriber Services Tariff to indirectly integrate the late payment charge with basic local exchange services, the use of the GSST to eliminate consumer ordering and authorization and the use of the GSST to create a service contract the company never had with end users.

35. BellSouth argues that the late payment charge is not itself a service. The only way the late payment charge would not be a service itself is if it provides nothing but compensation and is integrated into the rates and charges of other services.

36. The tariff provides nothing but compensation to BellSouth and is intended to be

integrated into the rates and charges of other services through the GSST.[1]

The Nature of the General Subscriber Services Tariff

37. There are several general methods for implementing a charge. One of the methods is to create a specific service with a specific charge.[2] A second method is to amend an existing tariff for a service to make the late payment charge an integral part of that tariff's rates. A third method is to amend the GSST to fuse or integrate the charge into all services to which the GSST is applicable. Through the device of the third method, the utility would be accomplishing the second method on a vast scale.

38. As an example of the second method, BellSouth could modify its Caller-ID service tariff to add language which provides that in addition to the $7.50 per month charge for Caller-ID when the consumer fails to pay the $7.50 per month within 30 days after billing a late payment charge of x percent will be applied to the unpaid portion.

39. In the Caller-ID example, the late payment charge is not a service, it is an integral part of the rates and charges.

40. Since BellSouth has many services, if it seeks to implement a late payment charge service by service it must file many tariffs. As a result, it is using the GSST to incorporate the late payment charge into all services, plus services it does not provide to end users. Moreover, it is prohibited from increasing charges associated with basic local exchange services Tenn. Code Ann. § 65-5-209 (f) and call-waiting by Tenn. Code Ann. § 65-5-209 (h).

41. For example, if BellSouth sought to modify the lifeline tariff alone to add an additional charge for late payment, its modification would be in conflict with and

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[1]I am mindful that the Hearing Officer could find, through BellSouth's representations, that the tariff was payment for the service of paying late. Under the literal decision, a consumer would be able to order the service and prevent disconnection indefinitely by either paying the late fee alone or by simply being billed for the late payment. As a result, much more needs to be considered and decided regarding that aspect of his decision.

[2]See, footnote 1.

prohibited by Tenn. Code Ann. § 65-5-209 (f) and is not permissible. Similarly, an indirect modification of the lifeline tariff would not be permissible.

42. The Hearing Officer, based upon BellSouth's representations, decided that the company was attempting to implement first and third methods since BellSouth is seeking a payment for the privilege of paying late.

43. The Hearing Officer also found that BellSouth's proposal is a method three attempt to integrate or fuse the charge into basic local exchange service would improperly increase charges associated with basic local exchange service.

44. If BellSouth is implementing a stand alone service, its tariff should be set up to provide the stand alone service. Its submitted tariff is not set up as a stand alone service tariff.

45. The published tariffs of BellSouth on June 6, 1995 included a General Subscriber Services Tariff (GSST).

46. The GSST by its nature is infused with or integrated into basic local exchange service tariffs. The evidence of this fusion or integration is GSST tariff A2.1 which provides that:

> The regulations specified herein (in BellSouth's GSST tariff are applicable to all communication services offered by South Central Bell (BellSouth).

47. That cancellation due to non-payment under the GSST was limited to sums due for service on June 6, 1995. A2.2.10 A.5.

48. BellSouth's proposed late payment provides for cancellation for sums charged and due when no service is provided consumers when BellSouth is billing for a third party or when BellSouth has purchased accounts receivable.

49. BellSouth's proposed late payment provides for cancellation for sums charged and due when no service is provided consumers when BellSouth has purchased accounts receivable.

50. BellSouth's GSST did not insert or integrate late payment charges with any rates

prior to the proposed late payment tariff under consideration in this case.

51. BellSouth contends that the mere fact that a customer appears on its billing list entitles the company to independently charge the customer whether or not the customer orders or authorizes a service to be provided by BellSouth.

52. Even if no customer orders or authorizes BellSouth to provide them with any billing services, BellSouth alleges that it can charge them a late payment charge independent of fees regarding billing services.

53. BellSouth alleges that the mere filing of a tariff permits the company to eliminate the step of a consumer ordering or authorizing it to provide a service.

54. BellSouth alleges that it can negate Tenn. Code Ann. § 65-4-125 (b) ordering and authorization or indirectly accomplish the negation of Tenn. Code Ann. § 65-4-125 (b) by filing a tariff. That result should be prohibited.

55. No rule permits BellSouth to eliminate the ordering or authorization process by tariff.

56. BellSouth has not cited a case which permits it to circumvent the ordering or authorization process by tariff.

57. The basic local exchange service rate for consumers on June 6, 1995 and today is an average rate made in consideration of the timeliness of payments and all related bad debt and collection expenses.

58. Because the basic local exchange service rates are average rates early payers do not receive a discount, on time payers do not receive a discount and late payers do not pay any penalty which was not in existence on June 6, 1995.

59. Under BellSouth's proposed tariff, early payers who are not late payment expense "cost causers" will not receive a 3% discount or any other discount off the average rate.

60. Under BellSouth's proposed tariff on time payers who are not late payment expense "cost causers" will not receive a 3% discount or any other discount off the average rate.

61. BellSouth's tariff, instead of providing the basic local exchange service early

payers and the on time payers with a discount off the average rate because of revenues received from so-called cost causers, will pay itself the additional sums and reduce nonbasic rates.

62. Their is no evidence and there are no facts in the record which shows that BellSouth included a late payment charge in its rates on June 6, 1995.

63. At some unspecified date, BellSouth changed its private line tariff to on which imposed a 1.5% late payment charge on private line subscribers.

64. There is no evidence in the record or the record regarding BellSouth's change of its private line tariff to implement a late payment charge that any regulatory agency considered the issues presented in this case with respect to the charge BellSouth imposed on private line tariff consumers.

65. The private line tariff late charge modification also indicated an intent by BellSouth to charge the private line customer late payment charges for amounts under BellSouth's Billing and Collections Tariff. There is no evidence in this record or any other record that any agency considered whether any privity of contract existed between BellSouth and the private line customer which justified imposition of a charge independent of the service the private line consumer ordered from BellSouth.

66. There is no evidence in this record or any other record that any agency considered whether any privity of contract existed between BellSouth and the private line customer which justified imposition of a charge independent of the service the private line consumer ordered from an enhanced service provider.

67. No hearing has been held to determine whether any services provided to a private line consumer constitutes basic local exchange service or BellSouth's imposition of a late charge payment on the private line consumer.

68. Tennessee consumers' have moved to Amend its Petition to Intervene, to request the Tennessee Regulatory Authority to also hear BellSouth's private line tariff and amendments to B2.4.1.E on the merits or on the same or similar grounds as Tennessee consumers challenge BellSouth's proposal to modify the General Subscriber Services Tariff (GSST).

69. There is a difference between an enhance service provider, an IXC and a clearing house billing agent. A clearing house billing agent is not a telecommunications

service provider.

70. That BellSouth, when it purchases accounts from other entities is governed by Uniform Commercial Code and Tenn. Code Ann. § 47-9-101 et seq. See Tenn. Code Ann. § 47-9-102.

71. A "late charge" in excess of the legal rate of interest constitutes usury when the charge is made as consideration for extension of time for payment. *Wilson v. Dealy*, 222 Tenn. 196, 199-201, 434 S.W.2d 835, 836-837 (1968).

72. If BellSouth contends that the late payment charge is compensation for the damage done to it by Tennessee consumers or end users failure to pay on due dates, it must prove its actual damages and it has not proved its actual damages in this case. See, *Wilson v. Dealy*, 222 Tenn. 196, 201, 434 S.W.2d 835 (1968).

73. If BellSouth can not prove actual damages, its rates will be unreasonable.

74. BellSouth has no authority to implement unreasonable rates.

75. The maximum interest rate for the use of money generally is ten (10) percent per year Tenn. Code Ann. § 47-14-103, but BellSouth's rate for the use of money is 36 percent per year or 42 percent compounded and is extortion prohibited by Tenn. Code Ann. § 65-4-122 (b) and is extortion or usury.

76. Alternatively, the maximum interest rate for the use of money generally is ten (10) percent per year Tenn. Code Ann. § 47-14-104, but BellSouth's rate for the use of money is 36 percent per year or 42 percent compounded and is extortion prohibited by Tenn. Code Ann. § 65-4-122 (b) and is extortion or usury.

77. BellSouth's late payment charge is a charge made as consideration for extension of time for payment and is usery.

78. Tenn. Code Ann. § 47-14-102 (7) provides that: "Interest" is compensation for the use or detention of, or forbearance to collect, money over a period of time, and does not include compensation for other purposes, including, but not limited to, time-price differentials, loan charges, brokerage commissions, or commitment fees.

79. Usery is an exaction of interest as compensation for the use of money. *Wilson v. Dealy*, 222 Tenn. at 199, 434 S.W.2d at 836.

80. With respect to BellSouth's purchase of accounts, its tariff will implement a late payment charge as if the consumer had borrowed money from BellSouth to pay the account when the consumer has not borrowed any money from BellSouth or ordered such a service from BellSouth.

81. To constitute consideration for an extension of the time for payment of a matured debt, the charge must be paid as consideration for the creditor's forbearance of asserting his right of collection. *Wilson v. Dealy*; *Estabrook v. Club Chalet of Gatlinburg, Inc.*, 1988 Tenn. App. LEXIS 4 (Tn. Ct. App. 1988)

82. Basic local exchange services consumers have not ordered any late payment service other than that contracted for in June 6, 1995 rates.

83. That permitting BellSouth to implement the proposed late payment tariff allows BellSouth to indirectly add charges to basic local exchange services which it can not add directly.

84. That BellSouth could not, for example, directly increase charges associated with touchtone without violating the four year prohibition of Tenn. Code Ann. § 65-5-209 (f), but its proposed tariff permits.

85. BellSouth through its contract with enhanced service providers has created security interests in the accounts and appears and is subject to the Uniform Commercial Code (UCC).

86. The Uniform Commercial Code limits the amounts every company can bill for late payments. Tenn. Code Ann. § 47-14-103 (3).

87. For purposes of the GSST at A37 on June 6, 1995 and the UCC, Tennessee consumers and end users are not debtors of BellSouth when BellSouth is billing for an enhanced service provider. Instead Tennessee consumers are debtors of the enhanced service provider. See, Tenn. Code Ann. § 47-14-102.

88. No BellSouth tariff provides for BellSouth to purchase accounts receivable of other companies.

89. BellSouth Billing is the real party in interest for matters regarding accounts receivable purchased from other companies.

90. BellSouth has a tariff, which is expressly limited to billing on behalf of other

companies that tariff is set forth at A37 of the companies GSST.

91. A37 of BellSouth's tariff requires that bill processing service must be ordered by a customer. A37.1.2.

92. A customer for A37 purposes is a "enhanced and information service provider." A37.1.1 A. "Enhanced and information service provider" appears to include both telecommunications service providers and companies who are also mere billing agents for other telecommunications service providers.

93. An "end user" is a BellSouth subscriber who receives a monthly telephone bill. A37.1.1 A.

94. Tennessee consumers represented by the Consumer Advocate Division are end users.

95. Bill processing service is provided to the "customer" at the rates and charges as set forth in A37.1.6. A37.1.2 A.

96. BellSouth's late payment tariff as drafted will force Tennessee consumers who are A37.1.1. A end users of other companies who are enhanced and information service providers for whom BellSouth bills, to independently pay BellSouth a late payment charge even though BellSouth is not undertaking any service ordered by the end user from BellSouth.

97. BellSouth's GSST, which is infused or integrated with basic local exchange service, at A37.1.2.H. provides that: Nonpayment of customer billing by an end user shall not be cause for denial or termination of an end user's local exchange service. BellSouth's proposed late charge tariff will modify the GSST which is integrated with basic local exchange service to permit the termination of an end user's basic local exchange service for nonpayment.

98. Modification of the GSST to permit termination of service for new charges, changes basic local exchange services as they existed on June 6, 1995, and is not authorized by Tenn. Code Ann. § 65-5-208 (a)(1).

99. Modification of the GSST to permit termination of service for new charges, changes basic local exchange services as they existed on June 6, 1995 and is prohibited by Tenn. Code Ann. § 65-5-209 (f) and call waiting.

100. There were no obligations of an A37 basic local exchange services end user on June 6, 1995 and BellSouth's late payment tariff imposes new obligations including new charges.

101. I have reviewed many of BellSouth's Billing and Collections contracts with its customers.

102. The contracts contain rates, terms, and conditions which are different from BellSouth's GSST at A37 and are therefore unlawful.

103. The GSST at A37, on June 6, 1995, provided that "Billing will be provided only for rated service charges." A37.1.1.B. "Rated service charges" means rated service charges of the telecommunications service provider for whom BellSouth bills and not the rated service charges of BellSouth or other entities.

104. The duty of the end user under GSST A37 on June 6, 1995 is solely one of remitting payment for the rated service charges of other telecommunications service providers to BellSouth.

105. BellSouth's proposed late payment modification of the GSST requires Tennessee consumers and end users to remit more than the rate service charges because, Tennessee consumers and end users under the late payment charge are required to also remit a separate and independent payment to BellSouth.

106. On June 6, 1995, BellSouth's GSST at A37 provided that financial deficiencies arising from non-payment are financially handled solely by the enhanced service provider "customer." A37.1.2.E.

107. BellSouth's proposed late payment charge modification of the GSST adds financial requirements to Tennessee consumers and is therefore contrary to Tenn. Code Ann. § 65-5-209 (f) and Tenn. Code Ann. § 65-5-208 (a)(1).

108. BellSouth has an Access tariff at E8.2.1.B2.g which provides that it can purchase the accounts receivable of a clearing house billing agent or an Interexchange carrier.

109. BellSouth's Access tariff is with recourse. E8.2.3.A and E8.2.3.A 2 (a)-(c).

110. Since BellSouth has recourse, it is not at risk with respect to late payments and uncollectibles.

111. The contracts do not evince or show that any Tennessee consumer or end users authorized a billing and collection agreement between the enhanced service provider and BellSouth.

112. The contracts do not evince or show any intent by Tennessee consumer or end users to authorize a billing and collection agreement between the enhanced service provider and BellSouth.

113. The contracts do not evince or show any intent by Tennessee consumer or end users to authorize the enhanced service provider to make Tennessee consumers or end user liable to BellSouth for any service BellSouth provides to the enhanced service provider.

114. Tennessee consumers and end users have not ordered or authorized any enhanced service provider to enter into any agreement with any billing and collecting entity for which Tennessee consumers and end users are liable.

115. Tennessee consumers are end users who remit payments to BellSouth

116. BellSouth submitted allegations related to its aggregate increase information subject to a blanket protective order.

117. Because discovery is not complete, I can not confirm or deny the accuracy of the information.

118. That the BellSouth rate filing does not address the fact that the customer or end-user has already considered the timeliness of payments and their related bad debt expense in BellSouth's current rates.

119. That the rates and charges in effect for BellSouth consumers on June 6, 1995 and at present, before the imposition of BellSouth's late payment charge tariff include, return on the investment in Working Capital required to fund the operations during the lag between provision of service and collection of revenues was included in the cost of service on which current rates are based.

120. That the cost and charges of service on which current basic local exchange service rates are based included bad debt expense reflecting BellSouth's actual collection experience and that those rates were in existence on June 6, 1995 and December 1, 1998.

121. That the imposition of a late payment charge without a corresponding reduction of basic local exchange service rates will result in BellSouth's double recovering of costs and charges. BellSouth will recover once through rates and again through the application of the penalty.

122. That reducing hunting charges will not compensate all basic local exchange service customers for the basic local exchange service increase.

123. A hunting charge is generally and perhaps exclusively a business service.

124. In my opinion the BellSouth's late payment charge GSST tariff is contrary to the prohibitions against rate increases in Tenn. Code Ann. § 65-5-209 (f)(basic local exchange service); Tenn. Code Ann. § 65-5-209 (h) (call waiting rates); and accomplishes by indirection, what the company cannot do directly.

In addition, the late payment tariff seeks to indirectly circumvent Tenn. Code Ann. § 65-4-125 (b) by implementing the charge without the authorization of consumers with respect to the services end users receive from other vendors and BellSouth simply bills for those other vendors or billing agents or is applying the service tariff of those other vendors due to its purchase of the accounts. Circumvention of Tenn. Code Ann. § 65-4-125 (b) is not authorized by any statute or rule.

Tennessee consumers are taking the position that Private Line Services are basic local exchange services and that the late payment charges regarding those basic local exchange services are unlawful.

Further the Affiant sayeth not.

R. Terry Buckner

R. Terry Buckner

Subscribed and sworn before me this the 13th day of September, 2000.

Teresa A. Harris

Notary Public

My commission expires on the 25th day of January, 2003.

90 S.W.2d 1
262 Ky. 215
(Cite as: 90 S.W.2d 1)

SOUTHEASTERN LAND CO.
v.
LOUISVILLE GAS & ELECTRIC CO.

Court of Appeals of Kentucky.

Jan. 21, 1936.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by the Southeastern Land Company against the Louisville Gas & Electric Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

ELECTRICITY k11(3)
145k11(3)
Conveyance by consumer of property by recorded deed, appointment of receiver to handle property, and its subsequent reacquisition by consumer after conveyance was declared void by court held not to terminate contract under which utility was furnishing electricity for property or to relieve consumer from liability thereon.

ELECTRICITY k11.4
145k11.4
Filing of rate schedule by electric company with board of public works as required by its franchise and contracts with consumers held sufficient notice to consumers of available rates, precluding consumer from recovering portion of charges paid by it on ground that company had failed to notify it of existence of cheaper rate than stipulated in its contract to which it would have been entitled.

ELECTRICITY k11.5(1)
145k11.5(1)
Impartial and uniform service to all consumers of electricity similarly situated is correct measure and means of securing them in their rights under law.

ELECTRICITY k11.5(1)
145k11.5(1)
Electric companies may make special or optional rates if based on reasonable classification.

ELECTRICITY k11.5(1)
145k11.5(1)
Rebate resulting in lower rate to one class of consumers of electricity than is paid by another is violation of contractual guarantee of uniformity of rates.

PUBLIC UTILITIES k103
317Ak103
Public utilities may not discriminate nor impose different terms and conditions on different persons.

PUBLIC UTILITIES k103
317Ak103
Public utility may not accomplish by indirection what it is forbidden to do directly.

***1** W. W. Downing, of Louisville, for appellant.

Crawford, Middleton, Milner & Seelbach, of Louisville, for appellee.

CREAL, Commissioner.

The Southeastern Land Company, a corporation, is appealing from a judgment sustaining a demurrer to and upon its failure to further plead, dismissing its petition whereby it sought to recover $4,473.66, including $1,251.18 interest, as alleged overcharge for electricity furnished it by the Louisville Gas & Electric Company, a public service corporation, from and including August, 1923, up to and including March, 1929.

Appellant owns a large office building in the city of Louisville known as the Realty building. Appellee under an ordinance of and contract with such city has for a number of years been furnishing electric current for light and power purposes to the city and its citizens. Section 3 (c) of the ordinance reads:

"The rates for electricity shall be uniform for equal service, and rates for power shall be the same to all consumers using equal amounts of electricity, under similar conditions, as to the maximum load and the relation of maximum load to *2 the average. All rates for electricity shall be filed with the Board of Public Works of the City of Louisville and be open for public inspection. The company may make special contracts with consumers at rates based upon the amount of electricity used and the condition of the contract, which special rates may be less than those charged to consumers taking a smaller amount of electricity or taking electricity under different conditions, but said special rates shall be the same to all consumers using a like amount of electricity under the same contract conditions. A schedule of such special rates and contract conditions shall be filed with the Board of Public Works and each and every charge therein shall also be filed with the Board of Public Works and be open to public inspection."

On January 15, 1919, real estate agents acting for appellant signed an application to appellee for electric service for the Realty building which, among other things, provided:

"All services to be rendered under this agreement shall be charged for at the rate fixed in Schedules D--1, F--3, of the Company's rates, which Schedules are filed with the Board of Public Works of the City of Louisville, and made a part of this agreement."

This application was signed by an agent of appellee and constituted the contract between the parties. Schedule D--1 was a general lighting rate, and F--3 a general power rate, and current was furnished and paid for during the period of alleged overcharge under these schedules.

In addition to some of the foregoing facts, it is alleged in substance and effect in the petition that during the period of the alleged overcharge there was in effect a schedule known as G--3, containing rates that should have been charged plaintiff; that other customers using equal amounts of electricity under similar conditions as to the amount of maximum load and the relation thereof to the average were given an opportunity to and did use the rates charged for electricity under the G--3 schedule; that plaintiff was not given equal opportunity with other patrons to use the G--3 schedule of rates because it had no notice of such schedule, and the company in fraud of plaintiff's substantial rights intentionally failed to notify it of the available cheaper rate, although it knew it was greatly to plaintiff's advantage to accept

the G--3 schedule.

It is further alleged that on August 24, 1920, plaintiff sold the Realty building to one M. E. Jonnard; that on June 20, 1921, in a suit pending in the Jefferson circuit court, a receiver was appointed by the court to handle the property, and on February 10, 1923, plaintiff again acquired it, the sale thereof to M. E. Jonnard having been set aside by the court as void; that the contract of January 15, 1919, between appellant and appellee, under its terms was not transferable and new occupants of the premises are required to make application for service before commencing the use of electricity; that when the property was sold to Jonnard and again when it was placed in the hands of a receiver, the contract with appellant terminated, and therefore during the time complained of in the petition, no contract for the sale or use of electricity was entered into or existed between the parties to this action.

The petition gives a tabulation of the amounts paid for current for the various months during the period complained of under schedules D--1 and F--3, and the amounts that would have been paid for the corresponding period under schedule G--3, and the difference, whether greater or less, in plus and minus columns, and thus arrives at the amount of the alleged overcharge.

By answer appellee traversed the allegations of the petition and affirmatively alleged in effect that the rates under schedules D--1 and F--3 were general and uniform without any minimum requirements as to the amount of current used; that beginning in 1913 and continuing up to the time the answer was filed, appellee, as it was authorized to do under the ordinances and contract, had filed with the board of public works schedules of special or optional rates and contract conditions from time to time, and that such rates had during all such times been available to consumers who came within the classes designated in such schedules and applied alike to all consumers who availed themselves of such rates and using a like amount of electricity under the same contract conditions. These schedules as revised and changed during the period were known as G--1, G--2, and G--3, and afforded to consumer combined light and power rates. The answer set up the minimum charge under these various schedules and the contract conditions which the consumer obligated himself to assume in order to avail ***3** himself of these rates. It is further alleged and attempted to be demonstrated by a tabulation set forth in the answer that for the period complained of, appellant would have paid $398.77 more for its power bill under the optional schedules than it paid to appellee during the same period under schedules D--1 and F--3. In a third paragraph appellee interposed a plea of limitation for all amounts and claims for overcharges prior to September 12, 1928.

By reply appellant denied the material allegations of the answer and alleged certain affirmative matters which it is unnecessary to now detail since we shall further refer to the pleadings in disposing of the questions raised by brief.

A demurrer to the fourth paragraph of the reply was treated as a demurrer to the petition with the result above indicated.

[1][2][3][4] It is first asserted by counsel for appellant that public utilities must not discriminate and may not impose different terms and conditions according to their caprice or whim upon different persons, and this we find to be a universal principle running through all authorities. Unquestionably appellant was entitled to the

same consideration in the matter of facilities and rates as other customers under similar circumstances. The ordinance and contract as well as the law of the land which is embedded in a sound public policy forbids actual inequalities or discrimination in the character of service furnished by public utilities or in charges therefor. And ***what the utility is forbidden to do directly, it may not accomplish by indirection by way of resort to any device or subterfuge leading to the same result.*** If a utility company receives a fair return upon its capital investment, any discrimination in the form of rebates, free service, or inequality in rates will necessarily result in the less favored customer paying not only for his own service, but also for that of the patron receiving unwarranted concessions. A rebate resulting in a lower rate to one class than is paid by another is a violation of a contractual guarantee of uniformity and equality of rates. Union Light, Heat & Power Co. v. City of Fort Thomas, 261 Ky. 100, 87 S.W.(2d) 103. Inequalities and apparent discriminations must necessarily arise out of different circumstances and conditions, but it is not every discrimination that is illegal. Impartial and uniform service to all customers similarly situated is the correct measure and means of securing them in their rights under the law. Bilton Machine Tool Co. v. United Illuminating Co., 110 Conn. 417, 148 A. 337, 67 A.L.R. 814; Pond on Public Utilities, § 270; State of Missouri v. Bell Telephone Co. (C.C.) 23 F. 539; Arkansas Natural Gas Co. v. Norton, 165 Ark. 172, 263 S.W. 775; North Carolina Public Service Co. v. Southern Power Co. (C.C.A.) 282 F. 837, 33 A.L.R. 626; P.U.R.1923A, 289.

[5] It has come to be generally recognized that electric, gas, or water companies may make special or optional rates if based on a reasonable classification such as users of large quantities of their output, etc. See Spear & Co. v. Public Service Commission, 105 Pa.Super. 240, 161 A. 441, P.U.R.1932D, 384, and authorities therein cited. In the latter case it is held in effect that the fixing of optional rates which gives to the consumers of electricity a choice between two or more schedules does not indicate partiality or amount to illegal discrimination since the consumer may choose the rate most advantageous and suitable to his needs. See, also, Graver v. Edison Electric Illuminating Co., 126 App.Div. 371, 110 N.Y.S. 603.

[6] It is next argued in effect that by its own terms the contract between appellant and appellee terminated when the property was sold to Jonnard in 1920, therefore it follows that there was no contract between the parties during the period in controversy, and in the absence of a contract the lowest rate was the proper rate. Brief for appellant quotes that part of the contract which reads:

"The consumer agrees to give notice in writing to the company when about to move and agrees to pay for all services furnished until such notice is given and the Company has made the final meter readings."

It is not alleged that appellant ever gave notice to appellee that it had sold or was about to quit the building. It is not even alleged that Jonnard ever took possession under the deed of 1920, but merely that for a time it was in the hands of a receiver and that in a litigation the conveyance was declared void. The recording of the deed to Jonnard was not such notice to appellee as would terminate the contract. Our recording statutes do not have the ***4** effect of carrying such notice. As already indicated, the contract for current to be furnished for the building was made with a real estate agent

acting for appellant and it is apparent that the service continued under this contract.

[7] It is next argued that the filing of a schedule with the board of public works in the city hall which was not recorded, indexed, stamped, or in a bound volume is not a public record giving notice to consumers, and that it was the duty of appellee to actually notify its customers using current for lighting and power purposes of its combined cheaper rate.

Under its franchise and contract, appellee was required to file its schedules of rates with the board of public works and this was all it was required under the ordinance or contract to do to bring notice to its customers. The filing of schedules G--1 to G--3, inclusive, with the board of public works brought to present and prospective consumers information as to rates and conditions upon which they were available, and this being done, it was not essential that individual notice be given to the consumer. Kansas City S. R. Co. v. C.H. Albers Commission Co., 223 U.S. 573, 32 S.Ct. 316, 56 L.Ed. 556; BerwinD-- White Coal Mining Co. v. Chicago & E. R. Co., 235 U.S. 371, 35 S.Ct. 131, 59 L.Ed. 275; Turner, etc., Co. v. Chicago, M. & St. P.R. Co., 271 U.S. 259, 46 S.Ct. 530, 70 L.Ed. 934; Harrison Electric Co. v. Citizens' Ice & Storage Co., 149 Ark. 502, 232 S.W. 932, P.U.R.1921E, 674; Dekler v. Atlantic City Electric Co., P.U.R.1926B, 351.

In Spear & Co. v. Public Service Commission, supra, it is said:

"Complainant contends further that if optional rates are proper, it is the duty of the company to calculate which will be the cheapest for each consumer and to bill him upon that basis. In practice such a procedure would be well nigh impossible. A utility had the duty to make proper classifications of its service and to prescribe rates accordingly, but having done this and having made all proper information available to its patrons, its obligation has been met. No public service company is advised beforehand what amount of use a given consumer will make of its service or how efficiently it will be taken, as is illustrated by the conditions at complainant's store where rate 'W' was first adopted and then discarded."

Our conclusion is that utility companies may make special or optional rates based on reasonable classifications and that such classifications do not amount to illegal discrimination; that the filing of these schedules of special or optional rates with the board of public works was all the notice necessary to be given appellee's patrons, and that the rates fixed by schedules G--1 to G--3, inclusive, were at all times available to appellant at its option if it cared to comply with the required conditions.

Wherefore the judgment is affirmed.

END OF DOCUMENT

David Wilson
vs.
Arthur G. Dealy and Robert S. Rourke, d/b/a Dealy-Rourke Personnel Service

[NO NUMBER IN ORIGINAL]
SUPREME COURT OF TENNESSEE, AT NASHVILLE
222 Tenn. 196, 434 S.W.2d 835, 1968 Tenn. LEXIS 423
August 23, 1968, Opinion Filed
FROM DAVIDSON

Petition to Rehear Denied December 20, 1968.

COUNSEL

Dan Garfinkle, Nashville, for plaintiff in error.
John R. Parker, Nashville, for defendants in error.

JUDGES

Mr. Chief Justice Burnett delivered the opinion of the Court.
AUTHOR: BURNETT

OPINION

{Tenn. 198} {S.W.2d 836} The present case is a suit on a contract and is before us on a stipulation of facts. David Wilson, the plaintiff in error, in a search for employment engaged the services of Arthur G. Dealy and Robert S. Rourke doing business as Dealy-Rourke Personnel Service, the defendant in error. Dealy-Rourke, an employment agency, performs the service of locating jobs for its clients. Wilson retained Dealy-Rourke's services by signing a standard form contract prepared by the latter. The contract terms reveal that if Dealy-Rourke referred Wilson to a job that he accepted he was then obligated to pay Dealy-Rourke a stipulated fee. The clause of the contract generating this litigation reads:

> "The full fee is due and payable within thirty (30) days of beginning employment unless a suitable timepayment note has been signed and agreed upon. **Late charges of one and one half (1 1/2%) per cent per month will be made on all accounts at the end of the thirty (30) day period.**" [Emphasis added.]

{Tenn. 199} Dealy-Rourke referred Wilson to a job that he accepted. Wilson neither paid Dealy-Rourke's fee within the thirty day period nor executed a note contemplating eventual payment. Dealy-Rourke sued Wilson for their fee plus the late charges. Wilson's defense is that the late charges of one and one-half per cent per month amount to usury that makes the contract void. The trial court held that the late charges were not interest but a penalty for late payment, therefore the late charges were not usurious and the contract is valid entitling Dealy-Rourke to recover their fee plus the late charges. Wilson appeals.

The only issue raised by counsel is whether the late charge of one and one-half per cent per month is usury.

The definition of usury is found in T.C.A. secs. 47-14-103 and 104. T.C.A. sec. 47-14-103 defines interest as "* * * the **compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money.**" [Emphasis added.] T.C.A. sec. 47-14-104 defines usury by stating that "The amount of said compensation shall be at the rate of six dollars ($ 6.00) **for the use of** one hundred dollars ($ 100) for one (1) year; and every excess over that rate is usury." [Emphasis added.] From reading the statutes it appears that usury is an exaction of interest, compensation for the use of money, exceeding six per cent per year.

The one and one-half per cent per month late charges constitutes interest and is usurious only if it is compensation for the use of money. Counsel for Mr. Wilson relies upon the cases of **Richardson v. Brown,** 68 Tenn. 242 (1877) and **Bang v. Phelps & Bigelow Windmill Company,** 96 Tenn. 361, 34 S.W. 516 (1896) as authority for *{Tenn. 200}* determining that any specie of charge over six per cent per year made for the late payment *{S.W.2d 837}* of a debt is usury. We think this interpretation of the **Richardson and Bang** cases, supra, is too broad. Both **Richardson** and **Bang** cases, supra, involve a suit on a note requiring payment of interest above the legal rate after the maturity date. An issue in both the cases was whether the charge above the legal interest rate amounted to usury or whether it was only a penalty for late payment. In each case the court found that the charges above the legal interest rate were compensation for the continued use of the money loaned beyond the maturity date of the note. Being compensation for the use of money, the charges were subject to state regulation of the interest rate and because they exceeded the legal rate were usury that made the notes void. The **Richardson** and **Bang** cases, supra, held only that a charge for **interest** above the legal rate is usury.

Whether a charge imposed because of late payment of a debt is compensation for the continued use of the money owed depends upon whether the late charge is made as consideration for an extension of the time for payment or as compensation for the damage done to the creditor by the debtor's failure to pay his debt when due. To constitute consideration for an extension of the time for payment of a matured debt, the charge must be paid as consideration for the creditor's forbearance of asserting his right of collection. The contract between Wilson and Dealy-Rourke does not obligate the latter to forbear collection of their fee if Wilson pays the late charges. Payment of the late charge by Wilson does not purchase an extension of time in which to pay his debt. Dealy-Rourke's fee is due absolutely, thirty days after Wilson accepts employment. At any time after Wilson *{Tenn. 201}* had been on the job for thirty days Dealy-Rourke could enforce their right to the agreed fee regardless of payment of the late charge by Wilson. The late charge of one and one-half per cent per month imposed by the contract is not then compensation for the use of money. The contract is not void because of usury. The late charge represents an attempt to liquidate the damages that would result should Wilson breach his obligation to pay the fee within the required time.

The Restatement of Contracts, sec. 339, reads:

"(1) An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

(a) * * *

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

Damages that are certain or that are readily susceptible to accurate proof are not subject to liquidation by the agreement of the parties prior to a breach of the contract. If a breach of contract will result in damages that are certain or that are subject to accurate proof the innocent party's remedy is to recover for the actual damages sustained.

Wilson's primary contractual obligation is to pay a specified sum of money on a specified date. The damages foreseeably resulting from Wilson's failure to pay Dealy-Rourke their fee when due are the loss by Dealy-Rourke of the interest that the fee would produce at the legal rate plus the expense incident to carrying Wilson's account on the partnership books past the date when payment *{Tenn. 202}* of the fee was due. Absent proof that Wilson is liable for special damages of a type amenable to liquidation, the above mentioned damages represent the entirety of Wilson's liability for his failure to pay Dealy-Rourke's fee on the due date. The damages foreseeably resulting from Wilson's breach of his contractual obligation are certain and easily provable; therefore the attempt to liquidate them by *{S.W.2d 838}* agreement prior to any breach of the contract is unenforceable.

Dealy-Rourke's remedy is to recover the actual damages that resulted from the failure of Wilson to pay his debt when due and for which Wilson can be proved to be liable. Affirmed and remanded. Plaintiff in error taxed with the costs.

DISPOSITION

Affirmed and remanded.

Wesley A. Estabrook, Plaintiff-Appellee
vs.
Club Chalet of Gatlinburg, Inc., Defendant-Appellant

No. 133
COURT OF APPEALS OF TENNESSEE, EASTERN SECTION
1988 Tenn. App. LEXIS 4
January 14, 1988, Filed
SEVIER CHANCERY, HON. CHESTER A. RAINWATER, CHANCELLOR. AFFIRMED AS MODIFIED AND REMANDED.

COUNSEL

KENNETH CLARK HOOD and WILLIAM S. NUNNALLY, FOR APPELLANT.
WANDA G. SOBIESKI, FOR APPELLEE.

JUDGES

Houston M. Goddard, Judge, Clifford E. Sanders, P.J. (E.S.), E. Riley Anderson, J., CONCUR.
AUTHOR: GODDARD

OPINION

GODDARD, J.

Club Chalet of Gatlinburg, Inc., Defendant-Appellant, appeals a judgment rendered against it in favor of Wesley A. Estabrook, Plaintiff-Appellee. The judgment resulted from a suit by the Plaintiff against the Defendant seeking damages for breach of a sub-lease, wherein the Court awarded $ 88,688 for accrued rents, $ 91,657.53 for future rents as commuted to present value, and $ 10,000 for attorney fees. The Court dismissed the counter-complaint of the Defendant seeking recovery for improvements made to the premises during its occupancy. For convenience in this opinion the sub-lease will be referred to as lease and the sub-lessor and sub-lessee as lessor and lessee.

On appeal the Defendant raises the following six issues and the Plaintiff the following two:

DEFENDANT'S ISSUES

I

THE CHANCELLOR ERRED IN DENYING THE DEFENDANT A TRIAL BY JURY IN THE CONSOLIDATED HEARING SINCE A JURY HAD BEEN DEMANDED IN THE CIRCUIT COURT PROCEEDING.

II

THE LEASE AGREEMENT IN UNENFORCEABLE UNDER THE DOCTRINES OF FRUSTRATION SINCE THE DEFENDANT WAS TOTALLY UNABLE TO OCCUPY THE PREMISES FOR THE PURPOSE FOR WHICH IT WAS LET.

III

THE CHANCELLOR ERRED IN FAILING TO FIND THAT THE INABILITY TO OBTAIN A CERTIFICATE OF OCCUPANCY WAS NOT A VALID DEFENSE UNDER THE TERMS OF THE LEASE AGREEMENT.

IV

SINCE THE PLAINTIFF LESSOR IS NOT BOUND IN ANY MEANINGFUL MANNER BY THE TERMS OF THE LEASE, THIS COURT SHOULD FIND THAT THE ENFORCEMENT OF THIS LEASE IS PRECLUDED BY THE DOCTRINES OF ILLUSORY PROMISE AND UNCONSCIONABILITY.

V

THE CHANCELLOR IMPROPERLY AWARDED DAMAGES FOR LOST RENT ARISING FROM A RENT ADJUSTMENT TIED TO THE CONSUMER PRICE INDEX BECAUSE THE PLAINTIFF OFFERED ABSOLUTELY NO PROOF OF THE CHANGE IN THE RELEVANT INDEX.

VI

THE CHANCELLOR IMPROPERLY AWARDED RENT FOR FUTURE YEARS CONTRARY TO TENNESSEE CASE LAW.

PLAINTIFF'S ISSUES

I

WHETHER ESTABROOK IS ENTITLED TO RECOVER PENALTIES FOR LATE PAYMENT AS BARGAINED FOR IN HIS AGREEMENT WITH CLUB CLALET.

II

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO AWARD ATTORNEY'S FEES IT FOUND TO BE ENFORCEABLE, NECESSARY AND REASONABLE.

In the latter part of 1981 or the early part of 1982 the Defendant leased certain space in the Tipton-Terrace Mall in Gatlinburg for the purpose of displaying a model chalet which they had constructed, and to house personnel incident to the sale of chalets. To further supplement their operation the Defendant purported to lease the entire second floor space on the east side of the Mall which was above the Plaintiff's World of Illusions Museum.

After Club Chalet began renovations of the second floor space it learned that the lessor, Richard Tipton, had a legal interest in only one-half of the second floor space, the remaining one-half being under the control of the Plaintiff. Thereupon, the Defendant entered into negotiations with the Plaintiff and on April 9 executed a lease to the Estabrook portion.

At the time these negotiations began Mr. Tipton had filed for bankruptcy, and the eventual disposition of the remainder of the second story space was under the control of the Bankruptcy Court.

Both the Plaintiff and the Defendant believed that ultimately the Tipton half of the second floor would be purchased by the Plaintiff and in furtherance of this expectation the Defendant had prepared and submitted to the City of Gatlinburg plans intended to meet the occupancy permit requirements of the City. The City, based upon the representations that the Defendant would acquire the Tipton portion by a lease from the Plaintiff when he acquired the property, issued a temporary occupancy permit.

When the Tipton property was sold at bankruptcy the Plaintiff was not the successful bidder, but rather third parties who refused to lease to the Defendant.

Even though the Defendant was unable to acquire all the space that it desired and perhaps needed, it continued to occupy the Estabrook space until late 1983 and paid the rental payments due through that year.

In December 1983 the Defendant notified the Plaintiff that it would no longer honor its lease obligations, but it was not until some 15 months later that the Defendant formally notified the Plaintiff that it was relying upon its failure to obtain an occupancy permit as the reason for repudiating the lease.

Thereafter, in early 1984, the Defendant sued the Plaintiff in the Circuit Court for Sevier County, seeking reimbursement for improvements made to the Plaintiff's leasehold interest. Shortly thereafter, on January 27, 1984, the Plaintiff sued the Defendant in the Chancery Court, seeking recovery for breach of the lease agreement.

Apparently, the record is not entirely clear on this point, the parties agreed that the Circuit Court and the cases consolidated for trial. The Defendant evidently relied upon his counter-claim in the Chancery Court case as a basis for redress of his wrongs as the record does not contain the Circuit Court complaint.

As already noted, the Chancellor awarded a judgment for accrued rents and also determined that the Plaintiff was entitled to future rents due under the lease. He referred the amount of future rents and of attorney fees due the Plaintiff to a Special Master.

The Special Master's report was filed awarding future rent in the sum of $ 91,657.53 and attorney fees in the amount in $ 16,000.

The Court accepted the Master's report as to future rents and, although no exceptions were filed, reduced the attorney fees to the sum of $ 10,000.

We now turn to the issues on appeal and will supplement the foregoing facts as necessary to illuminate the issues raised.

I

THE CHANCELLOR ERRED IN DENYING THE DEFENDANT A TRIAL BY JURY IN THE CONSOLIDATED HEARING SINCE A JURY HAD BEEN DEMANDED IN THE CIRCUIT COURT PROCEEDING.

We assume that a jury was demanded in the Circuit Court proceeding, although, as already noted, the Circuit Court complaint is not a part of the file. In any event, it is clear that no jury was demanded when an answer and counter-complaint was filed. The Trial Court apparently first became aware of the Defendant's insistence on a jury trial when the Defendant filed a motion to impanel a jury on February 22, 1985, some three months after an agreement to consolidate and less than two weeks before the original trial date of March 6.

Some seven months later the Defendant again raised the jury issue at a pre-trial hearing on September 13. The Chancellor agreed that a jury could be impaneled, but only in the event the parties strictly complied with the Court's standard pre-trial order which was supplied to counsel on that date. Although the order was never entered by the Court, the form was made a part of the record which provided, among other things, the following:

4. A concise brief with respect to all anticipated unusual evidentiary issues and all other unusual substantive issues of law, containing citations of the Shepardized cases and statutes relied upon. Photo copies of a specific statute or case in point may be submitted.

5. A statement of all special requests for jury instructions, including an exact typed or photo copy of all statutes and ordinances requested. If a special request is taken from the **Tennessee Pattern Jury Instructions - Civil**, or from a specific Tennessee reported case, or other authority, the exact citation should be given.

7. If a general verdict is not requested, then a statement of all issues of fact which counsel proposes should be submitted to the jury should be included, with a designation of which party has the burden of proof on each issue.

8. Whether counsel agrees for the case to be tried by a six (6) person jury.

Counsel for the Defendant never complied with any of the requirements of the order and the Chancellor, we think, properly concluded that he was no longer insisting upon a jury trial.

When another pre-trial conference was had on December 19, and counsel for the Defendant was still insisting upon a jury trial, the Chancellor offered to sever the Circuit Court case and transfer it back to the Circuit Court for a jury trial. Counsel for the Defendant, realizing that the Defendant might very well be bound by the doctrines of **res judicata** and collateral estoppel as to issues presented in the Chancery Court, concluded that as a matter of strategy it was wise to decline the Chancellor's offer and proceed non-jury as to the entire controversy.

While we can appreciate that counsel was under some pressure at that stage of the proceeding to have the Defendant's claim before the Court at the same time as the Plaintiff's, we are persuaded that the Court did not abuse its discretion in not permitting a jury trial. We reach this conclusion because counsel for the Defendant did not comply with the Chancellor's standard