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Guy M. Hicks
General Counsel

March 3, 2000

VIA HAND DELIVERY

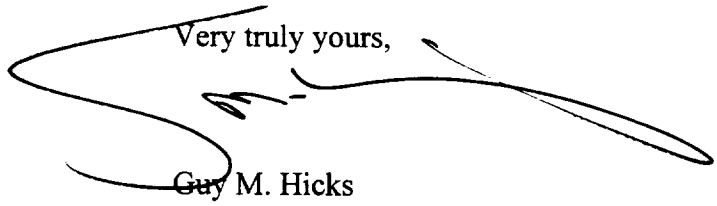
Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37245

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 Answer of BellSouth Telecommunications, Inc. to Complaint, or Alternatively, Petition to Intervene and Petition for Stay. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH/jem

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

CONSUMER ADVOCATE DIVISION	)	
	)	**Docket No. 00-00041**
vs.	)	
	)	**Tariff 00-00041**
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	

ANSWER OF BELLSOUTH TELECOMMUNICATIONS, INC.
TO COMPLAINT, OR ALTERNATIVELY,
PETITION TO INTERVENE AND PETITION FOR STAY

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Answer to the Consumer Advocate Division's ("CAD's") Complaint, or Alternatively, Petition to Intervene and Petition For Stay ("Complaint") as follows:

I. INTRODUCTION

Competition dictates BellSouth's proposed tariff, which implements a rate reduction for highly competitive hunting (or grouping) services. Competitors are actively marketing service which includes hunting services at rates substantially lower than BellSouth's tariffed rate. For example, BellSouth's current monthly tariffed rate for a 1FB with hunting service in Rate Group 5 is $69.48. Adelphia Business Systems' comparable monthly rate is $48.00 and NEXTLINK's monthly comparable rate is $42.00.

To the best of BellSouth's knowledge, however, Adelphia and NEXTLINK have targeted their service offerings to customers in Rate Group 5. Moreover, competitors as a whole clearly are treating Rate Group 5 differently than any other Rate Group. Many more competitors are operating in Rate Group 5 than in Rate Group 4, and virtually none are operating in Rate Groups 1, 2, or 3. BellSouth believes that once it is allowed to meet competition by reducing its rates for

hunting services in Rate Group 5, market dynamics likely will cause BellSouth's competitors to expand their efforts into other Rate Groups.

In addition to reducing hunting rates, BellSouth's proposed tariff also implements a late payment charge that applies only when customers have not paid their bill on or before the next billing date. Like any other business, BellSouth incurs costs tracking, administering, and collecting payments from its customers after the payments are due, and this charge simply allows BellSouth to recover these costs from the customers who cause BellSouth to incur these costs. This is a concept that is neither novel nor unique to public utilities. Mortgage companies, credit card companies, health care providers, and a host of other unregulated businesses collect late payment charges when customers pay their bills after they are due. Companies providing utility services in Tennessee, such as Metro Water Services, Nashville Electric Service, and Nashville Gas also collect late payment charges. Moreover, numerous CLEC tariffs on file with the Tennessee Regulatory Authority ("TRA") provide for late payment charges.[1] Like these other companies, BellSouth should be able to collect costs associated with late payments from the customers who cause it to incur these costs.

BellSouth provides its customers with options to avoid or lessen the impact of late payment charges. For example, low income residential customers who qualify for the Lifeline program may obtain a credit of up to $10.50 toward their basic local exchange telephone service. *See* General Subscriber Services Tariff at A3.31. Additionally, low income customers who

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[1] *See, e.g.,* AVR, L.P. d/b/a Hyperion of Tennessee, L.P. TN R.A. No. 1, §2.3.5; Business Telecom, Inc. d/b/a BTI Tennessee Tariff No. 1, §2.6.2(E); ICG Telecom Group, Inc. Tennessee Tariff No. 1, §2.6.2(E); NEXTLINK T.R.A. No. 1, §2.5.2.4; TCG Midsouth, Inc. Tennessee R.A. No. 1, §3.7.2(F); Teligent, Inc. T.R.A. Tariff No. 1, §2.8.5; Time Warner Communications of the Mid-South, L.P. Tennessee No. 1, §2.4.1; US LEC of Tennessee, L.L.C. TPSC Tariff No. 1, §2.7.3; WorldCom Technologies, Inc. Tennessee Tariff No. 2, §2.5.2(E).

qualify for the Link Up program may obtain a credit of up to 50% of their non-recurring charges for the connection of service, up to a maximum of $30.00. *Id.* at A4.7.1. BellSouth also recently implemented a credit challenged initiative for residential subscribers. *See* General Subscriber Services Tariff §A2.4.3.H. This tariffed initiative allows residential subscribers whose service has been temporarily suspended due to nonpayment of regulated charges to retain their local service if they elect full toll restriction (at no charge) and arrange to pay their overdue charges on an installment basis over up to twelve months. Some customers, however, simply do not pay their telephone bills by the due date. BellSouth, therefore, filed its proposed tariff to implement a late payment charge which incents customers to make timely payments to BellSouth and which collects costs associated with late payments from the customers who cause BellSouth to incur these costs.

II. PUBLIC INTEREST

Approving a tariffed late payment charge is a bridge that has been crossed before. Both the former Tennessee Public Service Commission ("PSC") and the TRA have allowed telecommunications services providers to file and implement tariffed late payment charges. *See, e.g.,* BellSouth Private Line Services Tariff §B.2.4.1.E. *See also* footnote 1, *supra.* In fact, it appears that tariffed late payment charges are common in the industry. Such charges, therefore, are not inconsistent with the public interest.

To the contrary, tariffed late payment charges are in the public interest. If no customer paid a bill after it became due, BellSouth would incur no costs associated with late payments. The costs associated with late payments, therefore, are the sole result of customers who fail or refuse to pay their bills on time. Common sense and fairness dictate that those who cause BellSouth to incur such costs should be the ones to pay for such costs.

Implementing a late payment charge also is consistent with the fundamental economic principle of cost causation. Under this principle, costs should be recovered entirely from the person or entity who causes the costs in the first place. This principle is especially applicable to costs associated with late payments. As noted above, if no customer paid a bill after the due date, BellSouth would incur no costs associated with late payments. Further, one customer's failure or refusal to pay a bill on time provides no direct or indirect benefit to any other customer. Spreading the costs associated with late payments across all customers, therefore, is not only unfair but also economically inefficient – customers who pay their bills on time (and who receive no benefit from the failure or refusal of other customers to make timely payments) are required to subsidize costs that are caused solely by those who do not pay on time. Thus BellSouth's tariff – which removes this subsidy, places the costs associated with late payments on those who cause these costs in the first place, and reduces highly competitive hunting rates – is well-grounded in fundamental economic principles and is in the public interest.

III. FOR A FIRST DEFENSE

The Complaint fails to allege facts upon which relief may be granted because rate hearings conducted by the former PSC more than six years ago pursuant to a statutory scheme that no longer applies to BellSouth are not relevant to BellSouth's proposed tariff. Many of the allegations in the CAD's Complaint erroneously rely on the last rate proceeding for BellSouth before the PSC. *See* Complaint at ¶ 6; Affidavit at ¶ 3. At the time of that rate proceeding, telecommunications companies like BellSouth operated under the "rate base – rate of return method of regulation." *See AT&T v. Greer*, 1996 WL 697945 at *2 (copy attached). This form of regulation, however, no longer applies to BellSouth. Despite the CAD's coy allegation "[t]hat the TRA and BellSouth assert that BellSouth's initial rates under Tenn. Code Ann. § 65-5-209

began on December 1, 1998," *see* Complaint at ¶ 9 (emphasis added), the simple fact remains that BellSouth, as a matter of fact and law, is operating under an approved price regulation plan.

As the Court of Appeals has acknowledged, "[t]he passage of [the price regulation statutes] has truly reformed the provision and the regulation of local telecommunications services." *AT&T v. Greer*, 1996 WL 697945 at *3 (Tenn. Ct. App. Dec. 6, 1996). *Accord BellSouth v. Greer*, 972 S.W.2d 663, 666-67 (Tenn. Ct. App. 1997) (describing the bill enacting the price regulation statutes as "dramatically altering the regulation of local telephone companies"). By enacting the price regulation statutes, the General Assembly "determined that for purposes of price regulation plans rates 'are just and reasonable when they are determined to be affordable . . . .'" *AT&T v. Greer* at *3 (citing T.C.A. §65-5-209(a)). Fourteen months ago, the TRA issued an Order approving BellSouth's application for a price regulation plan "with the rates existing on June 6, 1995" as the initial rates under the plan. *See* Order in Docket No. 95-02614 at 21 (Dec. 9, 1998). The Court of Appeals has affirmed this Order, *see Consumer Advocate Division v. Tennessee Regulatory Authority*, 2000 WL 13794 (Tenn. Ct. App. Jan. 10, 2000), and it has rejected the CAD's Petition to Rehear its decision as being "without merit." *See* Order on Petition to Rehear, Appeal No. M1999-02151-COA-R12-CV (Feb. 11, 2000). As a matter of law, therefore, BellSouth is operating under a price regulation plan, and BellSouth's rates for its services are affordable, just, and reasonable.

The CAD's anachronistic attempt to delve into the intricacies of a past rate proceeding that the former PSC conducted under a regulatory scheme that no longer applies to BellSouth, therefore, is inappropriate. In *BellSouth Telecommunications, Inc. v. Bissell*, 1996 WL 557846 (Tenn. Ct. App. Oct. 2, 1996) (copy attached), for instance, the PSC voted to continue an ongoing rate base – rate of return earnings investigation after BellSouth filed its application for a

price regulation plan. The Court of Appeals reversed the PSC's decision, ruling that "the PSC's decision to continue the investigation is simply arbitrary. . . ." *Id* at *2. The Court explained that "we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose." *Id.*

Similarly, a review of a prior rate proceeding would have no bearing on BellSouth's current rates because, as discussed above, these rates are affordable, just, and reasonable as a matter of law. Nor is a rate case from six years ago relevant to the costs BellSouth currently incurs in tracking, administering, and collecting payments from its customers after these payments are due. The TRA, therefore, should deny the CAD's request to convene a contested case and review a six-year-old rate case because such a review would serve no purpose.

Finally, as noted above, several CLECs have filed tariffs with the TRA which include late payment charges, and to the best of BellSouth's knowledge, none of these CLECs have represented whether the rates in their tariffs include any working capital or bad debt expense factors. Nor has the TRA or the CAD, to the best of BellSouth's knowledge, raised any such issues with regard to these rates, and for good reason. If a CLEC's rates for telecommunications services are just and reasonable, how the CLEC went about setting those rates is irrelevant. Similarly, how BellSouth went about setting its rates that existed on June 6, 1995 is irrelevant. *Cf. BellSouth v. Greer*, 972 S.W.2d 663, 681-82 (Tenn. Ct. App. 1997) (ruling that in deciding whether to approve BellSouth's application for a price regulation plan, the PSC was not required to review each of BellSouth's rates and tariffs to determine whether they were affordable and non-discriminatory). The CAD's reliance on the PSC's last rate proceeding involving BellSouth, therefore, is meritless.

IV. FOR A SECOND DEFENSE

The Complaint fails to allege facts upon which relief may be granted because BellSouth's proposed tariff implementing a late payment charge does not violate the statutory four-year freeze on BellSouth's initial basic local exchange telephone service rates. Section 65-5-209(f) provides that "the initial basic local exchange telephone service rates of an incumbent local exchange company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange company becomes subject to such regulation." The proposed late payment charge is not a rate for any telecommunications service, and it will not result in an increase in initial basic local exchange telephone service rates. Persons who receive basic residential telephone services, for instance, will be billed the same rates for those services after the implementation of the late payment charge as they were billed for those services before the implementation of the late payment charge. Moreover, if they pay their bills on time, customers will never be affected by the late payment charge. The late payment charge will only affect customers who order services, receive the benefit of those services, and cause BellSouth to incur additional costs by failing to pay for those services in a timely manner. The proposed late payment charge, therefore, does not violate the four-year freeze on the rates for basic services.

In this regard, the proposed late payment charge is analogous to BellSouth's tariff at issue in Docket No. 96-01422 (the five-line tariff). Prior to the implementation of the five-line tariff, BellSouth customers paid residential rates for an unlimited number of lines at a residential location as long as the customer did not have a business listing in the telephone directory. As approved, the five-line tariff provides that with certain exceptions, "the number of residential telephone lines delivered to residential locations and billed at residential service rates [is] limited to five (5)." *See* Final Order Modifying and Approving Tariff 96-177 and Modifying Tariff 95-

271, Docket No. 96-01422 (June 15, 1998). While intervenors in that docket argued that the tariff constituted an impermissible increase in basic local exchange services under the price regulation statues, BellSouth explained that:

> Tariff 96-177 does not raise residence rates. The rates for basic residence and business service are set forth in BellSouth's General Subscriber Services Tariff. These tariffed rates are unaffected by Tariff 96-177 and will not change upon its approval. After the effective date of the Tariff, for example, business customers in Nashville will continue to pay $39.70 per month, and residential customers in Nashville will continue to pay $12.15 per month.

See BellSouth Telecommunications, Inc.'s Brief on the Validity of BellSouth's Proposed Tariff, Docket No. 96-01422 (filed October 17, 1997). The TRA agreed, finding that "BST's proposed Tariff 96-177 and UTSE's currently effective Tariff 95-217 do not violate the provisions of Tenn. Code Ann. §§ 65-5-208 and 65-5-209." *See* Final Order at 5 (emphasis added). *See also* Final Order at 6-7 ("the Authority did not accept the contention of the parties opposing these tariffs that increasing these customers' rates from residential to business rates violates the price freeze provision of Tenn. Code Ann. § 65-5-209.").[2] Just as BellSouth's basic rates were the same after the five-line tariff was implemented as they had been before the five-line tariff was implemented, BellSouth's basic rates will be the same after the late payment charge is implemented as they are today. Just as BellSouth's five-line tariff did not violate the price freeze provision of Tenn. Code Ann. § 65-5-209, BellSouth's proposed late payment tariff does not violate the price freeze provision of Tenn. Code Ann. § 65-5-209.

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[2] The Authority reached this decision on the basis of a 2-1 vote. *See* Final Order at 5 n.4.

V. FOR A THIRD DEFENSE

The Complaint fails to allege facts upon which relief may be granted because BellSouth's tariff does not generate revenues for basic local exchange services or non-basic services. The price regulation statutes allow BellSouth to "adjust its rates for basic local exchange telephone services or non-basic services" as long as its "aggregate revenues for basic local exchange 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." T.C.A. § 65-5-209(e) (emphasis added). By statutory definition, no service is a "basic local exchange service" or a "non-basic service" unless it is first a telecommunications service. *See* 65-5-208(a)(1) & (2). As noted above, however, the late payment charge is not a rate or charge for any telecommunications service. Accordingly, the late payment charge is not a rate for a basic or non-basic service, and it does not generate "revenues for basic local exchange services or non-basic services." Thus the revenue cap imposed by section 65-5-209(e) has no bearing on the proposed late payment charge.

Nor is BellSouth required to reduce any rates to "compensate" for the late payment charge as the CAD erroneously suggests.[3] *See* Complaint at ¶ 24. As noted above, the late payment charge is not a rate for a telecommunications service, thus it does not produce "revenues" resulting from the sale of a telecommunications service. Instead, the late payment charge offsets costs BellSouth incurs as a direct result of a customer's failure to pay its bills in a

[3] Although BellSouth is not *required* to "compensate" for the late payment charge as the CAD erroneously suggests, BellSouth has *voluntarily:* (1) proposed to reduce hunting rates; and (2) proposed to use accumulated headroom under its price regulation plan in an aggregate amount that equals the amount of revenue the late payment charge will generate even if every customer who currently pays bills late continues paying bills late after the late payment charge is implemented. *See* BellSouth's Fourth Defense below.

timely fashion, and it provides an incentive for customers to pay for the services they receive in a timely fashion. Because this charge does not generate revenues from the sale of telecommunications services, no reduction in the rates for any telecommunications service is necessary or appropriate.

VI. FOR A FOURTH DEFENSE

In the alternative, and without waiving the foregoing, the Complaint fails to allege facts upon which relief may be granted because even assuming the late payment charge is a rate for a telecommunications service to which the price regulation statutes apply (which BellSouth denies), BellSouth's tariff does not result in aggregate revenues that exceed the aggregate revenue generated by the maximum rates permitted by its price regulation plan. Under price regulation, the sole issue for consideration is whether proposed rate changes cause "aggregate revenues for basic local exchange services or non-basic services generated by such changes" to exceed the "aggregate revenues generated by the maximum rates permitted by the price regulation plan." *See* T.C.A. § 65-5-209(e). If proposed rate changes do not cause aggregate revenues to exceed this statutory cap, the price regulation statutes permit BellSouth to "set rates for non-basic services as the company deems appropriate . . . ." *See id.*, § 65-5-209(h).

Clearly, BellSouth's proposed tariff will not cause its aggregate revenues to exceed the aggregate revenues permitted by its price regulation plan. BellSouth's tariff voluntarily implements a rate reduction and voluntarily uses accumulated headroom which, when combined, will at least offset any revenue generated by the late payment charge. BellSouth's implementation of the reduced hunting rates definitely will result in a reduction in BellSouth's aggregate revenues – customers currently subscribing to hunting in areas where competitors have chosen to target their efforts will pay less for the service as soon as the tariff is implemented. In contrast, the late

payment charge will generate the amount of revenue set forth in the proprietary portion of BellSouth's filing package only if customers who currently make late payments continue to make late payments after the implementation of the late payment charge. If customers who typically pay bills late begin paying bills on time after the late payment charge is implemented, however, the late payment charge will generate less revenue to offset the revenue reductions that definitely will occur upon implementation of the hunting reductions. The CAD, therefore, cannot claim that BellSouth has not complied with the price regulation statutes or with BellSouth's approved price regulation plan.

VII. FOR A FIFTH DEFENSE

The Complaint fails to allege facts or law supporting the CAD's request for an injunction or a stay. The CAD's assertion that "Tenn. Code Ann. § 65-3-105 empowers the TRA to enjoin and stay [BellSouth's late payment] tariff" is simply wrong. *See* Complaint, ¶ 36. Section 65-4-105 provides that the TRA has "with reference to all public utilities within its jurisdiction all the other powers conferred with reference to railroads regulated by the department of transportation . . . as provided by chapters 3 and 5 of this title." Section 65-3-105, in turn, requires the department of transportation to "see that such companies shall comply with all such regulations and orders as it may reasonably and lawfully make" and to enforce such regulations and orders "by mandamus or mandatory injunction, or by other summary proceedings provided by law." Significantly, the statute then plainly states that "[i]t is made the duty of the courts having jurisdiction in such proceedings to hear and determine all such summary causes as speedily as practicable . . . ." *Id.* (emphasis added). Clearly, section 65-3-105 permits the TRA to request a court to issue an injunction, but it does not permit the TRA to issue an injunction on its own. The TRA, therefore, should deny the CAD's request for injunctive relief.

Even if section 65-3-105 granted the TRA the power to issue an injunction, the CAD has failed to prove that it is entitled to an injunction. An injunction is an extraordinary and drastic remedy that never may be obtained as a matter of right. *Wright & Miller* § 2948; *Butts v. City of South Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977); *Hall v. Ballance*, 497 S.W.2d 409, 410 (Tenn. 1973); *Morrison v. Jones*, 430 S.W.2d 668, 673 (Tenn. Ct. App. 1968); *Hall v. Britton*, 292 S.W.2d 524, 531 (Tenn. Ct. App. 1953). Instead, the party requesting an injunction bears the burden of proving that it is entitled to an injunction and in considering such a request, the TRA must consider the following factors: (1) the likelihood of the CAD's success on the merits of its claims; (2) the likelihood that the CAD would suffer irreparable injury without an injunction; (3) the likelihood that other parties would suffer substantial harm absent an injunction; and (4) the likelihood that the public would be harmed absent an injunction. *See Doe v. Sundquist*, 106 F.3d 702-705 (6th Cir.), *cert. denied* 118 S. Ct. 51 (1997). The same factors must be considered in considering a request for a stay. *See, e.g., Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). As explained above, the CAD cannot demonstrate a likelihood of success on the merits of its claims, and it cannot show any of the other requisite factors. The TRA, therefore, should deny the CAD's request for an injunction.

VIII. FOR A SIXTH DEFENSE

Without waiving the foregoing, BellSouth more specifically responds to the allegations set forth in the Complaint as follows:

1. BellSouth admits the allegations set forth in Paragraph 1 of the Complaint.

2. BellSouth admits the allegations set forth in Paragraph 2 of the Complaint.

3. BellSouth admits the allegations set forth in Paragraph 3 of the Complaint.

4. BellSouth admits that Tenn. Code Ann. § 65-5-208 says what is says, but denies that this statute prohibits BellSouth from implementing its proposed Tariff No. 00-00041.

5. BellSouth denies the allegations set forth in Paragraph 5 of the Complaint.

6. BellSouth admits that in approving BellSouth's rates during the 1993 rate case, the PSC considered certain expenses BellSouth incurred in administering late payments as of that point in time. BellSouth denies that any such consideration by the PSC under rate base, rate-of-return regulation is relevant to the TRA's consideration of BellSouth's proposed Tariff No. 00-00041 under an approved price regulation plan. BellSouth denies the remainder of the allegations set forth in Paragraph 6 of the Complaint.

7. Paragraph 7 of the Complaint does not allege facts to which a response is required.

8. BellSouth denies the allegations set forth in Paragraph 8 of the Complaint.

9. BellSouth admits that on December 9, 1998, the TRA entered an Order approving BellSouth's application for a price regulation plan, and BellSouth admits that the Order says what it says.

10. BellSouth admits that on December 9, 1998, the TRA entered an Order approving BellSouth's application for a price regulation plan, and BellSouth admits that the Order says what it says.

11. BellSouth admits that Tenn. Code Ann. §§ 65-5-208 and 65-5-209 say what they say. BellSouth denies that either statute prohibits BellSouth from implementing its proposed Tariff No. 00-00041.

12. BellSouth admits that it filed Tariff No. 00-00041 on January 21, 2000 and that BellSouth sought an effective date of February 22, 2000. BellSouth denies the remainder of the allegations set forth in Paragraph 12 of the Complaint.

13. BellSouth admits that it filed Tariff No. 00-00041 on January 21, 2000 and that BellSouth sought an effective date of February 22, 2000. BellSouth denies the remainder of the allegations set forth in Paragraph 13 of the Complaint.

14. BellSouth admits that it filed Tariff No. 00-00041 on January 21, 2000 and that BellSouth sought an effective date of February 22, 2000. BellSouth denies the remainder of the allegations set forth in Paragraph 14 of the Complaint.

15. BellSouth denies the allegations set forth in Paragraph 15 of the Complaint.

16. BellSouth denies the allegations set forth in Paragraph 16 of the Complaint.

17. BellSouth denies the allegations set forth in Paragraph 17 of the Complaint.

18. BellSouth denies the allegations set forth in Paragraph 18 of the Complaint.

19. BellSouth denies the allegations set forth in Paragraph 19 of the Complaint.

20. BellSouth denies the allegations set forth in Paragraph 20 of the Complaint.

21. BellSouth denies the allegations set forth in Paragraph 21 of the Complaint.

22. BellSouth denies the allegations set forth in Paragraph 22 of the Complaint.

23. BellSouth denies the allegations set forth in Paragraph 23 of the Complaint.

24. BellSouth denies that Tariff No. 00-00041 constitutes a price increase. BellSouth further denies that the filing of proposed Tariff No. 00-00041 requires BellSouth to either "show the amount and source of any alleged subsidy to local basic exchange service from other rates" or reduce any rates.

25. BellSouth denies the allegations set forth in Paragraph 25 of the Complaint.

26. BellSouth denies the allegations set forth in Paragraph 26 of the Complaint.

27. BellSouth denies the allegations set forth in Paragraph 27 of the Complaint.

28. BellSouth admits that §§ 65-4-122 and 65-4-204 say what they say. BellSouth denies that either statute prohibits BellSouth from implementing its proposed Tariff No. 00-00041.

29. BellSouth admits that §§ 65-4-122 and 65-4-204 say what they say. BellSouth denies that either statute prohibits BellSouth from implementing its proposed Tariff No. 00-00041.

30. BellSouth denies the allegations set forth in Paragraph 30 of the Complaint.

31. BellSouth denies the allegations set forth in Paragraph 31 of the Complaint.

32. BellSouth denies the allegations set forth in Paragraph 32 of the Complaint.

33. BellSouth denies the allegations set forth in Paragraph 33 of the Complaint.

34. BellSouth is unable to determine the intended meaning of the allegations set forth in Paragraph 34 of the Complaint and, therefore, can neither admit nor deny those allegations.

35. BellSouth denies the allegations set forth in Paragraph 35 of the Complaint.

36. BellSouth denies the allegations set forth in Paragraph 36 of the Complaint.

37. BellSouth denies that the CAD is entitled to any of the relief requested in the Complaint.

38. Any allegations that are not expressly admitted herein are denied.

WHEREFORE, having fully answered, BellSouth prays that the Authority dismiss the CAD's Complaint and enter its Order approving BellSouth's proposed Tariff No. 00-00041.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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CERTIFICATE OF SERVICE

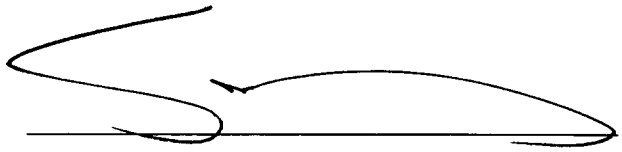
I hereby certify that on March 3, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

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

L. Vincent Williams, Esquire
Office of Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243



SEE COURT OF APPEALS RULES 11 AND 12

AT & T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., Petitioner/Appellant,
v.
H. Lynn GREER, Chairman, Sara Kyle, Director, and Melvin J. Malone, Director, Constituting the Tennessee Regulatory Authority, Respondents/Appellees. [FN1]

FN1. This case was commenced against Keith Bissell, Steve Hewlett, and Sara Kyle, who constituted the Tennessee Public Service Commission. However, the Public Service Commission ceased to exist on 30 June 1996 and the General Assembly vested much of the Public Service Commission's authority, including the power to set rates, in the Tennessee Regulatory Authority.

No. 01A-01-9512-BC-00556.

Court of Appeals of Tennessee.

Dec. 6, 1996.

APPEAL FROM THE TENNESSEE PUBLIC SERVICE COMMISSION FOR DAVIDSON COUNTY AT NASHVILLE, TENNESSEE

VAL SANFORD JOHN KNOX WALKUP Gullett, Sanford, Robinson & Martin 230 4th Avenue North, 3rd Floor P.O. Box 198888 Nashville, Tennessee 37219-8888 ATTORNEYS FOR PETITIONER/ APPELLANT CHARLES W. BURSON Attorney General and Reporter

JONATHAN D. SHELL Assistant Attorney General Tax Division 404 James Robertson Parkway, Suite 2121 Nashville, Tennessee 37243-0489 ATTORNEYS FOR RESPONDENTS/ APPELLEES

OPINION

LEWIS.

*1 This is an appeal by petitioner/appellant, AT & T Communications of the South Central States, Inc. ("AT & T"), from the decision of the Tennessee Public Service Commission ("TPSC") to implement a price regulation plan for United Telephone Southeast, Inc. ("UTS"). AT & T claims that TPSC failed to follow the proper standards and procedures when it addressed the application of UTS to elect a price regulation plan pursuant to Tennessee Code Annotated section 65-5-209. The facts out of which this matter arose are as follows.

On 16 June 1995, UTS filed an application to implement a price regulation plan pursuant to Tennessee Code Annotated section 65-5-209. During the proceedings, the following companies filed petitions for leave to intervene: BellSouth Telecommunications, Inc. ("Bell"); AT & T; MCI Metro Access Transmission Services, Inc.; the Consumer Advocate; and MCI Telecommunications, Inc. TPSC granted all petitions.

On 7 August 1995, TPSC issued a notice setting the case for hearing on 7 September 1995. Thereafter, TPSC's staff filed its audit of UTS's 31 December 1994 3.01 report. The staff recommended that TPSC find that UTS's rates were affordable and that no other contested case proceedings were necessary. On 24 August 1995, AT & T filed a reply arguing that the staff's report was an initial determination and that further contested case proceedings were necessary for TPSC to carry out its statutory powers and duties. Four days later, TPSC's staff filed a memorandum in support of its recommendation.

On 5 September 1995, TPSC entered an order canceling the 7 September hearing because there was no statutory authority for a contested case hearing. TPSC then ordered the staff to audit UTS's most recent 3.01 report of 31 March 1995. The staff concluded that UTS's earned rate of return did not exceed its current authorized fair rate of return and was below the authorized range. On 20 September, TPSC entered an order adopting the staff's audit report and holding that the rates which were in effect as of 6 June 1995 were affordable pursuant to Tennessee Code Annotated section 65-5-209(c). TPSC also approved the effective date proposed by UTS. Finally, TPSC stated that the order would become final if UTS did not request a contested case hearing. Thereafter, UTS informed TPSC it would not request such a hearing.

On 28 September 1995, AT & T filed a motion in which it raised an issue as to the proper application and construction of Tennessee Code Annotated section 65-5-209 and requested an opportunity to be

heard. UTS opposed the motion. On 13 October 1996, TPSC found that its previous orders addressed most of AT & T's issues and that it did not have the authority to address any issue not resolved in its previous orders. As a result, it denied AT & T's motion.

On 12 December 1995, AT & T filed a petition for review pursuant to Tennessee Rule of Appellate Procedure 12. UTS and Bell filed notices of appearance as respondents in support of TPSC's order. On 26 January 1996, TPSC filed a motion to dismiss. TPSC claimed that this court lacked jurisdiction because the 13 October order was not the result of a contested case. On 12 April 1996, this court denied the motion and held that this court has jurisdiction to determine jurisdictional issues.

On 11 July 1996, this court granted TPSC's motion to consider post-judgment facts. Specifically, the order allowed this court to consider the chancery court's decision in AT & T Communications of the S. Cent. States, Inc. v. Bissel, No. 95-3094-II (Davidson Chan. 7 May 1996). On 16 July 1996, this court entered an order substituting the members of the Tennessee Regulatory Authority as appellees in the place of the members of TPSC.

*2 AT & T has presented two issues for our review. They are:

1. Whether the final order issued by the Tennessee Public Service Commission ... in the matter styled, In re Application of United States Telephone-Southeast, Inc. for Approval to Implement Price Regulation Plan, Docket No. 95-02615, was illegal and void as being contrary to the governing statutes, particularly T.C.A. § 65-5-209 (1995 Supp.)?
2. Whether the proceeding before the Commission in the matter styled, In re Application of UTS-Southeast, Inc. for Approval to Implement Price Regulation Plan, Docket No. 95-02615, was, as a matter of statutory and constitutional law, a contested case proceeding, which should have been so conducted by the Commission, and from which jurisdiction to review is in this Court?

We begin our discussion of this matter with a discussion of the "Telecommunications Reform Act of 1995." This appeal, as pointed out by the Attorney General, is the most recent in a series of attempts by AT & T to derail the legislature's efforts to deregulate local telecommunications services and to open the local telecommunications industry to competition.

In 1995, the General Assembly passed Public Chapter 408, the "Telecommunication Reform Act of 1995." 1995 Tenn. Pub. Acts ch. 408 (codified in title 65). Chapter 408 became effective on 6 June 1995. The General Assembly stated its purpose in passing chapter 408 as follows: "The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers." Tenn.Code Ann. § 65-4- 123 (Supp.1996). Prior to the passage of chapter 408, the providing of local telephone services was not open to competition. One provider in a particular locality held the exclusive right to provide such service for the designated area unless the service was inadequate. Because there was no competition forcing providers to charge fair and reasonable rates, TPSC established the rates charged for such services. The rate regulation procedures adopted by TPSC included an extensive inquiry into the provider's cost of doing business, its capital investment, i.e., "rate base," and its revenues; into the nature and extent of the services provided; and into various other factors that enabled TPSC to determine a "fair rate of return" on the provider's "rate base."

TPSC collected this information and determined the fair rate of return through contested case proceedings in which TPSC allowed interested parties to intervene and participate. Usually, these were lengthy and expensive proceedings. TPSC then set the rates the provider was to charge for its services with the objective being to make the provider's earned rate of return equal to its authorized fair rate of return. Periodically, TPSC compared the provider's earned rate of return with the authorized rate of return and ordered rate adjustments to bring the earned rate of return into compliance with the authorized rate of return. This became known as the "rate base--rate of return" method of rate regulation.

*3 The passage of chapter 408 has truly reformed the provision and the regulation of local

telecommunications services. Chapter 408 allows, for the first time, competition in all telecommunications services markets and gives incumbent local exchange telephone companies ("incumbents"), now providing local telephone services, the option to select an alternative form of rate regulation. Instead of the traditional rate of return method, incumbents, such as UTS, may elect to have their rates regulated through a price regulation plan. See Tenn.Code Ann. § § 65-5-208 & -209 (Supp.1996).

The change to price regulation plans reduced TPSC's power to control the individual prices charged by incumbents for individual services. Thus, it enhanced an incumbent's ability to compete in the market place by setting boundaries of acceptable pricing policies, rather than dictating the incumbents exact price. Within prescribed bounds of conduct, an incumbent now has the ability to adjust its prices in response to the competitive environment in which it finds itself.

The Tennessee General Assembly delegated to TPSC the power to "fix just and reasonable individual rates." Id. § 65-5-201. The legislature then determined that for purposes of price regulation plans rates "are just and reasonable when they are determined to be affordable...." Id. § 65-5- 209(a). The incumbent's rates on 6 June 1995 are deemed affordable under section 65-5-209 if the incumbent's earned rate of return is less than or equal to its authorized fair rate of return at the time of the company's application for price regulation. Id. § 65-5-209(c).

Prior to issuing an order adopting a price regulation plan for an incumbent, TPSC must verify the incumbent's earned rate of return by auditing the incumbent's most recent TPSC 3.01 financial report. Id. If the audit shows the incumbent's earned rate of return is equal to its authorized rate of return, then its rates existing on 6 June 1995 are deemed affordable and are to be used as the initial rates on which price regulation will be based. Id. If the earned rate of return is too high then TPSC must initiate a contested, evidentiary proceeding to establish the initial rates. Id. Alternatively, if the incumbent's earned rate of return is below its authorized fair rate of return, the incumbent may request that TPSC initiate a contested, evidentiary proceeding to set its initial rates. Tenn.Code Ann. § 65-5- 209(c)(Supp.1996). If it does not request such a hearing, however, the rates existing on 6 June 1995 shall become the initial rates. Id.

At the outset, we must address the jurisdictional issue raised in TPSC's motion to dismiss. We must determine if the proceedings by which UTS became subject to price regulation under Tennessee Code Annotated section 65-5-209 was a contested case. If it was not a contested case, we do not have jurisdiction.

The Uniform Administrative Procedures Act, Tennessee Code Annotated title 4, chapter 5, and Tennessee Rule of Appellate Procedure 12.1(a) govern this court's review of TPSC's actions. Tennessee Code Annotated section 4-5- 322(a)(5) describes this court's jurisdiction to hear petitions for judicial review of TPSC's orders. Pursuant to that section, "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review." Id. § 4-5-322(a)(1)(1991 & Supp.1996)(emphasis added). Thus, only a final decision in a contested case is subject to judicial review.

*4 TPSC contends that this court lacks jurisdiction because TPSC did not issue the final order from which AT & T seeks appeal in a contested case. TPSC argues that Tennessee Code Annotated section 65-5-209 required it to issue an order implementing a price regulation plan for UTS if UTS satisfied certain financial criteria. Moreover, TPSC contends that nothing in section 65-5- 209 permitted AT & T to initiate a contested case proceeding as part of UTS's application for a price regulation plan.

Clearly, TPSC did not conduct a contested case proceeding in connection with UTS's application. In fact, that is the substance of AT & T's complaint in this appeal. Given these circumstances, the actual jurisdictional question for this court to resolve is whether AT & T had a constitutional right to be heard making the proceeding a contested case as a matter of law.

In a declaratory judgment action filed by AT & T, [FN2] AT & T contended that Tennessee Code Annotated section 65-5-209(c) deprived it of its due process "right to be heard as to the justness and reasonableness of rates to which it is to be subject."

The chancellor ruled that AT & T had no constitutionally protected interest in the rates it was charged. [FN3] The chancery court entered a judgment in the declaratory judgment action on 7 May 1996 and no appeal was taken. Relitigation of this issue is barred by the doctrine of collateral estoppel.

> FN2. As previously stated, this court granted a motion to consider post- judgment facts namely the case of AT & T Communications of the S. Cent. States, Inc. v. Bissel, No. 95-3094-II (Davidson Chan. 7 May 1996). This case is the declaratory action discussed herein.
>
> FN3. AT & T will use UTS's services. Thus, it will be subject to the rates charged pursuant to the price regulation plan.

"Under the doctrine of collateral estoppel, when an issue has been actually and necessarily determined in a former action between the parties, that determination is conclusive upon them in subsequent litigation." King v. Brooks, 562 S.W.2d 422, 424 (Tenn.1978). "In order to bar the relitigation of certain facts determined in the former action by applying the doctrine of collateral estoppel, there must be an identity of the parties or their privies and identity of the issue." Stacks v. Saunders, 812 S.W.2d 587, 591 (Tenn.App.1990).

The declaratory judgment action involved all the parties that are involved in this case. Thus, there was identity of the parties. As to the identity of the issues, AT & T contends that the chancery court did not address the issue of whether AT & T had any due process rights as to the rates charged to it by other providers. The issues raised in the declaratory judgment action involved AT & T's general contention that Tennessee Code Annotated section 65-5-209 was unconstitutional. AT & T's complaint clearly alleged that AT & T had a due process interest in the rates it was charged and that Tennessee Code Annotated section 65-5-209(c) violated those rights. In its complaint, AT & T alleged:

> 10. AT & T is a customer of BellSouth and UTSE for basic local exchange telephone service and for non-basic service as those terms are defined in T.C.A. § 65-5-208, as adopted in Chapter 408 of the Public Acts of 1995. As such, AT & T has a direct, legally protected interest in the rates, charges and prices imposed by BellSouth and UTSE for such services.
>
> *5 11. T.C.A. § 65-5-209, adopted by Section 10 of Chapter 408 of the Public Acts of 1995, sets up a new system for the regulation of rates, charges, and prices of Incumbent Local Exchange Telephone Companies electing to be governed thereby by filing an application for a price regulation plan.... The implementation of such price regulation plans by UTSE and BellSouth will directly affect the rates, prices, and charges imposed by UTSE and BellSouth for the services provided to AT & T, and will result in the deprivation of AT & T's rights and interests under the Constitution of Tennessee and of the United States.
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> ....
>
> 13.... Instead, T.C.A. § 65-5-209 provides a novel and unprecedented departure form the general law established for the setting of rates for public utilities in this state, and deprives AT & T and other interested parties of their rights to just and reasonable rates established under fair and reasonable procedures.
>
> ....
>
> 17. Further, the Legislature, under subsection (c), on a finding by TPSC that a company's earned rate of return is less than or equal to that company's current authorized fair rate or return, has fixed the initial rates to be charged by a company under a price regulation plan, such as BellSouth or UTSE, for all services rendered, as the rates in effect on the effective date of the act. There is no rational basis for so fixing such initial rates. The act of the Legislature in so doing, therefore, violates Article 1, Section 8 of the Tennessee Constitution. On this ground, subsection (c) is unconstitutional.
>
> 18. Neither in T.C.A. § 65-5-209, nor elsewhere in Chapter 408, is provision made for the judicial review of the rates and prices fixed by subsection (c) of T.C.A. § 65-5-209. On the contrary, subsection (c) appears to be designed to preclude such judicial review. AT & T, therefore, is deprived of its constitutional right to be heard as to the justness and reasonableness of rates to which it is to be subject. Subsection (c), therefore, violates Article 1, Section 8, and Article 1, Section 17 of the Tennessee Constitution, and the Fourteenth Amendment to the United States Constitution.

Clearly, one of the issues set forth in the complaint was the precise constitutional issue presented here, i.e., whether AT & T has any due process rights as

to the rates charged to it by other providers.

The chancellor provided a thorough memorandum and opinion. At the outset of the memorandum, the court stated: "[R]atepayers have no due process property rights to the charging of particular rates. AT & T is forbidden, then, from challenging the legislation in issue because AT & T might object to the charging of a particular rate." Moreover, the court specifically ruled that the allegations in paragraphs seventeen and eighteen were without merit.

It is the opinion of this court that the issue presented in this case is the same as one or more of the issues presented in the declaratory judgment action. Moreover, the parties in both actions were the same. As such, the doctrine of collateral estoppel applies and prevents AT & T from challenging the constitutional validity of Tennessee Code Annotated section 65-5-209 on the basis of its rights surrounding the rates charged to it by other providers and on the basis of any other theory advanced and resolved in the declaratory judgment action. The issue in this case has been conclusively determined between these parties by a court of competent jurisdiction and may not now be relitigated.

***6** TPSC's 18 August 1995 order allowing AT & T to intervene does not affect this ruling. The order merely stated that the proceedings "may" affect AT & T's rights and that AT & T could participate "as its interest may appear." Nothing in the order conclusively recognized the existence of rights nor did it create any constitutionally protected rights that previously did not exist. AT & T has not identified a constitutional right to be heard. Because there was no contested case, AT & T is left only with the argument that the proceeding was a contested case as a matter of law because it should have been a contested case. We respectfully disagree.

In addition to the lack of constitutional support, AT & T's claim to a contested case is not supported by the statutes. No reasonable interpretation of Tennessee Code Annotated section 65-5-209 requires or permits TPSC to convene a contested case under the circumstances here. TPSC does not have discretion on whether to allow an incumbent to select price regulation. Under the statute, an incumbent is entitled to price regulation. "The authority [FN4] shall enter an order within ninety (90) days of the application of an incumbent local exchange telephone company implementing a price regulation plan for such company." Tenn.Code Ann. § 65-5-209(c)(Supp.1996)(emphasis added).

> FN4. The authority, i.e. the Tennessee Regulatory Authority, now has the power to implement a price regulation plan pursuant to Tennessee Code Annotated section 65-5-209.

AT & T has pointed out that "contested case" is defined differently in two applicable statutes, section 4-5-102(3) and section 65-5-101(2). Section 4-5-102(3) defines contested case as follows:

> "Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the granting or denial of licenses, permits or franchises where the licensing board is not required to grant the licenses, permits or franchises upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency's jurisdiction.

Tenn.Code Ann. § 4-5-102(3)(1991).

This court's jurisdiction over this matter derives from Tennessee Code Annotated section 4-5-322, which allows judicial review of final decisions in contested cases. The jurisdictional statute is part of the UAPA, therefore, it seems appropriate that the definitions given in the UAPA, such as the definition of "contested case" given in section 4-5-102(3), would control the interpretation of section 4-5-322. Clearly, the General Assembly intended the definition in section 4-5-102(3) to refer to proceedings before TPSC. TPSC is the only agency concerned with rate making and granting of certificates of convenience and necessity both of which are specifically mentioned in section 4-5-102(3). See United Inter-Mountain Tel. Co. v. Public Serv. Comm'n, 555 S.W.2d 389, 391 (Tenn.1977).

*7 Under the UAPA definition, a contested case is a proceeding in which "the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." Because AT & T has not set forth any statutory or constitutional provisions which required TPSC to provide AT & T with an opportunity to be heard before TPSC implemented UTS's request for price regulation, the proceeding was not a contested case as defined in Tennessee Code Annotated section 4-5-103(b).

The Tennessee General Assembly has extremely broad powers to determine the method and the extent to which it will regulate utilities. It has the power to do all acts not expressly or impliedly forbidden by the Tennessee Constitution or the United States Constitution. See Bank of Commerce & Trust Co. v. Senter, 149 Tenn. 569, 576, 260 S.W. 144, 146 (1924)(discussing taxing powers). The regulation of rates charged by public utilities is a legislative function. McCollum v. Southern Bell Tel. & Tel. Co., 163 Tenn. 277, 280, 43 S.W.2d 390, 390-91 (1931); Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 159 (Tenn.App.1992). The decision of whether to regulate utilities and the extent and method of such regulations are within the exclusive domain of the legislature and are subject to change at the will of the legislature. See Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 141, 59 S.Ct. 366, 371, 83 L.Ed. 543, 551 (1939). Moreover, it is the opinion of the majority that the concurring opinion would not fulfill the intent of the legislature. Adoption of the concurring opinion would not promote the reform sought by the enactment of the statute. In essence, the litigious nature of the process would not change.

By enacting chapter 408, the General Assembly expressed its will to open the local telecommunications market to competition and declared that price regulation is a proper method of regulation. We are of the opinion that AT & T's interpretation and contentions concerning chapter 408 are contrary to the plain wording of the act and to the policy statement expressed in Tennessee Code Annotated section 65-4-123.

Therefore, it results that the appeal of AT & T is dismissed for lack of jurisdiction by this court. Costs on appeal are taxed to petitioner/appellant, AT & T Communications of South Central States, Inc., and the cause is remanded to the Tennessee Regulatory Authority for any further necessary proceedings.

TODD, P.J., M.S., concurs.

KOCH, Jr., J., concurring in separate opinion.

CONCURRING OPINION

The majority opinion rests on two principal holdings--first that this court lacks jurisdiction to hear this appeal and second that collateral estoppel bars AT & T's attack on the constitutionality of Tenn.Code Ann. § 65-5-209 (Supp.1996). I have prepared this separate opinion because I disagree with the majority's jurisdictional analysis. I would hold that this court has jurisdiction over this appeal and that collateral estoppel prevents AT & T from pursuing its constitutional challenge to Tenn.Code Ann. § 65-5-209.

I.

*8 In 1995 the General Assembly overhauled the procedure for setting rates for telephone services. [FN1] It replaced the cumbersome administrative rate- setting process with one in which competitive forces, rather than regulators, dictate the rates. The change required the General Assembly to provide transitional mechanisms from the former regulatory environment to the new market-driven one. This appeal involves one of these mechanisms--the transition procedures in Tenn.Code Ann. § 65-5-209(c) for incumbent local exchange telephone companies.

FN1. Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts ___ (3 Tenn.Code Ann.1995 Advance Legislative Serv., Chapter 398-414 at p. 205).

The new legislation required incumbent telephone companies to decide whether their rates would continue to be set using the traditional "rate base--rate of return" process or whether their rates would become more responsive to market forces. [FN2] While incumbent companies had the right to begin operating free from the traditional regulatory oversight, their right was conditioned on a threshold determination that their initial rates would be

"affordable." Thus, Tenn.Code Ann. § 65-5-209(c) required incumbent companies to apply to the commission for a "price regulation plan." The sole purpose of this proceeding was to ensure that an incumbent telephone company's initial rates would be "affordable."

FN2. This choice was not difficult for incumbent telephone companies to make because their new competitors were not going to be subject to the burdensome regulatory rate-making process.

The General Assembly understood that the initial rates were the most important component of any new price regulation plan. Thus, rather than simply assuming that the incumbent company's current rates were "affordable," the General Assembly decided that the commission should take one last look at a company's current rates before releasing its regulatory grip. Rather than directing the commission to commence a lengthy rate-making proceeding for every incumbent telephone company seeking to operate under a new price regulation plan, the General Assembly devised an expedited procedure for determining whether an incumbent company's current rates were affordable.

This expedited procedure involved comparing the incumbent company's current earned rate of return with its currently authorized fair rate of return. The rates that an incumbent company was charging on June 6, 1995 would become the initial rates in the company's price regulation plan, as long as the company's current earned rate of return did not exceed its currently authorized fair rate of return. If the company's current rate of return exceeded its authorized fair rate of return, the General Assembly directed the commission to commence a "contested, evidentiary proceeding" to set the company's initial rates-- presumably at a lower level than its current rates. [FN3]

FN3. By the same token, the General Assembly authorized incumbent companies to seek higher initial rates if their current earned rate of return was less than their currently authorized fair rate of return.

The General Assembly directed the commission to base its comparison of an incumbent company's earned and authorized rates of return on its staff's audit of the incumbent company's "most recent ... 3.01 report." See Tenn.Code Ann. § 65-5-209(c), -209(j). The 3.01 report is a monthly financial report filed by telephone companies with more than 6,000 access lines. [FN4] It details the company's revenues and expenses and provides monthly, year-to-date, and twelve months-todate information consistent with the Uniform System of Accounts as adopted and amended by the Federal Communications Commission. [FN5] It must reflect all rate-making adjustments to the company's operating revenues, expenses, and rate base contained in the commission's most recent order applicable to the incumbent company. See Tenn.Code Ann. § 65-5- 209(j).

FN4. Tenn. Comp. R. & Regs. r. 1220-4-1-.10(2)(a) (1988).

FN5. Tenn. Comp. R. & Regs. r. 1220-4-1-.11(1)(a) (1988).

*9 The General Assembly did not provide clear answers to two important questions concerning the expedited Tenn.Code Ann. § 65-5-209(c) procedure. First, it did not indicate whether the hearing during which the commission receives and acts on the staff audit of an incumbent company's 3.01 report would be a contested case proceeding. Second, it did not describe what role, if any, an incumbent company's customers or competitors could play with regard to the commission's consideration of the staff audit of the incumbent company's 3.01 report. This case demonstrates the problems caused by these oversights.

II.

United Telephone--Southeast, Inc. applied for a price regulation plan less than two weeks after the 1995 legislation took effect. During the next two months, the commission entered a series of orders pursuant to Tenn.Code Ann. § 4-5-310 (1991) and Tenn.Code Ann. § 65-2-107 (1993) permitting the Consumer Advocate [FN6] and four of United Telephone's customers and competitors [FN7] to intervene and participate in the proceeding. On August 7, 1995, the commission published a notice that it would hold a contested case hearing on United Telephone's application for a price regulation on September 7, 1995. The notice stated that the hearing would be conducted in accordance with the Uniform Administrative Procedures Act.

FN6. The commission entered an order on August 28, 1995, permitting the Consumer Advocate to intervene as an "official party of record."

FN7. The commission permitted South Central Bell Telephone Company to intervene as a party on July 24, 1995. On August 18, 1995, it entered an order permitting AT & T Communications of the South Central States, Inc. to intervene and participate in the proceedings. Similar orders were entered on August 28 and August 30, 1995 for MCI Metro Access Transmission Services, Inc. and MCI Telecommunications Corporation respectively.

On August 30, 1995, the Consumer Advocate filed a motion suggesting that the contested case proceeding scheduled for September 7, 1995 was inappropriate. The Consumer Advocate likened United Telephone's application for a price regulation plan to an audit, and argued that National Health Corp. v. Snodgrass, 555 S.W.2d 403, 405 (Tenn.1977) stood for the proposition that audits were not contested cases. On September 5, 1995, the commission entered an order rescinding its August 7, 1995 notice of hearing on the ground that "there is no statutory authority for a contested proceeding at this juncture. "

The commission's staff filed the report of its audit of United Telephone's most recent 3.01 report on September 15, 1995. [FN8] The report concluded that United Telephone's current earned rate of return was less than its authorized fair rate of return. [FN9] On September 20, 1995, the commission, without conducting a contested case hearing, "accepted" its staff report. It also determined that United Telephone's rates in effect on June 6, 1995 were affordable and would become the initial rates under United Telephone's price regulation plan effective on October 15, 1995, unless United Telephone requested a contested evidentiary hearing within ten days.

FN8. The staff actually filed an audit report earlier on August 16, 1995. However, the commission rejected this audit on September 5, 1995 because it did not involve United Telephone's most recent 3.01 report.

FN9. The commission had determined in December 1994 that United Telephone's authorized fair rate of return should be between 8.85% and 10.05%. The staff audit in September 1995 concluded that United Telephone's current earned rate of return for the twelve months ending on March 31, 1995 was 8.69%.

United Telephone immediately informed the commission that it did not intend to request a contested evidentiary hearing. In addition, AT & T, one of the intervening parties, requested the commission to "clarify" its September 20, 1995 order by making separate findings with regard to each of United Telephone's basic and non-basic rates. On October 13, 1995, the commission entered its final order authorizing United Telephone to begin operating under a price regulation plan based on its rates in effect on June 6, 1995. The commission also denied AT & T's request to convene a hearing because it lacked the authority to make further findings with regard to United Telephone's rates and because the other relief requested by AT & T exceeded its authority.

***10** The proceedings took a curious turn at this point. On October 6, 1995, AT & T filed a petition pursuant to Tenn.Code Ann. § 4-5-224 (1991) in the Chancery Court for Davidson County challenging the constitutionality of Tenn.Code Ann. § 65-5-209. [FN10] While this proceeding was pending, AT & T also appealed the commission's October 13, 1995 order to this court in accordance with Tenn.Code Ann. § 4-5-322(b)(1) (Supp.1996) and Tenn. R.App. P. 12. Many of AT & T's issues on this direct appeal were the same as those raised in its pending declaratory judgment proceeding.

FN10. AT & T had requested a declaratory ruling from the commission concerning these issues on July 14, 1995. The commission denied the request on August 22, 1995.

The commission moved to dismiss AT & T's direct appeal on the ground that this court lacked subject matter jurisdiction because its October 13, 1995 order was not the final order in a contested case proceeding. On April 12, 1996, this court declined to dismiss the appeal. We determined that this court, rather than the commission or the trial court, should decide legal questions concerning our own jurisdiction. AT & T Communications of the S. Cent. States, Inc. v. Bissell, App. No. 01A01-9512-BC-00556 (Tenn. Ct.App. April 12, 1996) (order denying motion to dismiss appeal).

Notwithstanding this court's denial of the motion to

dismiss this appeal, AT & T continued to press forward with its declaratory judgment action in the chancery court. Following a hearing in mid-February 1996, the chancery court filed a memorandum and order on May 7, 1996 finding AT & T's attacks on the constitutionality of Tenn.Code Ann. § 65-5-209 to be without merit. AT & T Communications of the S. Cent. States, Inc. v. Bissell, No. 95-3094-II (Davidson Chan. Ct. May 7, 1996). Rather than appealing this decision, AT & T turned its attention to this appeal. However, the commission asserted that the doctrine of res judicata prevented AT & T from relitigating its constitutional issues because the chancery court had already decided them adversely to AT & T in the declaratory judgment proceeding and because the chancery court's judgment had become final without being appealed.

III.

Our authority to review the commission's decisions stems from Tenn.Code Ann. § 4-5-322(b)(1) (Supp.1996) which provides for a direct appeal to this court from "any final decision" of the commission or its successor, the Tennessee Regulatory Authority. Even though the phrase "any final decision" is quite broad, considering it in light of both Tenn.Code Ann. § 4-5-322(a)(1) and Tenn. R.App. P. 12 indicates that it includes only final decisions in contested cases. Thus, this court has direct appellate jurisdiction over the commission's final decisions in contested cases.

The majority's jurisdictional decision in this case is based on its conclusion that the commission's decision setting the initial rates under United Telephone's price regulation plan was not a final decision in a contested case. This conclusion ignores the existing statutes governing practice before the commission and creates a species of rate-making proceeding that is completely shielded from judicial review. I find no indication in Tenn.Code Ann. § 65-5-209's legislative history that the General Assembly desired decisions with such far-reaching financial consequences to be essentially unreviewable, or that the General Assembly decided to depart from the commission's practice of permitting interested and affected parties to intervene and participate in a rate-making proceeding.

A.

*11 A Tenn.Code Ann. § 65-5-209 proceeding to approve a price regulation plan for an incumbent telephone company is essentially a rate-making procedure. Its primary purpose is to fix the rates that the incumbent company will charge once its price regulation plan has been approved. The proceeding is not simply an "audit" even though the evidentiary foundation for the commission's decision is the staff audit of the incumbent company's most recent 3.01 report. Thus, the holding in National Health Corp. v. Snodgrass, 555 S.W.2d 403, 405 (Tenn.1977) that an audit is not a contested case has no bearing on this appeal.

Both the Uniform Administrative Procedures Act and the statutes specifically applicable to the commission's proceedings define rate-fixing proceedings as contested cases. Tenn.Code Ann. § 65-2-101(2) (Supp.1996) states that "the fixing of rates shall be deemed a contested case rather than a rule-making proceeding." [FN11] Tenn.Code Ann. § 4-5-102(3) (1991) likewise states that contested case proceedings may include rate-making and price-fixing. Statutes involving the same subject matter should be construed together, State v. Blouvett, 904 S.W.2d 111, 113 (Tenn.1995), in order to promote consistency and uniformity, State ex rel. Witcher v. Bilbrey, 878 S.W.2d 567, 571 (Tenn.Ct.App.1994), and to avoid placing the statutes in conflict with each other. Cronin v. Howe, 906 S.W.2d 910, 912 (Tenn.1995). Accordingly, we have in the past construed the definitions of "contested case" in Tenn.Code Ann. § 4-5-102(3) and Tenn.Code Ann. § 65-2-101(2) in pari materia. Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 161 (Tenn.Ct.App.1992).

FN11. Tennessee's decision to classify rate-making as a contested case rather than as a rule-making proceeding points to a clear contrast between the State's and the federal government's understanding of the nature of a rate-making process proceeding. The rate-making mandated by federal law is viewed as informal rule-making. See, e.g., Consolidated Aluminum Corp. v. T.V.A., 462 F. Supp 464, 475 (Supp.1978).

Parties to contested case proceedings before the commission include "[a]ll persons having a right

under the provisions of the laws applicable to the ... [commission] to appear and be heard" and all "interested persons who have been permitted to intervene and become a party to any contested case." Tenn.Code Ann. § 65-2-107 (Supp.1996). Persons who become parties to a contested case before the commission have a statutory right "to present evidence and argument in accordance with the rules of the [commission]." Tenn.Code Ann. § 65-2- 108 (Supp.1996).

The commission's criteria for intervention were not altered by the 1995 legislation providing for a new mechanism to set telephone rates. Tenn.Code Ann. § 65-2-107 requires only that an intervenor be an "interested person." In addition, Tenn.Code Ann. § 4-5-310(a)(2) (1991) requires that an intervenor demonstrate that the proceeding will affect its "legal rights, duties, privileges, immunities or other legal interest" or that "qualifies as an intervenor under any provision of law."

B.

The facts in this record demonstrate beyond peradventure that the commission itself considered AT & T and the other intervenors as parties to United Telephone's application for a price regulation plan. The commission's orders granting the petitions to intervene invoked both Tenn.Code Ann. §§ 4-5-310 and 65-2-107. Once the commission had granted these persons the right to intervene, Tenn.Code Ann. § 65-2-108 gave them the right to present evidence and argument.

***12** The commission never fully explained its abrupt decision that "there is no statutory authority for a contested proceeding at this juncture." There are two possible explanations for this decision. First, the commission could have agreed with the Consumer Advocate's assertion that a Tenn.Code Ann. § 65-5- 209(c) proceeding was an audit, not a contested case. Second, it could have concluded that a Tenn.Code Ann. § 65-5-209(c) proceeding did not become a contested case until either the commission or the incumbent telephone company triggered a "contested evidentiary proceeding" to set the company's initial rates.

Both rationales are without merit. The Consumer Advocate's characterization of Tenn.Code Ann. § 65-5-209(c) as an audit is simply wrong and, therefore, National Health Corp. v. Snodgrass has no bearing. The notion that a Tenn.Code Ann. § 65-5-209(c) proceeding does not become a contested case unless either the commission or the incumbent telephone company triggers a "contested evidentiary proceeding" is equally untenable. In addition to overlooking the complimentary definitions of "contested case" in Tenn.Code Ann. §§ 4-5-102(3) and 65-2-101(2) stating that rate-making proceedings are contested cases, it ignores the participatory rights granted to intervenors in Tenn.Code Ann. § 65-2-108.

The legislative history of Tenn.Code Ann. § 65-5-209 provides no indication that the General Assembly intended to prevent interested parties from participating in Tenn.Code Ann. § 65-5-209(c) proceedings just as they can participate in any other proceeding before the commission. In addition, I am unable to identify any policy reason to support the finding that these proceedings would be essentially closed unless either the commission or the affected incumbent telephone company triggered a full-blown "contested evidentiary proceeding" to set the initial rates. There are, however, sound policy reasons for treating the early phases of a Tenn.Code Ann. § 65-5- 209(c) proceeding as a contested case.

Disputed factual and legal questions could very well arise in a Tenn.Code Ann. § 65-5-209(c) proceeding before a "contested evidentiary proceeding" to set an incumbent telephone company's initial rates is triggered. Questions could be raised about the staff's audit methodology and factual conclusions. These issues directly affect the commission's decision, and thus they should be aired and resolved before the commission determines whether an incumbent telephone company's actual rate of return exceeds its currently authorized fair rate of return.

These disputed matters could very well be of interest, not just to an affected incumbent company, but also to other incumbent companies applying for a price regulation plan. In addition to issues concerning audit methodology, incumbent telephone companies may also have questions about the commission's decisions concerning the implementation of this new, dramatically different rate-making procedure. Recognizing and following the intervention and hearing procedures in Tenn.Code Ann. § § 65-2-107, -108 provides the

most efficient way to resolve these matters.

IV.

*13 Having concluded that this court has jurisdiction to consider AT & T's appeal from the commission's October 13, 1995 order, I concur with the majority's conclusion that AT & T is collaterally estopped from challenging the constitutionality of Tenn.Code Ann. § 65-5-209 in this proceeding. The parties to the chancery court proceeding that resolved these issues against AT & T's position are the same. Accordingly, the chancery court's decision on these issues is conclusive on AT & T in subsequent proceedings. [FN12]

FN12. Neither the majority nor I have reached the merits of AT & T's constitutional arguments since we have invoked the doctrine of collateral estoppel.

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SEE COURT OF APPEALS RULES 11 AND 12

BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner/Appellant,
v.
Keith BISSELL, Steve Hewlett, Sara Kyle, Constituting the Tennessee Public Service Commission, Respondents/Appellees.

No. 01-A-01-9509-BC00400.

Court of Appeals of Tennessee.

Oct. 2, 1996.

FOR APPELLANT: Bennett L. Ross Nashville, Tennessee

FOR INTERVENOR AT & T COMMUNICATIONS, INC: Val Sanford John Know Walkup Nashville, Tennessee FOR APPELLEES: Dianne F. Neal Public Service Commission Nashville, Tennessee

FOR TENNESSEE CONSUMERS: Charles W. Burson Attorney General & Reporter Michael E. Moore Solicitor General L. Vincent Williams Consumer Advocate Division Nashville, Tennessee

OPINION

CANTRELL, Judge.

*1 The Tennessee Public Service Commission ordered the completion of a previously authorized investigation of the future earnings of BellSouth Telecommunications, despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates. BellSouth filed a petition with this court for review of the PSC's order, arguing that completion of the investigation was inconsistent with the legislative purpose. We reverse the Commission's order and remand the case for further consideration by the Tennessee Regulatory Commission.

I.

Prompted by a petition filed by the State Consumer Advocate, the Public Service Commission voted on March 28, 1995 to conduct an investigation of the intrastate earnings of South Central Bell (now BellSouth Telecommunications) for a one-year future test period. Under the statute in effect at that time, such an investigation of future earnings was a required preliminary step in the performance of the P.S.C.'s function of establishing "just and reasonable rates" for telephone service.

On May 25, 1995, the Legislature enacted the Teleommunications Reform Act, now codified at Tenn.Code Ann. § 65-5-201 et seq. The new act was expressly designed to encourage competition in the telecommunications services market, and it created an alternative to the traditional method of establishing consumer telephone rates by future rate-of-return analysis.

Under the new procedure, a telephone company could apply for price regulation, and the P.S.C. was required to implement a price regulation plan within 90 days, based on an audit of the rate of return earned by the utility within the most recent reporting period. See Tenn.Code Ann. § 65-5-209(c)and (j). Thus the statute permitted expedited decision-making based on retrospective rather than prospective financial data.

BellSouth applied on June 20, 1995 for price regulation under the new statute. Nonetheless, on July 14, 1995 the Commission voted to complete the earnings investigation, reserving the issue of "whether any use could be made of the results of this investigation under the price regulation scheme set out in the Telecommunications Act...." BellSouth filed a petition under Rule 12, Tenn.R.App.P. to appeal that order. The PSC and intervenor AT & T filed a joint motion to dismiss the petition, on the ground that the order of investigation was not a final order subject to appellate review.

On October 25, 1995, this court dismissed the joint motion on the ground that "interlocutory administrative orders are reviewable where the agency has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual's rights." This court also stayed all proceedings in the Commission related to the earnings investigation, and directed that the appeal proceed.

On July 1, 1996, the PSC was replaced by a new,

appointed agency called the Tennessee Regulatory Authority. See Tenn.Code Ann. § 65-1-201. On June 11, 1996, this court heard oral arguments on BellSouth's petition for review. Neither in the briefs nor in oral argument did the PSC articulate a reason why the investigation should continue. The parties all acknowledge that the information gained through the investigation would be irrelevant to BellSouth's rates. The PSC argues only that the investigation might serve some purpose.

*2 We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment." See Jackson Mobilphone v. Tennessee PSC, 876 S.W.2d 106 at 111 (Tenn.App.1993). An agency's arbitrary decision--even a preliminary, procedural, or intermediate one--may be reversed by the reviewing court. Tenn.Code Ann. § 4-5-322(a)(1), (h)(4).

We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. See Acts 1995, ch. 408. But we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

We, therefore, reverse the PSC's order continuing the earnings investigation and remand the cause to the Tennessee Regulatory Authority for further proceedings consistent with this opinion. Tax the costs on appeal to the PSC. LEWIS and KOCH, JJ., concur.

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