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Patrick Turner
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September 19, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Tariff Filing of BellSouth Telecommunications, Inc. to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Payment Charge*
Docket No. 00-00041

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Response of BellSouth Telecommunications, Inc. to Consumer Advocate Divisions' Recent Filings. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Patrick Turner

Patrick W. Turner by jm with permission

PWT/jem

Enclosure

229242

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Tariff Filing to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Charge*

Docket No. 00-00041

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO CONSUMER ADVOCATE DIVISIONS' RECENT FILINGS

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to the CAD's "Objection to September 1, 2000 Notice of Filing of Executive Secretary and to the Appearance of Violations of the Public Meetings Act;" the CAD's "Motion to Amend Tennessee Consumers' Petition to Intervene;" the CAD's "Response to BellSouth's Implied Motion for Summary Judgment;" and the Affidavit attached to that response. As explained below, even if these documents had been filed in a timely fashion, the arguments set forth in these documents should be rejected because they are simply wrong. Given the time and manner in which they were filed, however, the TRA should summarily reject these filings and/or strike them from the record of this docket.

Once again, the CAD has responded to a decision with which it disagrees by launching a series of ill-conceived attacks in an attempt to muddy the waters and delay the implementation of the decision. Apparently feeling unconstrained by legal precedent, procedural deadlines, or professional courtesy, the CAD has relentlessly raised specious claims of "due process," "issue of fact," or anything else that will delay the implementation of BellSouth's tariff. In the past two weeks alone, the

CAD has ignored the deadline for filing a list of disputed facts; launched a meritless attack against the Notice of Filing issued by the Executive Secretary; wrongfully accused the TRA of conducting an illegal meeting; belatedly filed an affidavit which presents the erroneous legal opinions of an affiant who is not qualified to render legal opinions; filed a frivolous Motion to Amend that simply ignores the filed rate doctrine; and suggested that it "may address BellSouth's legal arguments in a separate brief" which the CAD apparently plans to file whenever it is good and ready to file it.

These tactics by the CAD have become all too common before the TRA. When the Court of Appeals was confronted with similar tactics by the CAD, however, it succinctly responded accordingly:

> The Consumer Advocate Division launches an unfocused fusillade of complaints that our October 1, 1997 opinion "overlooks" or "misapprehends" prior case law, material facts, and the arguments in the Consumer Advocate's earlier briefs.
>
> * * *
>
> The Consumer Advocate Division raises many new arguments in its petition for rehearing, including its assertion that Tenn. Code Ann. §65-5-209, as interpreted by this Court, amounts to a taking of private property without due process of law and that this Court has usurped the powers of the Tennessee Regulatory Authority in violation of Tenn. Const. art. II, §§1 & 2. We will not attempt to run down the threads of each of the Consumer Advocate Division's arguments because the Division has not itself filed a petition for rehearing. Instead, we interpret its response to be that we should deny BellSouth's petition for rehearing because our October 1, 1997 opinion is simply wrong.

BellSouth v. Tennessee Public Service Commission, 972 S.W.2d 663, 682 (Tenn. Ct. App. 1997).

The TRA should similarly reject the CAD's attempts to re-hash arguments it has already presented and to ignore appropriate procedure. As noted below, therefore, BellSouth respectfully requests that the TRA:

1. Overrule the CAD's Objection to September 1, 2000 Notice of Filing of Executive Secretary and to the Appearance of Violations of the Public Meetings Act for the reasons stated below;

2. Deny the CAD's Motion to Amend Tennessee Consumers' Petition to Intervene on the grounds that it is untimely and that the amendment sought is futile;

3. Strike the CAD's Response to BellSouth's Implied Motion for Summary Judgment and Affidavit on the grounds that it is untimely and that the CAD blatantly disregarded the Notice of Filing;

4. In the alternative, strike the Affidavit on the grounds that it presents the legal opinions of an affiant who is not qualified to present legal opinions;

5. In the alternative, rule the Affidavit does not present any issues of material fact; and

6. Approve BellSouth's tariff on reconsideration.

I. INTRODUCTION

As noted in BellSouth's previous briefs in this docket, late payment charges are common in the telecommunications and other utility industries. In fact, courts across the nation have upheld the imposition of late payment charges by utilities. The Supreme Court of Louisiana, for instance, has stated that a utility "incurs

certain additional costs as a result of the failure of this group (or classification) of customers to pay promptly, and the [5%] late charge imposed on the late payers is designed to offset these expenses." *State v. Council of City of New Orleans*, 309 So.2d 290, 295 (La. 1975) (copy attached as Exhibit 1). The Louisiana Court also noted that a statistical study performed by the utility in that case showed that "low income customers were beneficiaries rather than victims of the late payment charge, since wealthier customers with larger accounts were generating a disproportionately large portion of the revenues from late payment charges." *Id.* at 295. Thus "if the late charge billing practice was terminated and the expenses incurred from late payments evenly distributed among all customers by a general rate increase (as had been suggested by the Attorney General), lower income customers would bear a greater proportion of these costs than they do now." *Id.*

Similarly, the Supreme Court of Arkansas made the following statements regarding a utility late payment charge in the amount of 8% of the first $15.00 and 2% of any remaining balance:

> The late charge [as approved by the Public Service Commission], far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills. The appellant's argument [to the contrary] actually means in substance not that the utility company be prevented from collecting excessive interest but that its customers who pay their bills promptly be penalized by sharing the burden of collection costs not of their making. We are confident that the framers of the Constitution of 1874 did not insert their prohibition against usury with any notion of

outlawing an arrangement such as that approved by the Public Service Commission in this instance.

Coffelt v. Arkansas Power & Light Co, 451 S.W.2d 881, 883-84 (Ark. 1970) (emphasis added) (copy attached as Exhibit 2). The Missouri Court of Appeals also has acknowledged that a utility's late payment charge "is attributable to direct costs incurred by the utility on those accounts of customers who fail to make timely payments of their bills," and "it necessarily follows that expenses imposed on the utility by customers who pay late will be reflected in the operating costs of the company." *State v. Public Service Commission*, 674 S.W.2d 660, 662 (Ct. App. Mo. 1984) (copy attached as Exhibit 3).

These decisions simply reinforce the fact that the TRA properly decided, in the first instance, that it can and should approve BellSouth's proposed late payment charges. As noted below, none of the CAD's sundry attacks on that decision have merit. On reconsideration, therefore, the TRA should approve BellSouth's tariff.

II. ARGUMENT

A. The TRA Should Overrule the CAD's "Objection to September 1, 2000 Notice of Filing of Executive Secretary and to the Appearance of Violations of the Public Meetings Act."

On September 1, 2000, the Executive Secretary issued a Notice of Filing which directed each party "to file a list of each and every fact the party deems to be relevant to the two issues being considered in this matter." (Copy attached as Exhibit 4). The Notice of Filing states that "the purpose of this request is to

determine which facts are undisputed and to determine whether factual questions must be resolved before the Authority may resolve the legal issues presented by the two issues agreed to by the parties." Finally, the notice clearly and unambiguously states that "each party shall file its list of facts no later than 2:00 p.m. on Friday, September 8, 2000." (Emphasis added).

Instead of spending its time preparing a presentation of purported factual issues, the CAD chose to spend its time launching a 30-paragraph attack on the Executive Secretary's Notice. In a characteristically circuitous and perplexing argument, the CAD argues that if the TRA granted the CAD's Petition for Reconsideration, "it granted the Petition for Reconsideration on its merits," and that "if the Agency only intended to consider the merits of the Petition for Reconsideration at a later date, it apparently has not granted the Petition for Reconsideration and that said Petition for Reconsideration must be deemed denied as a matter of law." *See* Objection at ¶¶ 3-4. This utterly indefensible argument ignores the plain language of both the majority's ruling during the August 29, 2000 Directors' Conference and section 4-5-317 of the Tennessee Code Annotated.

During the August 29, 2000 Directors' Conference, the majority approved the following motion: "I'm willing to grant the Consumer Advocate's Petition for Reconsideration and consider the merits of the issues raised at a later date." (Tr. at 58-59). This action taken by the majority is entirely consistent with the language of Section 4-5-317, which allows the TRA to enter an order "granting the petition and setting the matter for further proceedings . . . ." Section 4-5-317(c).

Clearly, the Directors decided to reconsider the majority's decision and to allow the parties to comment further on that decision before making a final decision on the merits of this docket. This procedure is appropriate, and it is expressly sanctioned by Section 4-5-317.[1]

The CAD also alleges that the Executive Secretary's Notice of Filing "appears to originate from a meeting which was not held in accordance with the Public Meetings Act." Objection at 1. In truth, the Notice of Filing likely originated from the CAD's failure (or refusal) to respond to Director Greer's request -- made during the August 29, 2000 Directors' Conference -- for examples of what the CAD considered to be material factual issues in this docket. *See* Tr. at 52-58. In any event, the Notice of Filing is not substantially different than a Staff Data Request which typically is issued by the Executive Secretary and served upon one or more parties regardless of whether a Directors' Conference has been held in the docket. Neither Staff Data Requests nor the Notice of Filing in this docket violate the Public Meetings Act, and the CAD's argument to the contrary is yet another improper attempt to delay the implementation of a ruling with which the CAD does not agree.

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[1] This procedure is also consistent with the TRA's new procedural rules, which have been reviewed and approved by the Office of the Attorney General. These new rules state that if the TRA grants a petition for reconsideration, "the matter shall be heard as soon as practicable . . . ." TRA Rule 1220-1-2-.20(2)(a). Clearly, granting a petition to reconsider is not a ruling on the merits of the issues being reconsidered.

B. The TRA Should Deny the CAD's Motion to Amend because it is Untimely, Futile, and Made in Bad Faith.

An agency's decision on a motion to amend a pleading rests in the sound discretion of the agency and will not be overturned on appeal unless an abuse of discretion has been shown. *Cf. Welch v. Thuan*, 882 S.W.2d 792, 793 (Tenn. Ct. App. 1994). Among the factors to be considered in deciding a motion to amend are undue delay in filing, the futility of the amendment, and bad faith by the moving party. *Id.* More specifically, when the requested amendment would simply add a claim that is barred as a matter of law, the requested amendment is futile and should be denied. *Id.* (affirming the denial of a motion to amend a complaint to add a claim that was barred by the statute of limitations). Based on this precedent, the TRA should deny the CAD's Motion to Amend.

The CAD's Motion to Amend, which requests "that BellSouth's Private Line Tariff late payment charge as described in BellSouth Tariff B2.4.1.3,"[2] is quite confusing. *See* Motion to Amend at 1. The affidavit attached to the Motion, however, states that

> Tennessee consumers' (sic) have moved to Amend its (sic) 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).

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[2] This is not a typographical error by BellSouth. Instead it is a verbatim quote of the CAD's Motion.

Affidavit at ¶ 68. It would appear, therefore, that the CAD is attempting to retroactively challenge the approval of Section B2.4.1.E of BellSouth's tariff, which has been approved and in effect since at least July 2, 1990. *See* Exhibit 5.

The CAD's Motion to Amend, therefore, was filed more than 10 years after the effective date of the 1.5% late payment provisions in section B2.4.1.3 of BellSouth's tariff; seven months after the CAD filed its Complaint in this docket; six weeks after the TRA entered its Order Reversing Initial Order and Approving Tariff; and three weeks after the CAD filed its Reply to BellSouth's response to the CAD's request for reconsideration and second request for a stay. The CAD, therefore, has had ample opportunity to raise this issue in this docket and has simply chosen not to do so. Given this undue delay in filing, the TRA should deny the Motion to Amend. *See Welch*, 882 S.W.2d at 793.

This is especially true in light of the fact that Section B2.4.1.3 of BellSouth's tariff is approved, has been in effect for 10 years, is binding upon BellSouth and its customers, and has the effect of law. *See GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986). The CAD knows full well that it cannot retroactively challenge approved and effective tariffs.[3] Moreover, even if the TRA had the statutory authority to retroactively

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[3] Alternatively, if the CAD is asking the TRA to eliminate any late payment charge from Tariff B2.4.1.E on a going-forward basis, the TRA should deny the CAD's request for the same legal reasons it should reject the CAD's challenges to BellSouth's current late payment tariff. Either way, the CAD is requesting the TRA to allow it to amend its pleading in order to assert a claim that clearly has no merit and, therefore, is futile.

amend a tariff which has been approved and in effect for more than 10 years (which it does not), granting such a request would improperly open a Pandora's Box of policy and implementation issues.[4] Accordingly, the TRA should deny the CAD's Motion to Amend because the amendment requested by the CAD is futile. *See Welch*, 882 S.W.2d at 793.

Finally, attempting to retroactively attack a tariff that has been in effect for 10 years is just plain silly. The only possible motive for the CAD to file such a frivolous pleading is to delay the implementation of BellSouth's approved tariff. The TRA, therefore, should deny the CAD's Motion to Amend because it was filed in bad faith for the purpose of delaying the implementation of BellSouth's tariff. *See Welch*, 882 S.W.2d at 793.

For each of these reasons, therefore, the TRA should deny the CAD's Motion to Amend.

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[4] The CAD's arguments in the Discount Communications proceeding provides one example of the chaos that would result if a party could seek retroactive modification of a published tariff. In that docket, the CAD claimed that the AT&T/MCI Arbitration Order (which provides that the wholesale discount is applied to the tariffed service rate before the federal and state credits for Lifeline are applied) is inconsistent with the new Universal Service Order (which, according to the CAD, requires the federal and state credits to be applied to the tariffed service rate before the wholesale discount is applied). The CAD, however, conceded that its proposed methodology resulted in a higher resale rate for Lifeline than the methodology ordered by the TRA in the AT&T/MCI Arbitration Order. The CAD's witness also conceded that if BellSouth were required to retroactively provide a $3.50 state credit amount to Discount, then absent some impact the witness was not aware of, Discount should be required to retroactively pay the higher resale rate for Lifeline. Implementing such an approach, however, would be unmanageable in that one docket, let alone in all other dockets to which similar reasoning could apply.

C. The TRA Should Strike the CAD's "Response to BellSouth's Implied Motion for Summary Judgment" because it was Filed in Blatant Disregard to the Deadline Imposed by the Notice of Filing.

The CAD filed its "Response to BellSouth's Implied Motion for Summary Judgment" and the Affidavit attached to that Response "to address the Executive Secretary's Notice." *See* Response at 1. That Notice, however, clearly and unambiguously states that "each party shall file its list of facts no later than 2:00 p.m. on Friday, September 8, 2000." (Emphasis added). The CAD did not seek additional time to respond to the Notice of Filing, and as noted above, rather than spending its time preparing a presentation of purported factual issues, the CAD chose to spend its time launching a 30-paragraph attack on the Executive Secretary's Notice of Filing. It was not until September 13, 2000 -- five days past the deadline -- that the CAD finally got around to filing its Response.

The CAD should not be allowed to file a response to the Notice of Filing five full days after the deadline set forth in the Notice. Professional courtesy alone would have led most parties appearing before the TRA to request additional time to make such a filing and to inform the opposing party of such a request. The CAD, however, has once again disregarded both the dictates of professional courtesy and the explicit deadlines established by the TRA, apparently simply because it believes it can get away with it. BellSouth respectfully submits that it is time for the CAD to begin playing by the same rules that apply to all other parties that appear before

the TRA. BellSouth, therefore, respectfully requests the TRA to strike the CAD's Response and the Affidavit attached to it from the record.

D. In the alternative, the TRA should Strike the Affidavit Accompanying the CAD's "Response to BellSouth's Implied Motion for Summary Judgment" because it Improperly Addresses Issues of Law and not Issues of Fact.

The CAD supports its "Response" by attaching the affidavit of R. Terry Buckner. During the hearings in the Generic CSA Docket, the TRA struck portions of Mr. Buckner's testimony because they constituted legal opinions which Mr. Buckner is not qualified to offer. Nothing in the Affidavit suggests that Mr. Buckner is any more qualified to offer legal opinions today than he was during the CSA proceedings. The Affidavit, however, plainly states that "[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." *See* ¶ 32.

The Affidavit, therefore, clearly is a hodge-podge of legal opinion offered either directly by the Affiant or indirectly by counsel for the CAD through the words of the Affiant. Among the more blatant examples of improper legal opinion set forth in the Affidavit is the discussion of the application of the Uniform Commercial Code and the usury statutes to BellSouth's tariff. *See, e.g.*, ¶¶ 70, 85-87; 71-80. In addition to setting forth legal opinions that the Affiant is not qualified to present, the discussion in Section E below demonstrates that these

opinions are just plain wrong. The TRA, therefore, should strike the Affidavit in its entirety because when read as a whole, it clearly constitutes the legal opinion of an Affiant who is not qualified to provide a legal opinion.

E. In the Alternative, the TRA Should Rule that the Affidavit does not Present any Issues of Material Fact.

In essence, the Affidavit: (1) erroneously argues that the late payment charge is an increase in the rates for basic local exchange service; (2) erroneously argues that the late payment charge violates the Uniform Commercial Code; and (3) erroneously argues that the late payment charge violates the usury statutes. As explained below, each of these arguments is simply wrong as a matter of law. Thus if the CAD is permitted to ignore the time deadlines established in the Notice of Filing and improperly file an Affidavit constituting legal opinion by an Affiant who is not qualified to offer legal opinions, the TRA should rule that the Affidavit simply does not present any issues of material fact.

1. As a Matter of Law, the Late Payment Charge is not an Increase in the Rates for Basic Local Exchange Service.

The CAD continues to insist that late payment factors were included in the BellSouth rates that existed on June 6, 1995 and that BellSouth's late payment tariff therefore constitutes "double recovery" or "extortion." BellSouth has addressed this argument in pleadings it has already filed in this docket. Moreover, the CAD's argument ignores the reality that in general, the costs of all services as they existed at some discreet past points of time were factored into the overall rate

structure that existed on June 6, 1995.[5] This simply has no bearing on whether a rate increase complies with the price regulation statutes.

Assume, for instance, that no cost or rate changes had occurred since June 6, 1995. Assume further that BellSouth filed a tariff to increase its rates for Memory Call service (which clearly is a non-basic service). Under this hypothetical, the cost of providing service has not changed and no rates are being reduced to "offset" the Memory Call rate increase. In the CAD's incorrect and anachronistic view of the world, the rate increase would constitute "double recovery" or "extortion" by BellSouth. In the General Assembly's controlling view of the world, however, this rate increase would be permissible as long as BellSouth's "aggregate revenues for basic local exchange telephone services or non-basic services generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan." *See* T.C.A. §65-5-209(e). The CAD's purported factual statements regarding what was or was not factored into BellSouth's rates as of June 5, 1996, therefore, have no bearing whatsoever on the legality of BellSouth's late payment charge.

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[5] Clearly, this does not mean that any particular service included all or a portion of such costs. For instance, no reasonable person could dispute that the 1FR rates that existed on June 6, 1995 were below the cost of providing the service. These rates, therefore, clearly could not have included all of the costs associated with providing the service.

2. As a Matter of Law, the Uniform Commercial Code does not Apply to BellSouth's Late Payment Tariff.

The Affidavit is simply wrong as a matter of law when it states that the Uniform Commercial Code applies to BellSouth's late payment tariff. *See* Affidavit, ¶¶ 70, 85-87. In *Fuller v. Orkin Exterminating Co.*, 545 S.W.2d 103 (Tenn. Ct. App. 1975), the Plaintiff sued under a contract for pest extermination services. The Plaintiff relied, in part, on the Uniform Commercial Code, and the Tennessee Court of Appeals ruled that the trial court should have "stricken all references in the complaint based on the Uniform Commercial Code." *Id.* at 109. In doing so, the Court held that "the Uniform Commercial Code applies only to the sale of goods" and "the Plaintiffs did not allege any damages from purchase of goods or chattels." *Id.*

BellSouth's tariffs do not govern the sale of goods or chattels. Instead, they govern the sale of services, and as noted above, the Uniform Commercial Code does not apply to the sale of services. The Affidavit's reliance on the Uniform Commercial Code, therefore, is simply misplaced.

3. As a Matter of Law, Tennessee's Usury Statutes do not Apply to BellSouth's Late Payment Tariff.

Similarly, the Affidavit's reliance on the usury statutes is misplaced. The United States District Court has specifically considered the application of the Tennessee usury statutes to late payment charges imposed by utilities. In *Ferguson v. Electric Power Board of Chattanooga*, 378 F. Supp. 787 (E.D. Tenn. 1974) (copy attached as Exhibit 6), the Court considered the imposition of a 10%

late payment charge that was applied if the bill was not paid within 10 days of the billing date. The Court expressly stated that this late payment charge "does not equate to 'interest' as defined by statute and as interpreted by court decisions in Tennessee, and accordingly does not come within the state usury statutes." *Id.* at 790. More specifically, the Court stated that the late payment charge at issue in that case clearly "is neither a 'payment for the use of money' nor is it 'consideration for the creditor's forbearance . . . of collection.'" *Id.* The Court, therefore, concluded that the Tennessee usury laws "have no application" to the 10% late payment charge rendered by the Electric Power Board of Chattanooga. Similarly, the usury statutes have no application to BellSouth's 3% late payment charge. *Accord State v. Public Service Commission*, 674 S.W.2d 660, 663 (Mo. Ct. App. 1984)(citing four cases for the proposition that "[o]ther decisions have uniformly supported the view that late payment charges included in regulated utility rate structures are not the equivalent of interest charged for the use of money.").

III. CONCLUSION

For the reasons stated above, the TRA should:

1. Overrule the CAD's Objections to the September 1, 2000 Notice of Filing of Executive Secretary and to the Appearance of Violations of the Public Meetings Act for the reasons stated above;

2. Deny the CAD's Motion to Amend Tennessee Consumers' Petition to Intervene on the grounds that it is untimely and that the amendment sought is futile;

3. Strike the CAD's Response to BellSouth's Implied Motion for Summary Judgment and Affidavit on the grounds that it is

untimely and that the CAD blatantly disregarded the Notice of Filing;

4. In the alternative, strike the Affidavit on the grounds that it presents the legal opinions of an affiant who is not qualified to present legal opinions;

5. In the alternative, rule the Affidavit does not present any issues of material fact; and

6. Approve BellSouth's tariff on reconsideration.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Patrick Turner by Jm with permission

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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

L. Vincent Williams, Esquire
Office of Tennessee Attorney General
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Nashville, Tennessee 37243

Patrick Turner
by Jm with permission

EXHIBIT 1

Supreme Court of Louisiana.

STATE of Louisiana ex rel. William J. GUSTE, Jr., Attorney General
v.
The COUNCIL OF the CITY OF NEW ORLEANS and New Orleans Public Service, Inc.

Nos. 55218, 55219 and 55227.

Feb. 24, 1975.
Rehearing Denied March 31, 1975.

Action was brought by State, through Attorney General, acting as representative of consumer public at large and as consumer of gas and electricity by state agencies located in New Orleans against city council which had adopted resolution establishing increased rate schedules for gas and electric service customers in city. The Civil District Court for the Parish of Orleans, No. 549--638, Division 'H,' Oliver P. Carriere, J., dismissed the action, and the State appealed. The Court of Appeal, Morial, J., 297 So.2d 518, reversed, and certiorari was granted. The Supreme Court, Marcus, J., held that late payment provision that net monthly bill would be increased ten percent if payment was not made on or before the due date was reasonable and did not violate usury statutes or Consumer Credit Law.

Judgment of court of appeal reversed, and judgment of district court reinstated.

Calogero, J., recused.

West Headnotes

[1] Municipal Corporations ⚿619
268k619

City of New Orleans is authorized by its constitutional grant of home rule to regulate those utility companies that furnish services within its jurisdiction. LSA-Const. art. 6, § 7; art. 14, § 22; LSA-Const.1974, art. 6, §§ 4, 6.

[2] Public Utilities ⚿119.1
317Ak119.1
(Formerly 317Ak119, 101k3821/2)

While public utilities may reasonably distinguish among classes of customers by charging varying rates for varying services, any discrimination among customers as to rate charged for same service is impermissible.

[3] Public Utilities ⚿119.1
317Ak119.1
(Formerly 317Ak119, 101k3821/2)

Public utility's rate structure must be nondiscriminatory.

[4] Public Utilities ⚿181
317Ak181
(Formerly 101k3821/2)

In reviewing reasonableness of classifications drawn among utility customers by rate structure, appropriate deference is owed to determinations made by legislative body vested with rate-making authority, and court's review is limited to determination of whether rate structure is reasonable.

[5] Electricity ⚿11.4
145k11.4
(Formerly 145k1.4)

[5] Gas ⚿14.6
190k14.6

Gas and electricity utility's late payment provision that net monthly bill would be increased ten percent if payment was not made on or before the due date was reasonable, in that such billing practice imposed the increase on class of customers whose common characteristic was that they failed to pay monthly bill within ten days of billing date and utility incurred additional costs as result of failure of its customers to pay bills promptly.

[6] Electricity ⚿11.5(1)
145k11.5(1)
(Formerly 145k1.5(1))

[6] Gas ⚿14.1(2)
190k14.1(2)

Gas and electricity utility's late payment provision

that net monthly bill would be increased ten percent if payment was not made on or before due date did not discriminate against lower fixed income customers, in that wealthier customers with larger accounts would generate disproportionately large portion of revenues from late payment charges.

[7] Electricity ⚿11.4
145k11.4

[7] Gas ⚿14.6
190k14.6

In considering gas and electricity billing procedures, existence of another method of collection did not preclude court from determining that the method employed was nonetheless reasonable.

[8] Electricity ⚿11.4
145k11.4
(Formerly 145k1.4)

[8] Gas ⚿14.6
190k14.6

The choice of which of two or more reasonable methods of billing for gas and electric service should be employed remains with legislative body vested with rate-making authority.

[9] Usury ⚿32
398k32

Usury statutes apply to loans but not to consumer credit sales. LSA-C.C. arts. 1935, 2924.

[10] Usury ⚿32
398k32

As a sale of commodities, monthly billing of gas and electricity charges by utility constitutes consumer credit sale rather than a loan.

[11] Public Utilities ⚿120
317Ak120
(Formerly 101k3821/2, 101k382)

[11] Usury ⚿32
398k32

Appropriate basis for regulation of utility rates is neither the usury statute, since charges for gas and electricity constitute consumer credit sale rather than loan, nor Consumer Credit Law, which specifically excludes utility rates from its operation; rather, regulation of public utility rates, including charges for delayed payment, rests solely with that agency or subdivision of the state vested with authority to supervise the operation of the utility, subject to judicial review of the reasonableness of the regulation. LSA- R.S. 9:3510-9:3568, 9:3512(3); LSA-C.C. arts. 1935, 2924.

[12] Consumer Protection ⚿6
92Hk6
(Formerly 382k861)

Late charge billing practice of gas and electricity utility did not constitute deceptive trade practice under Unfair Trade Practices and Consumer Protection Law, since late charge is not usurious interest and public utilities are exempt from regulation by the Law. LSA-R.S. 51:1401-51:1418.

***291** Blake G. Arata, City Atty., David S. Cressy, Asst. City Atty., for applicant in 55218, for respondents in 55219 and 55227.

Chaffe, McCall, Phillips, Toler & Sarpy, Harry McCall, Jr., James P. Farwell, New Orleans, for applicant in 55219, for respondents in 55218 and 55227.

Monroe & Lemann, Andrew P. Carter, Eugene G. Taggart, New Orleans, for applicant ***292** in 55227, for respondents in 55218 and 55219.

William J. Guste, Jr., Atty. Gen., Louis A. Gerdes, Jr., Robert L. Danner, Jr., Asst. Attys. Gen., for respondents in all cases.

David A. Marcello, Director, Louisiana Center for the Public Interest, New Orleans, for amicus curiae.

John M. Madison, Jr., Wilkinson, Carmody & Peatross, Shreveport, for amicus curiae, Southwestern Electric Power Co.

MARCUS, Justice.

On December 21, 1972, the Attorney General of Louisiana instituted this suit against the Council of the City of New Orleans (hereinafter referred to as the Council) and New Orleans Public Service, Incorporated (hereinafter referred to as NOPSI),

seeking a declaratory judgment that the late charge provided in the rate schedules promulgated by NOPSI and approved by resolution of the Council for utility services and the city tax collected thereon were illegal and void. Preliminary and permanent injunctions against their levy and collection were also sought. The action was brought on behalf of the state of Louisiana as a representative of the consumer public of Orleans Parish and as a consumer of gas and electricity by state agencies located in Orleans Parish. As another supplier of electrical power in the city employing similar billing practices, Louisiana Power & Light (hereinafter referred to as LP) intervened in the proceedings to assert and defend its interests.

Pursuant to a rule on the matter, the trial court denied the application for a preliminary injunction on the ground that no showing of irreparable injury, required by article 3601 of the Louisiana Code of Civil Procedure, had been made. After trial on the merits, judgment was rendered in favor of all defendants, dismissing plaintiff's suit. Plaintiff appealed the judgment to the court of appeal, which reversed the district court judgment. State ex rel. Guste v. Council of the City of New Orleans, 297 So.2d 518 (La.App.4th Cir. 1974). Upon defendants' applications, we granted writs of certiorari to review the judgment of the court of appeal. 300 So.2d 497, 498 (La.1974).

FACTS

An understanding of the public utility concept that has developed in this country is essential to the resolution of this controversy. Fundamentally, two characteristics of operation peculiar to those enterprises that supply continuous utility services through permanent physical connections between the plant of the supplier and the premises of the consumer (I.e., public utilities) require their public regulation: (1) the economic necessity of the services to the community, and (2) the severely localized and restricted market for utility services (so limited because of the necessarily close physical connection between the utility plant on the one hand and the consumers' premises on the other) that, combined with the economies of a large-scale enterprise, requires monopoly status to survive (I.e., competition within such a limited market would substantially increase the costs of services and/or bankrupt the rivals). See J. Bonbright, Principles of Public Utility Rates 7--17 (1961). Thus, in exchange for their favored status, furnishers of utility services submit to public regulation, which generally sanctions utility rates that provide a limited but reasonable return on the investment of the public utility. In effect, the public regulation acts as a substitute for competition. Id.

[1] The city of New Orleans is authorized by its constitutional grant of home rule to regulate those utility companies that furnish services within its jurisdiction. La.Const. art. 6, s 7 (1921); Id. art. 14, s 22, as amended by Acts 1950, No. 551; See *293 State v. City of New Orleans, 151 La. 24, 91 So. 533 (1922).[FN1] Pursutant to this authority, the home rule charter of the city empowers the Council to fix '. . . any rate, fare or charge for any . . . service rendered, or to be rendered, by any public utility . . .' after appropriate public hearings on the matter. Home Rule Charter of the City of New Orleans s 4--1604 (1954).

FN1. The new state constitution leaves this grant of power undisturbed. La.Const. art. 6, ss 4, 6 (1974).

The present schedules providing rates for utility services resulted from an application filed with the Council by NOPSI on January 4, 1972. Pursuant to this application, public utility consultants were appointed to represent the city, and notice was given of public hearings on the application. After the hearings were held, and all sides had presented their witnesses and evidence and cross-examined the witnesses offered by their adversaries, the Council unanimously adopted its resolution of November 22, 1972, approving rate schedules that were projected to allow NOPSI a fair and reasonable return on invested capital, which had been fixed by the Council at 7.07 per cent of a rate base[FN2] computed to provide minimum rates to utility customers on the one hand and to enable NOPSI to furnish adequate and safe service to its customers, maintain its potential to meet future service requirements, and protect its credit and its ability to attract capital at reasonable costs, on the other.

FN2. As explained by one commentator, '(r)ate base' represents the total investment in, or fair value of, the facilities of a utility employed in providing its service. That figure is multiplied by a percentage, called 'rate of return,' to arrive at the wages of capital, or the allowed return, which

> orthodox regulation gives the utility an opportunity to earn. . . . A. J. G. Priest, Principles of Public Utility Regulation 139 (1969).

Additionally, a city ordinance authorizes the levy and collection of a city sales tax in the amount of three per cent (3% Of the amount due for utilities services each month. The new rate schedule necessarily also increased the total taxes due from the consumer, since the percentage is calculated on the increased rates.

The quantitative amounts of the rate increases and sales tax are not at issue here; rather, the challenge posed by this suit is directed to the provision for late payment included in and adopted as part of the rate schedules and that portion of the sales tax imposed thereon.[FN3] The late payment provision reads as follows:

> FN3. The plaintiff's attack on the legality of the city sales tax as levied herein was neither briefed nor argued before this court. Thus, we would ordinarily consider the argument abandoned. However, the questions regarding the validity of the sales tax and the validity of the rate charge are inexorably bound together; hence, the treatment of the issues presented here with respect to the late charge will necessarily entail a resolution of the legality of the levy and collection of the sales tax under these circumstances as well.

> The net monthly bill calculated in accordance with the above rate will be increased ten per cent if payment is not made on or before the due date shown on the bill, which shall not be less than ten days after it is rendered.
> The amount due on the due date is denominated the 'Net Total' on the monthly invoice; the amount due as a late payment, which is the 'Net Total' increased by ten per cent (10%), is designated as the 'Gross Total.'

ISSUES

The gravamen of plaintiff's complaint is that: (1) the late charge is an arbitrary and discriminatory penalty that is imposed unjustly against those customers paying beyond the monthly due date; (2) the late charge penalty constitutes 'interest' exceeding the maximum legal rate and, hence, is usurious; and (3) as usurious interest, the late charge also constitutes a deceptive *294 trade practice proscribed by the Unfair Trade Practices and Consumer Protection Act.

I.

[2] As noted above, because public utilities enjoy monopoly status and are not subject to the competitive forces of the marketplace, public regulation of their affairs must act as a substitute to prevent a utility from dealing unfairly with its customers. Included in this public regulation is the prevention of unreasonable discrimination by the utility among its customers through various business practices (E.g., rebates, preferential charges, and service inequalities.)[FN4] While public utilities may reasonably distinguish among classes of customers by charging varying rates for varying services, any discrimination among customers as to the rate charged for the same service is uniformly considered impermissible.[FN5]

> FN4. For a thorough discussion of unlawful discriminatory practices see A. J. G. Priest, Principles of Public Utility Regulation 285--326 (1969).

> FN5. 'And the same observation is true as to quality and amount of service, extension of facilities, collection of accounts and rules and regulations generally.' Id. at 288.

[3] Unlike many other states, Louisiana has no statute of statewide application that proscribes unreasonable discrimination by a utility in rate-makeing. However, the courts of this state have jurisprudentially adopted the generally prevailing rule that a utility's rate structure must be nondiscriminatory.[FN6]

> FN6. See Hicks v. City of Monrore Utilities Comm'n, 237 La. 848, 112 So.2d 635 (1959); Johnson v. Mayor, 129 So. 433 (La.App.2d Cir. 1930).

The Attorney General characterizes the late payment rate here in question as 'discriminatory, unjust, and confiscatory,' on the ground that it imposes a penalty on the class of late payers in excess of expenses incurred by NOPSI as a result of the delay of that group in paying its bills. He further alleges that this discrimination works a particular hardship on those customers living on fixed incomes that are payable only once a month

(E.g., Social Security recipients, retired federal employees and service personnel and welfare recipients). Finally, the ruling of the Louisiana Public Service Commission, which has rate-making jurisdiction over utilities situated and doing business in other parts of the state, imposing a five per cent (5%) delinquency charge (rather than ten per cent, as here) on bills paid later than 25 days from the billing date (rather than ten days, as here) is cited as a persuasive standard of reasonableness to which NOPSI should be required to conform.

[4] Thus, the precise question here is whether the late charge billing practice employed by NOPSI comports with the standards of reasonableness required of classifications drawn among utility customers by a rate structure. In reviewing the reasonableness of the classification before us, appropriate deference is owed to the determinations made by the legislative body vested with rate-making authority. As noted above, the Council of the city of New Orleans is vested with the sole legal authority to regulate the rates charged by companies furnishing utility services in the city of New Orleans. Recognition of that authority requires that we limit our review to a determination of whether the late charge is reasonable and refrain from merely substituting our judgment for that of the Council. Cf. O. Pond, A Treatise on the Law of Public Utilities s 940 (1925).[FN7]

FN7. Although the Council is an elected legislative body, in this context it functions much like an administrative agency vested with the authority to regulate utilities. Thus, the principles of judicial review ordinarily employed for administrative actions are useful here as well. For a thorough discussion of the scope of judicial review of administrative action see K. Davis, Administrative Law Text 545--56 (3d ed. 1972).

*295 [5] Considering the arguments of the Attorney General in light of these principles, we are unable to declare that the late payment charge employed by NOPSI is unreasonable or unlawful. The billing practice used by NOPSI imposes the ten per cent (10%) penalty on a class of customers who have one characteristic in common, Viz., they have failed to pay their monthly bill within ten days of the billing date. NOPSI incurs certain additional costs as a result of the failure of this group (or classification) of customers to pay promptly, and the late charge imposed on the late payers is designed to offset these expenses. According to the testimony of Michael Burns, the Manager of the Customer Accounting Division of NOPSI, the additional costs are incurred in the collection of overduce accounts in the field, reconnection of previously disconnected service,[FN8] uncollectible accounts, and the maintenance of security deposits. Mr. Burns' testimony also indicated that no substantial disparity existed between the expenses thus incurred and the total revenue produced by the late charge.[FN9] Thus, it cannot be said that NOPSI enjoys a substantial profit as a result of its late billing practice.[FN10] It is argued that fairness requires that all NOPSI customers bear the expenses described above, rather than the class that includes only late payers. However, those expenses are not incurred by the class of customers that pays its bills promptly; thus, it is hardly unreasonable to free this group from the obligation to defray expenses for which they are not responsible.

FN8. This is partially defrayed by a $1.50 service charge assessed to the customer.

FN9. The evidence establishes that, for the year ending December 31, 1972, the total costs incurred from the four areas designated above totaled $1,026,900.00. The revenue derived during the same period from the delayed payment charge was $1,031,610.00. Thus, the revenue exceeded costs by $4,710.00.

FN10. Additionally, because its rate of return on capital is limited to 7.07 per cent of the rate base, NOPSI's operation depends heavily on a substantial, short-term cash flow. It can reasonably be assumed that dilatory payments of utility bills reduces the cash flow and causes NOPSI to incur the additional expense of borrowing funds for continued operation.

[6] Moreover, testimony given by John H. Erwin, Treasurer and Assistant Secretary of LP , in the district court demonstrates that, contrary to the charges of the Attorney General, a disproportionately small number of overdue accounts are those of customers below the statistical poverty level. In fact, Mr. Erwin determined from his statistical study that low income customers were beneficiaries rather than victims of the late payment charge, since wealthier customers with larger accounts were generating a disproportionately large portion of the revenues from late payments charges.

Thus, he concluded that, if the late charge billing practice was terminated and the expenses incurred from late payments evenly distributed among all customers by a general rate increase (as has been suggested by the Attorney General), lower income customers would bear a greater proportion of these costs than they now do. The evidence is also clear that it was the common practice of both NOPSI and LP to adjust the monthly due dates of customers on small, fixed incomes who suffered hardships under the due dates previously assigned them. In sum, there is no evidence to substantiate the charge that the ten per cent penalty works a harsh discrimination against lower fixed income customers.

[7][8] Finally, in noting the ruling of the Louisiana Public Service Commission offered by the Attorney General as an alternative to the billing procedures employed here, it suffices to say that the existence of another method of collection does not preclude our determination that the method before us is nonetheless reasonable. The choice of which of two or more reasonable methods should be employed remains the Council's. Our review is limited *296 to a determination of whether the method chosen was reasonable, not whether it was the most desirable of those available. Having made that determination, we need not consider the merits of the alternative proposed.

II.

In characterizing the late charge as usurious interest, the Attorney General relies upon article 1935 of the Louisiana Civil Code, which provides:

> The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more.

Based upon this definition, it is argued that the late charge constitutes '. . . damages due for delay in the performance of an obligation to pay money . . ..' As interest, the late charge may not exceed eight per cent (8%) of the principal debt, La.Civil Code art. 2924 (1870), as amended by Acts 1972, No. 454, s 9; hence, the ten per cent (10%) late charge is said to constitute usurious interest.

[9][10][11] This argument overlooks the clear language of article 2924 of the Civil Code and the settled jurisprudence of this state, both of which are to the effect that the usury statutes apply to loans but not to consumer credit sales. Id.; e.g., Motes v. Van Wagner, 188 So.2d 704 (La.App.4th Cir. 1966) and cases cited therein. As a sale of commodities (i.e., electricity and gas), the monthly billing by NOPSI clearly constitutes a consumer credit sale rather than a loan. Consumer credit sales are ordinarily governed by the Consumer Credit Law. La.Acts 1972, No. 454, s 1, enrolled as La.R.S. 9:3510--9:3568 (Supp.1974). However, recognizing that utility rates are fully regulated by other means, the Consumer Credit Law specifically excludes such rates from its operation.[FN11] Thus, the appropriate basis for regulation of utility rates is neither the usury statute nor the Consumer Credit Law; properly, regulation of public utility rates, including charges for delayed payment, rests solely with that agency or subdivision of the state vested with authority to supervise the operation of the utility, subject to judicial review of the reasonableness of the regulation. Hence, the charge that the late charge billing practice employed by NOPSI constitutes usurious interest is unfounded.

> FN11. La.R.S. 9:3512(3) (Supp.1974) makes the following exclusion:
> transactions under public utility . . . tariffs if a subdivision or agency of this state . . . regulates the charges for the services involved, The charges for delayed payment, and any discount allowed for early payment . . ..
> (Emphasis added.)

III.

[12] The final complaint offered by the Attorney General is that, as usurious interest, the late charge billing practice also constitutes a deceptive trade practice proscribed by the Unfair Trade Practices and Consumer Protection Law. La.Acts 1972, No. 759, s 1, enrolled as La.R.S. 51:1401--51: 1418 (Supp.1974). Since, as noted above, the late charge is not usurious interest, this charge is also unfounded. Moreover, public utilities are exempt from regulation by the Act. Id. 51:1406.

CONCLUSION

The charge imposed by NOPSI for late payment in the amount of ten per cent (10%) above the amount originally due within ten days from the monthly billing date is a reasonable method of encouraging prompt payment and offsetting the expenses incurred

by NOPSI as a result of late payments by customers. It is neither arbitrary nor discriminatory; rather, it allocates and distributes those expenses among the customers responsible for them. The *297 sale of energy, a commodity, is a consumer credit sale, which is not subject to the usury statutes. Hence, the late payment charge, which is part of the price paid for the commodity, is not usurious interest. Moreover, public utility rates and charges for delayed payment are excluded from the regulatory embrace of the Consumer Credit Law. Thus, their regulation is the exclusive province of the appropriate regulatory body--here, the Council--subject to judicial review for reasonableness. Finally, the method employed by NOPSI is not a deceptive trade practice proscribed by the Unfair Trade Practices and Consumer Protection Law.

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed, and the judgment of the district court is reinstated.

DIXON, J., concurs.

CALOGERO, J., recused.

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EXHIBIT 2

Kenneth COFFELT, Appellant,
v.
ARKANSAS POWER & LIGHT COMPANY, Appellee.

No. 5--5192.

Supreme Court of Arkansas.

March 23, 1970.

Rehearing Denied April 27, 1970.

Suit brought as class action for declaratory judgment as to whether imposition by utility company of late charge against customers violated prohibition against usury. The Chancery Court, Pulaski County, Kay Matthews, Chancellor, granted summary judgment upholding validity of charge and dismissed complaint for want of equity. Appeal was taken. The Supreme Court, George Rose Smith, J., held that imposition of charge against customers, who did not pay their monthly bills within 10 business days after due date, of 8% of first $15 of net bill and 2% of any amount in excess of $15 did not violate prohibition against usury.

Affirmed.

[1] JUDGMENT ⚖185.2(1)

228k185.2(1)
Where plaintiff did not file response to defense motion for summary judgment, facts established by such motion stood undisputed. Ark.Stats. § 29-211(e).

[2] USURY ⚖1
398k1
"Usury" involves agreement by which borrower is required to pay excessive rate of interest for loan or forbearance of money.
See publication Words and Phrases for other judicial constructions and definitions.

[3] USURY ⚖42
398k42
Imposition by utility company of late charge against customers, who did not pay their monthly bill within 10 business days after due date, of 8% of first $15 of net bill and 2% of any amount in excess of $15 did not violate prohibition against usury. Ark.Stats. § 73-207.

*313 **882 Kenneth Coffelt, Little Rock, for appellant.

House, Holmes & Jewell, Little Rock, for appellee.

GEORGE ROSE SMITH, Justice.

This suit for a declaratory judgment was brought as a class action by the appellant, who seeks relief on behalf of all consumers who purchase electricity from the appellee, a public utility. The question presented is whether our constitutional *314 prohibition against usury is violated by the utility company's authorized practice of imposing a 'late charge' against customers who do not pay their monthly bills within ten business days (fourteen calendar days) after the due date. This appeal is from a summary judgment upholding the validity of the late charge and dismissing the complaint for want of equity.

The complaint asserts that the imposition of the late charge amounts to the exaction of usurious interest upon the net amount of the bill. By answer the utility company denied the assertion of usury. We take the controlling facts from the affidavit and exhibits accompanying the defendant's motion for summary judgment.

In 1968 the utility company filed a petition asking the Public Service Commission to approve a tariff entitled 'Gross-Net Billing Rider,' which was apparently the first attempt by this particular company to add a late charge to its bills. (We use the phrase 'late charge' merely for convenience. The practice has also been said to involve a discount for prompt payment, a penalty for tardy payment, a gross-net rate differential, and, at least by this appellant, usurious interest. We are interested not in nomenclature but in the substantive nature of the charge.) Interventions were filed protesting approval of the proposed charge.

At a hearing upon the petition the company offered proof from which the Commission found that the company's extra expense in the collection of overdue accounts had amounted, apparently in 1968, to $610,629. The Commission, to enable the company to recoup such expenses from the

consumers who were responsible therefor, authorized the imposition of a late charge amounting to 8% of the first $15.00 of the net bill and 2% of any amount in excess of $15.00. The Commission's announced purpose was to avoid discrimination as between the company's consumers. The Commission's reasoning was stated in its order, as follows:

*315 The genesis of such a penalty (late charge) is the strong policy of rate regulation against discrimination. Rates and other charges must be designed as nearly as possible to assess costs on the class of customers which creates them. In this case the application of this policy to the question before the Commission means that costs created by late paying customers should be borne by those very customers rather than distributed in the rates charged all consumers. The other side of the proposition is that if the penalty is excessive as compared to the costs created, then the late payers are bearing costs of company operation not properly attributable to them. In the latter instance this class becomes the class discriminated against. The Company has conclusively demonstrated that it is put to considerable expense **883 in collecting past due accounts. * * * It cannot be gainsaid that those consumers who are responsible for these expenses to the Company should pay them. It is noteworthy that those customers who in the past have not paid their bills within two weeks of billing date include persons in all income brackets and are in no way confined to those who are in the lower income groups.

In approving the proposed late charge the Commission pointed out that the company's accounting methods had not been designed to completely isolate its collection costs, because no late charge had been imposed in the past. The Commission directed that the company maintain appropriate records in the future to reflect such costs and to file a report of its experience every sixty days, to the end that the Commission may adjust the amount of the late charge to equal the actual cost of collecting overdue accounts.

[1] With respect to the summary judgment, the forgoing facts are undisputed. We should add that the appellant is mistaken in suggesting in his brief that the facts supporting the motion for summary judgment *316 must be treated as being disputed by the plaintiff's verified complaint. That view was originally taken by some federal courts in construing the Federal Rules of Civil Procedure, but both the Rules and our summary judgment act have been amended to make it clear that proof must be met with proof. This is the pertinent language in Act 160 of 1967: 'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' Ark.Stat.Ann. s 29-- 211(e) (Supp.1969). Inasmuch as the plaintiff in the case at bar filed no response whatever to the defendant's motion for summary judgment, the facts established by that motion stand undisputed.

[2] The trial court was right in rejecting the charge of usury. What we must determine is the substantive nature of the late charge authorized by the Public Service Commission. Usury involves an agreement by which the borrower is required to pay an excessive rate of interest for the loan or forbearance of money. Armstrong v. McCluskey, 188 Ark. 406, 65 S.W.2d 558 (1933). There we went on to point out that the existence of usury is to be determined by 'the real nature of the transaction.'

[3] We think it plain that the Public Service Commission, in approving a late charge similar to those which the Commission found to be already assessed by some 32 other utility companies in Arkansas, was not authorizing this appellee to collect excessive interest for the loan or forbearance of money. We readily distinguish this case from the only authority cited by the appellant, Sloan v. Sears, Roebuck & Co., 228 Ark. 464, 308 S.W.2d 802 (1957). There the seller was charging more than 10% per annum for an extension of credit, which we found to be the equivalent of a loan of money.

*317 The late charge, as approved by the Public Service Commission, is simply a practical method of preventing discrimination among the utility company's customers. The prohibition against discrimination in utility rates is basic in public utility law. Pond, Public Utilities, s 270 (4th ed., 1932). That prohibition is incorporated in our statute governing public utilities: 'No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any

unreasonable prejudice or disadvantage.' Ark.Stat.Ann. s 73--207 (Repl.1957). Even before the passage of that staute we had held that a public utility must serve its consumers without unjust discrimination, though the utility may make a reasonable classification of its consumers. Ark. Natural Gas Co. v. Norton Co., 165 Ark. 172, 263 S.W. 775 (1924).

**884 The late charge, far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically classified to avoid discrimination. Its effect is to require delinquent ratepayers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills. The appellant's argument actually means in substance not that the utility company be prevented from collecting excessive interest but that its customers who pay their bills promptly be penalized by sharing the burden of collection costs not of their making. We are confident that the framers of the Constitution of 1874 did not insert their prohibition against usury with any notion of outlawing an arrangement such as that approved by the Public Service Commission in this instance.

Affirmed.

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EXHIBIT 3

Missouri Court of Appeals,
Western District.

STATE of Missouri ex rel., John ASHCROFT, Attorney General, ex inf., John A. PELZER, Commissioner of Administration, Appellant,
v.
PUBLIC SERVICE COMMISSION of the State of Missouri, Respondent,
and
Missouri Power & Light Company, Intervenor/Respondent.
and
STATE of Missouri ex rel. John C. DANFORTH, Attorney General, Relator/Appellant,
v.
PUBLIC SERVICE COMMISSION of the State of Missouri, Respondent,
and
Missouri Power & Light Company, Intervenor/Respondent.

No. WD 34535.

July 24, 1984.

State of Missouri sought review in consolidated action of proceedings separately presented to the Public Service Commission regarding late payment charges imposed on state accounts owed to electric utility companies. The Circuit Court, Cole County, Byron L. Kinder, J., affirmed decisions of Commission, and an appeal was taken. The Court of Appeals, Clark, J., held that: (1) late charges allowed electric utilities by Public Service Commission for governmental accounts were not an interest penalty subject to usury legislation, and (2) Public Service Commission's approval of a late payment charge on state accounts by electric utility imposed 15 days after rendition of bill was not unreasonable, despite State's assertion it could not comply, in view of evidence that State made payments to utility on time once late payment charges became effective.

Affirmed in part and remanded in part.

West Headnotes

[1] Public Utilities ⚿195
317Ak195

On appellate review, Public Utility Commission order enjoys a presumption of validity, and as to matters of reasonableness, court may not substitute its judgment for that of Commission if Commission order is supported by substantial and competent evidence on record as a whole.

[2] Public Utilities ⚿194
317Ak194

Findings of Public Service Commission are prima facie correct and challenger carries burden of making a convincing showing that such findings are not reasonable and lawful.

[3] Usury ⚿1
398k1

Late charges allowed electric utilities by Public Service Commission for governmental accounts were not an interest penalty subject to usury legislation.

[4] Electricity ⚿11.4
145k11.4

Public Service Commission's approval of a late payment charge on state accounts by electric utility imposed 15 days after rendition of bill was not unreasonable, despite State's assertion it could not comply, in view of evidence that State made payments to utility on time once late payment charges became effective.

*661 John Ashcroft, Atty. Gen., William Clark Kelly, Shelly A. Woods, Asst. Attys. Gen., Jefferson City, for appellant.

Gary W. Duffy, Hawkins, Brydon & Swearengen, P.C., Jefferson City, for intervenor-respondent Mo. Power & Light Co.

Eric Kendall Banks, Asst. General Counsel, Jefferson City, for Mo. Public Service Com'n.

Before SOMERVILLE, P.J., and CLARK and LOWENSTEIN, JJ.

CLARK, Judge.

The State of Missouri as appellant seeks review in this consolidated action of proceedings separately presented to the Public Service Commission regarding late payment charges imposed on state accounts owed to respondent electric utility companies. The question presented is whether the state as sovereign may be involuntarily subjected to added charges for failure to make timely payment of bills for electric services consumed.

A common issue in the first point of the case applicable to both respondents arises from different procedural origins. As to Missouri Power and Light, hereafter MPL, a proposed tariff was filed by MPL with the commission amending its rate to large governmental users to include a late payment charge of one percent a month applied to accounts unpaid twenty days after billing. The commission approved the late payment charge but directed amendment of the period from twenty to forty days. As an intervenor in the case, the state filed a writ of review in the circuit court and now appeals the judgment which affirmed the decision of the commission.

In the case of Kansas City Power and Light, hereafter KCPL, its tariff provides no special government rate. The rate for all non-residential accounts does include a late payment charge which it has applied to delinquent accounts owed by the state. In a complaint filed with the commission, the state raised the issue of whether the late payment charge could be imposed. The commission found that the charge was valid under the KCPL tariff, a writ of review was taken by the state and this appeal is prosecuted from the adverse decision by the circuit court.

The state contends in its first point that the commission erred in concluding the late payment charge was an element of the utilities' rate structure and was not interest. The classification of the charge as interest is of significance to the state because ***662** it claims immunity from assessment of interest on its bills unless the charge has been countenanced by an act of the legislature or by the terms of a lawful contract. The state argues that the public service commission order is unlawful if the effect of the order approving late payment charges on utility bills is to impose interest expense on public funds not otherwise provided in the contracts for the services.

[1][2] We first note the scope of appellate judicial review in this case, particularly because the state's first challenge is to the validity of the commission's finding that the late payment item in the utilities' rate structure was not interest. The review by this court is of the order entered by the commission and accords no deference to the determination made by the circuit court. State ex rel. Public Water v. Public Service Commission, 600 S.W.2d 147 (Mo.App.1980). On appellate review, the commission order enjoys a presumption of validity and as to matters of reasonableness, the court may not substitute its judgment for that of the commission if the commission order is supported by substantial and competent evidence on the record as a whole. State ex rel. Utility Consumers Council v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979). The court is not authorized to weigh the evidence heard by the commission. The findings of the commission are prima facie correct and the challenger carries the burden of making a convincing showing that those findings are not reasonable and lawful. State ex rel. Inman Freight System, Inc. v. Public Service Commission, 600 S.W.2d 650 (Mo.App.1980).

The principal point of controversy before the commission and here was and is whether the charges in question imposed by the utility on the bill of a customer not paid by the due date are the equivalent of and should be identified as interest. The state's argument assumes, although no Missouri cases are cited to support the proposition, that if the late payment charge were correctly identified for what it is, a charge for the use of money, the state would be entitled to escape payment of those charges on its electric utility bills. It assumes avoidance of interest charges on overdue accounts is a perquisite of the sovereign.

The practice in utility rate making of accounting for the expense of delinquent accounts is common and assumes a variety of forms. In some instances it may involve a discount for prompt payment, in others, a gross-net rate differential or, as here, it may take the form of a penalty for tardy payment. In whatever form, however, the charge is attributable to direct costs incurred by the utility on those accounts of customers who fail to make timely payment of their bills. The evidence to this effect was uncontroverted and the commission order so

found.

It necessarily follows that expenses imposed on the utility by customers who pay late will be reflected in the operating costs of the company. As the court observed in State ex rel. Utilities Commission v. North Carolina Consumers Council, Inc., 18 N.C.App. 717, 198 S.E.2d 98 (1973), the cost of collecting past due accounts is an operating expense which has an influence on the fair rate of return a company should earn and, in turn, is a factor taken into account in setting rates. If a utility is denied the opportunity to charge late payment customers, those who pay their bills promptly will be indirectly penalized by sharing collection costs entirely disassociated from their own accounts and the service they consume.

[3] The subject was considered in Coffelt v. Arkansas Power & Light Co., 248 Ark. 313, 451 S.W.2d 881 (1970) where a class action was brought to determine if late payment charges were interest and therefore subject to usury legislation. The court held the charge not to be interest but a method of preventing discrimination among customers of the utility. The court stated:

> "The late charge, far from being an exaction of excessive interest for the loan or forbearance of money, is in fact a device by which consumers are automatically *663 classified to avoid discrimination. Its effect is to require delinquent rate payers to bear, as nearly as can be determined, the exact collection costs that result from their tardiness in paying their bills." Id. 451 S.W.2d at 884.

Other decisions have uniformly supported the view that late payment charges included in regulated utility rate structures are not the equivalent of interest charged for the use of money. Tennyson v. Gas Service Company, 506 F.2d 1135 (10th Cir.1974); Ferguson v. Electric Power Board of Chattanooga, Tennessee, 378 F.Supp. 787 (E.D.Tenn.1974); Jones v. Kansas Gas and Electric Co., 222 Kan. 390, 565 P.2d 597 (1977); State ex rel. Guste v. Council of City of New Orleans, 309 So.2d 290 (La.1975). Appellant cites no case authority supporting its claim that late charges are to be equated with interest and independent research has disclosed none.

The evidence before the commission in these cases demonstrated that both utilities incurred significant collection expenses directly attributable to consistent delinquencies in payment of state accounts. In the case of MPL, the evidence showed an average monthly state delinquency of $110,000.00 computed on an annual basis which, in the situation of a private consumer ratepayer would have resulted in discontinuance of service. Specific instances of state agencies which make no payments at all on utility bills for months and, in the case of the Division of Insurance for more than one year, were given. As to KCPL, where the case was based on service to a single representative facility operated by the State Board of Education, the records disclosed a consistent late payment history agreed to be typical of all state accounts with KCPL. Once the late payment charge was imposed, however, the delinquency was eliminated and bills were regularly paid within fifteen days of submission.

Viewed from the standpoint of evidentiary support, the decision by the commission that a late payment charge on utility service bills rendered to the state is not interest but an allocation of the cost of service is warranted and reasonable. It is undeniable that the utility incurs added costs for processing bills not paid currently, which costs include not only the reduction in operating funds from lessened cash flow but billing and accounting expenses associated with follow-up procedures and partial payments which the evidence showed to have been a practice with some state agencies. These costs would be unfairly borne by other ratepayers if the late charge schedule were not imposed on the few customers who do not pay bills currently.

The state's argument is also flawed on other grounds. In contending that the commission inaccurately and improperly denied classification of the late payment charge as interest, the state assumes an approved utility rate schedule which included an interest charge on overdue accounts would be inapplicable to bills rendered the state. This the contention seems to say must follow because the state is not liable to pay interest on its debts unless its consent to do so is manifested by an act of the legislature or by a lawful consent.

Even assuming the validity of this latter proposition, for which no Missouri case authority is cited, the circumstances of utility rates distinguish those charges from debts on accounts generally for

goods and services purchased by the state. In the first place, the rate structure for utility services, including late payment charges by whatever name, are published and set by authority of the state regulatory agency. Any customer, including the state, which contracts for the service implicitly agrees to pay the published rate as a condition of accepting the service. There is no second level of ratemaking whereby an individual customer may claim exemption from an otherwise applicable segment of the published rate. If an interest charge for late payment is provided in the utility rates promulgated by the commission, the state necessarily consents to payment of the charge by contracting for service and not making timely payment on its accounts.

In the second place, if the interest charge is an item included in the rates adopted by *664 the commission and applicable to all customers of the utility, the state is precluded by law from seeking or receiving an advantage not available to other utility customers receiving service under similar conditions. Section 393.130, RSMo 1978 expressly forbids rate discrimination among customers of gas, electrical, water or sewer corporations for like and contemporaneous service under the same or substantially similar circumstances or conditions.

The state's contention that the commission order is in error in finding the late payment charge on state accounts owed MPL and KCPL is not an interest penalty lacks merit because the facts and the law adequately support the decision. Moreover, the point is substantively deficient because the Public Service Commission is empowered by statute to establish the rate structure for MPL and KCPL and, when it has so acted in accordance with the legislative power delegated to it, the rates so promulgated are applicable to all utility customers without special exemption or exception where the state occupies the status of a customer.

In a second point related only to the case of KCPL, the state contends the commission finding disallowing its protest to the fifteen day payment period was unlawful and unreasonable because the evidence showed the state was unable to pay electric utility bills in less than forty days. The argument focuses on the evidence adduced regarding the necessity for processing payment requests through various levels of bureaucracy to assure that the state received the services, that the charges are proper and that funds have been appropriated for the purpose.

Without recounting in detail the full explanation which the state's evidence presented in justification of the delay accompanying payment of bills, it will suffice to say that each invoice must pass at least four independent examinations essentially duplicating the same verifications, and at each stage, the intervention of other work required of the officer, inattention or other mischance may extend the already laborious process. Despite the routine character of electric bills for the facility chosen as a test location in the case, approximately 80 percent of the bills were allowed to become delinquent, but even the periods of delinquency were not uniform. There was no evidence that the state recognized or implemented voluntarily any incentives to achieve prompt payment. The commission found the business methods employed by the state to be self-imposed and therefore subject to improvement.

[4] In effect, the state argues that the commission's approval of a late payment charge by KCPL imposed fifteen days after rendition of the bill is unreasonable because the evidence required the finding that the state cannot comply. This assertion ignores substantial and competent evidence in the record. There is no constraint imposed by law on the state to engage in the protracted review of invoices which the evidence described. The duty to authorize and certify for payment only those accounts for which appropriated funds are available and for which goods and services have actually been rendered does not impose any particular regimen. The commission was persuaded and the evidence supports the conclusion that with appropriate incentives, the state could substantially reduce the time for processing account payments. The validity of this proposition was demonstrated by the state's performance in making payments to KCPL on time once the late payment charge became effective.

The analysis and disposition in this opinion of the primary point, the state's claim of immunity from liability for assessment of any late payment charge, makes no distinction between the two consolidated cases, that of MPL and KCPL. The positions of the contesting parties, the facts and the issues are the same. As to the claim by the state that the payment period of fifteen days under the KCPL tariff is too

brief, the issue is applicable only to the latter case and, to this point has been considered apart from the MPL case. So viewed, the commission decision is entitled to affirmance.

*665 In its argument, however, the state points to the earlier MPL decision by the commission and contends the order in the KCPL case is arbitrary and unreasonable when considered in conjunction with the MPL decision. In that case, MPL sought amendment of its governmental user rate to impose a late payment penalty to accrue 20 days after rendition of the statement. By its order entered December 20, 1975, the commission approved the late charge but found the payment period unreasonably short. That time was increased to 40 days. In the KCPL case, the state contended the 15 day period set out in the KCPL non-residential user tariff was unreasonably short and asked that if a penalty were to be sanctioned as to state accounts, the grace period be 40 days. Unaccountably, the commission denied the complaint thus leaving the state only 15 days in which to pay KCPL invoices without penalty.

The state asserts and the record appears to confirm that the evidence in the KCPL case showed no difference in state accounting procedures or payment capabilities from those which prevailed in 1975 and no difference between processing KCPL bills and those rendered by MPL. The inconsistency between the two decisions is readily apparent. The brief submitted by the commission makes no effort to explain or distinguish the two situations or to counter the state's contention that if 40 days was reasonable in one case, it should likewise be reasonable in the other.

The decision of the Public Service Commission of Missouri in case number 18,386 (The MPL case) is affirmed. The decision in case number EC-81-197 (The KCPL case) is affirmed to the extent the decision sanctions tariff provisions imposing late payment charges generally on accounts owed by the State of Missouri. The case is, however, remanded to the commission for further proceedings and decision on the length of the payment period available before imposition of late charges, all in consideration of the commission's prior decision on the same subject in case number 18,386 (the MPL case).

All concur.

END OF DOCUMENT

EXHIBIT 4

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

NOTICE OF FILING

IN RE: **Tariff Filing of BellSouth Telecommunications, Inc. to Reduce Grouping Rates in Rate Group 5 and to Implement a 3% Late Payment Charge**

DOCKET NO: **00-00041**

DATE: **September 1, 2000**

On August 29, 2000, the Tennessee Regulatory Authority ("the Authority") considered the *Second Petition for Stay of Effectiveness and Petition for Reconsideration* filed by the Consumer Advocate on August 10, 2000 and all related filings. After reviewing the filings and hearing the parties' arguments, the Directors unanimously voted to grant the *Petition for Reconsideration* and decided to consider the merits of the reconsideration at a later date. A majority of the Directors then voted to hold the *Second Petition for Stay of Effectiveness* in abeyance.

As a result of these holdings and to assist the Authority in reviewing its Order of August 3, 2000, the Authority directs each party to file a list of each and every fact the party deems to be relevant to the two issues being reconsidered in this matter. The party shall identify the issue to which each fact pertains. The purpose of this request is to determine which facts are undisputed and to determine whether factual questions must be resolved before the Authority may resolve the legal issues presented by the two issues agreed to by the parties. Each party shall file its list of facts no later than **2:00 p.m. on Friday, September 8, 2000**.

FOR THE TENNESSEE REGULATORY AUTHORITY

K. David Waddell, Executive Secretary

cc: Parties of Record

Original Notice in Docket File

EXHIBIT 5

B2. REGULATIONS

B2.3 Obligations Of The Customer (Cont'd)

B2.3.1 Customer Responsibilities (Cont'd)

I. Making Company facilities available for maintenance purposes at a time agreeable to both the Company and the customer. No allowance will be made for the period during which the service is interrupted for such purposes.

B2.3.2 Reserved For Future Use

B2.3.3 Transfer Of Service

The service or any rights associated therewith may not be assigned or in any manner transferred except as otherwise provided for in this Tariff.

B2.4 Payment Arrangements And Credit Allowances

B2.4.1 Payment Of Charges And Deposits

A. Applicants for service who have no account with the Company or whose financial responsibility is not a matter of general knowledge, may be required to make an advance payment at the time an application for service is placed with the Company, equal to the installation charges if applicable and at least one month's charges for the service provided. In addition, where the furnishing of service involves an unusual investment, applicants may be required to make payment in advance of such portion of the estimated cost of the installation or construction as is to be borne by them. The amount of the advance payment is credited to the customer's account as applying to any indebtedness of the customer for the service furnished.

B. The Company may, in order to safeguard its interests, require an applicant or customer to make such deposit as the Company deems suitable to be held by the Company as a guarantee of the payment of charges. The fact that a deposit has been made in no way relieves the applicant or customer from complying with the Company's regulations as to advance payments or the prompt payment of bills on presentation. At such time as the contract is terminated the amount of the deposit is credited to the customer's account and any credit balance which may remain is refunded. At the option of the Company such a deposit may be refunded or credited to the customer at any time prior to the termination of the contract. In case of cash deposit, interest at the rate of 6 percent per annum is paid for the period which the deposit is held by the Company.

C. The customer is held responsible for the payment of all the charges for service and channels in accordance with the Company's regular billing and collection practice.

D. A charge of $10.00 will apply whenever a check or draft presented for payment for service is not accepted by the institution on which it is written. (N)

E. A late payment charge of 1-1/2 percent (1-1/2%) applies to each subscriber's bill (including amounts billed in accordance with the Company's Billing and Collection Services Tariff) when the previous month's bill has not been paid prior to the next billing date. The late payment charge will not apply to any subscriber's bill with an unpaid balance totaling less than $25.00. (N)

(M)

Material previously appearing on this page now appears on page(s) 7.1 of this section

EXHIBIT 6

United States District Court, E.D. Tennessee, Northern Division.

Jerry D. FERGUSON
v.
ELECTRIC POWER BOARD OF CHATTANOOGA, TENNESSEE, and Tennessee ValleyAuthority.

No. CIV-1-74-6.

July 16, 1974.

Suit by electrical customer for a declaration that a portion of charges for electricity assessed against it was violative of Tennessee usury laws as well as federal Truth In Lending Act. On motion of defendant to dismiss, the District Court, Frank W. Wilson, Chief Judge, held that municipal electric distributor's gross rate charge of 10% In excess of net bill for residential customers who were unable to pay their electric charges within ten days of billing was neither violative of Tennessee usury statute nor deferal Truth In Lending Act, inasmuch as it was neither a payment for use of money nor a consideration for creditor's forbearance of collection, and both civil and criminal penalties of Truth In Lending Act were expressly made inapplicable to 'any agency of any State or political subdivision.'

Motion sustained.

West Headnotes

[1] Electricity ⚖11.2(2)
145k11.2(2)

Inclusion of a gross rate billing requirement in a power sale and distribution contract of Tennessee Valley Authority is within discretion accorded that agency by Congress; and setting of "resale rate schedules" limited only by provision that they not violate the "purposes of this Act," is a clear and broad grant of discretion to the TVA Board to set power rates at the consumer level. Tennessee Valley Authority Act of 1933, § 10 as amended 16 U.S.C.A. § 831i; U.S.C.A.Const. art. 6, cl. 2.

[2] Electricity ⚖11.3(7)
145k11.3(7)

Matter of rate setting under the Tennessee Valley Authority Act is not subject to judicial review. Tennessee Valley Authority Act of 1933, § 10 as amended 16 U.S.C.A. § 831i; U.S.C.A.Const. art. 6, cl. 2.

[3] States ⚖18.73
360k18.73
(Formerly 360k4.15)

Practice of billing electrical charges upon a net and gross rate basis, both within the system of the Tennessee Valley Authority and throughout the electrical power industry, which predates both the original enactment and subsequent amendment of the Tennessee Valley Authority Act, cannot in any sense be said to be in violation of the "purposes" of that Act, and is not subject to modification or interference by state legislation. Tennessee Valley Authority Act of 1933, § 10 as amended 16 U.S.C.A. § 831i; U.S.C.A.Const. art. 6, cl. 2.

[4] Usury ⚖48
398k48

A charge imposed because of late payment of a debt comes within definition of "interest" under Tennessee usury statute only where it is paid as consideration for creditor's forbearance of asserting his right of collection. T.C.A. § 47-14-103.

[5] Usury ⚖48
398k48

Gross rate of 10% in excess of net bill charged residential customers who were unable to pay their electric charges within ten days of billing did not equate to "interest" within Tennessee usury statute and it was neither a payment for use of money nor consideration for creditor's forbearance of collection. T.C.A. § 47-14-103.

[6] Consumer Credit ⚖34
92Bk34
(Formerly 293k6.1 Pawnbrokers and Money Lenders)

Municipal electric distributor's imposition of a gross rate billing charge of 10% in excess of net bill when residential customers were unable to pay their

electric charges within ten days of billing did not constitute a failure to disclose in violation of federal Truth in Lending Act where late payment provision of power rates was specifically exempted from disclosure provisions of Act, and both civil and criminal penalties in Act were expressly made inapplicable to "the United States or any agency thereof" as well as "any agency of any state or political subdivision." Truth in Lending Act, § § 105, 113, 15 U.S.C.A. §§ 1604, 1612.

*788 Horace L. Smith, Jr., Joe M. Parker and Atchley, Atchley & Cox, Chattanooga, Tenn., for plaintiff.

Will Allen Wilkerson, Chattanooga, Tenn., for Electric Power Board.

Robert H. Marquis, Gen. Counsel, TVA, Beauchamp E. Brogan, Associate Gen. Counsel, Justin M. Schwamm, Asst. Gen. Counsel and James E. Fox, TVA, Knoxville, Tenn., for Tennessee Valley Authority.

MEMORANDUM OPINION

FRANK W. WILSON, Chief Judge.

This is a lawsuit brought by an electrical customer, acting upon his own behalf and on behalf of all other electrical customers similarly situated, seeking to have a portion of the charges for electricity declared to be in violation of the Tennessee usury laws (Tenn.Const. Art. Sect. 7; TCA § 47-14-104) and in violation of the federal Truth In Lending Act (15 U.S.C. § 1601). The lawsuit was initially filed in the state court against the Electric Power Board of Chattanooga as the only defendant. Thereafter the plaintiff amended his complaint so as to join the Tennessee Valley Authority as a party defendant, whereupon the case was removed by that defendant to this court pursuant to 28 U.S.C. § § 1337 and 1441. The case is presently before the Court upon a motion to dismiss and a motion for summary judgment filed on behalf of each defendant.

The plaintiff alleges in his complaint that he is a residential customer of the Electric Power Board (EPB) of Chattanooga, a municipally owned distributor of electricity in the Chattanooga, Tennessee area, which in turn purchases its electricity under contract from the Tennessee Valley Authority (TVA), a federal agency engaged in the production and wholesale distribution of electricity in the Tennessee Valley Area. He further alleges that it is the practice of the EPB to bill him and all residential customers upon a 'net' and 'gross' rate basis, the gross rate being 10% In excess of the net rate and the gross rate being payable if the customer does not pay the net bill within ten days of the billing date. The plaintiff alleges that the TVA, in its contract arrangement with the EPB, requires the EPB to invoice *789 its residential customers upon this basis. Finally, the plaintiff alleges that he and others who were unable to pay their electric charges within ten days of billing have been required to pay the gross bill, or 10% In excess of the net bill, which additional charge the plaintiff contends is both a violation of the Tennessee usury laws and a violation of the federal Truth In Lending Law. Upon these allegations the plaintiff seeks to maintain a class action for both injunctive relief and monetary damages.

The defendants' motion to dismiss is based upon the contention that the foregoing allegations are insufficient to state a cause of action as to either party defendant. In addition, the defendants have moved for a summary judgment, filing in support of their motion a copy of the contract between the TVA and the EPB and an affidavit from the Manager of Power for the TVA. The matters set forth in these documents substantially accord with the allegations of the complaint and are uncontested by the plaintiff. It is accordingly undisputed that the contract between the TVA and the EPB, in addition to setting forth rate schedules at which EPB must sell electricity to its customers, includes the following provision:

'Above rates are net, the gross rates being 10% Higher. In the event the current monthly bill is not paid within ten days from date of bill, the gross rates shall apply.'

Upon the foregoing state of the record, the defendants contend (1) that the gross rate billing requirement is valid under the provisions of the Tennessee Valley Authority Act as amended; (2) that the gross billing charge does not constitute interest and the Tennessee usury laws accordingly have no application to the charge; and (3) that the federal Truth In Lending Act is inapplicable to the electrical charge here complained of as both the TVA and the EPB are exempt from that Act with

respect to such charges.

[1][2][3] Turning first to the issue of the validity of the gross rate billing requirement under the TVA Act as amended, it would appear clear that the inclusion of such a provision in a TVA power sale and distribution contract would be within the discretion accorded that agency by Congress. Section 10 of the TVA Act (16 U.S.C. § 831i) expressly provides in relevant part:

'. . . Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, . . . as in its judgment may be necessary or desirable for carrying out the purposes of this chapter . . .'

Thus the setting of 'resale rate schedules,' limited only by the provision that they not violate the 'purposes of this Act,' is a clear and broad grant of discretion to the TVA Board to set power rates at the consumer level. In the absence of a clear violation of the 'purposes of this Act' the matter of rate setting under the Tennessee Valley Authority Act is not subject to judicial review. Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958); Tennessee Electric Power Co. v. Tennessee Valley Authority, 21 F.Supp. 947 (E.D.Tenn.1938) (separate conclusion of law number 33) aff'd 306 U.S. 118, 59 S.Ct. 366, 83 L.Ed. 543 (1939); Virgin Islands Hotel Assn. v. Virgin Islands W. & P. Authority, 465 F.2d 1272 (3rd Cir. 1972); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970). The practice of billing electrical charges upon a net and gross rate basis, both within the TVA system and throughout the electrical power industry, predates both the original enactment and subsequent amendment of the TVA Act and cannot in any sense be said to be in violation of the 'purposes' of that Act. Accordingly, under the supremacy clause as contained in Article VI of the United States Constitution, the Congressionally granted rate making authority of the *790 Tennessee Valley Authority is not subject to modification or interference by state legislation. See Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920); Tennessee Valley Authority v. Kinzer, 142 F.2d 833 (6th Cir. 1954); Posey v. Tennessee Valley Authority, 93 F.2d 726 (5th Cir. 1937); Rainbow Realty Co. v. Tennessee Valley Authority, 124 F.Supp. 436 (M.D.Tenn.1954).

[4][5] Although the conclusion just stated is decisive of the lawsuit as regards the plaintiff's usury allegations, it is likewise clear that the gross rate charge under attack does not equate to 'interest' as defined by statute and as interpreted by court decisions in Tennessee, and accordingly does not come within the state usury statutes. Interest, as limited by Article XI, § 7 of the Tennessee Constitution, is defined by statute as follows:

'Interest is the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money.' TCA § 47- 14-103.

In interpreting the constitutional limitation on 'interest', the Supreme Court of Tennessee has stated that interest is the 'price paid for the loan of money or the forebearance of debt'. Dennis v. Sears-Roebuck & Co., 223 Tenn. 415, 425, 446 S.W.2d 260, 265 (1969). Furthermore, as held in Wilson v. Dealy, 222 Tenn. 196, 434 S.W.2d 835 (1968), a charge imposed because of late payment of a debt comes within the statutory definition of 'interest' only where it is paid 'as consideration for the creditor's forebearance of asserting his right of collection'. It is accordingly clear that the 'gross rate' in the billing for electric service is neither a 'payment for the use of money' nor is it 'consideration for the creditor's forebearance . . . of collection.' Accordingly, the Tennessee usury laws would have no application to a gross rate billing charge in an electrical utility rate structure. For analogous holdings in other state jurisdictions, see Coffelt v. Arkansas P. & L. Co., 248 Ark. 313, 451 S.W.2d 881 (1970); State ex rel. Utility Commission v. North Carolina Consumers Council, 18 N.C.App. 717, 198 S.E.2d 98 (1972), cert. denied, 284 N.C. 124, 199 S.E.2d 663 (1973); Central Hudson Gas & Electric Co. v. Napolatano, 277 App.Div. 441, 101 N.Y.S.2d 57 (1950).

[6] Finally, and with reference to the plaintiff's allegation that the imposition of a gross rate billing charge for electrical service constitutes a failure to disclose in violation of the federal Truth In Lending Act on the part of the EPB, it is sufficient to note that the late payment provision of the power rates here under attack is specifically exempted from the disclosure provisions of that Act. Acting pursuant to 15 U.S.C. § 1604, the Federal Reserve Board has

specifically exempted late charges in public utility bills from the disclosure provisions of the Act. See 12 C.F.R. § 226.3(d). Furthermore, both the civil and criminal penalties of the Truth In Lending Act are expressly made inapplicable to 'the United States or any agency thereof' as well as 'any agency of any State or political subdivision' 15 U.S.C. § 1612.

The defendant's motion to dismiss will be sustained. An order will enter accordingly.

END OF DOCUMENT