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March 8. 2001

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

RE: Tennessee Regulatory Authority Proposed Amendments to
Rules 1220-4-2-.01 through .42
Docket No. 00-00873

Dear Mr. Waddell:

In supplemental comments in the above referenced docket filed yesterday on behalf of BellSouth Advertising and Publishing Corporation, I omitted inadvertantly the referenced exhibits. Please substitute the enclosed commennts with exhibits for yesterday's filing.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,

Guilford F. Thornton, Jr.

GFT/lb

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE: TENNESSEE REGULATORY AUTHORITY PROPOSED AMENDMENTS TO RULES 1220-4-2-.01 THROUGH .42

DOCKET NO. 00-00873

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION'S FINAL COMMENTS REGARDING TENNESSEE REGULATORY AUTHORITY PROPOSED RULE 1220-4-2-.09 (1) THROUGH (9)

I. INTRODUCTION

Pursuant to the September 29, 2000 Notice of Rulemaking and subsequent procedural orders published by the Tennessee Regulatory Authority ("TRA"), BellSouth Advertising & Publishing Corporation ("BAPCO") respectfully submits its final comments to the referenced Proposed Rules of the Tennessee Regulatory Authority.

On January 10, 2001, BAPCO submitted preliminary comments on the TRA's Proposed Amendments to Rules 1220-4-2-.01 through .42. BAPCO participated in the first of three Workshops conducted by the TRA Staff concerning the Proposed Rules. BAPCO offered and agreed in this Workshop to submit language relating to certain of the Proposed Rules reflecting the comments of, and proposed changes by, BAPCO, those participating and the Staff.

II. PROPOSED RULE 1220-4-2.09 (9)

BAPCO's most significant concerns relate to the newly proposed subsection (9) of Rules 1220-4-2-.09 (the "Proposed Cover Rule"). In its preliminary comments and at Workshop I, BAPCO requested that the TRA voluntarily withdraw the Proposed Cover Rule, or voluntarily stay its rulemaking with respect to that rule, until a final decision was rendered by the Court of Appeals of Tennessee in a consolidated appeal of two TRA orders entered in 1998. Like the

Proposed Cover Rule, those two TRA orders required BAPCO to advertise without charge the commercial logo and name of "competitive local service providers" on the covers of its Tennessee telephone directories. Soon after the orders were entered by the TRA, the Court of Appeals granted BAPCO a stay of those orders pending resolution of the appeal.

In the instant rulemaking proceeding, BAPCO sought the withdrawal or stay of the Proposed Cover Rule on the ground that it suffered from the same jurisdictional, statutory, and constitutional infirmities as the TRA's two 1998 orders, was subject to the Court's stay and was likely to be invalidated by the ruling of the Tennessee Court of Appeals in the event BAPCO prevailed on appeal. Those legal infirmities, which are set forth in the briefs filed and arguments made before the Tennessee Court of Appeals and in BAPCO's preliminary comments to the TRA, include the following:

1. The TRA lacks statutory authority to adopt a Rule requiring BAPCO, a non-utility, to advertise on its directory covers the commercial logos and names of unrelated local exchange carriers.

2. The TRA lacks statutory authority over BAPCO and the branding and design of its directory covers.

3. The Proposed Cover Rule violates constitutional provisions respecting freedom of speech.

4. The Proposed Cover Rule is a confiscatory taking in violation of the Tennessee and Federal Constitutions.

5. The Proposed Cover Rule violates state and federal trademark law and promotes marketplace confusion.

On February 16, 2001, the Court of Appeals of Tennessee, in BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority, Nos. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV (Tenn. Ct. App. Feb. 16, 2001), reversed the orders of the TRA

and confirmed the validity of BAPCO's arguments. (A copy of the Court's decision is attached hereto as Exhibit "A" and will hereinafter be referred to as the "Opinion"). The Court held:

> Because we find that neither state nor federal law allows the TRA to compel BAPCO to brand its White Pages *cover* with the name and commercial logo of "competing telecommunications service providers" in competition with BST, and because we further find, as articulated by Judge Koch in his separate concurring opinion, that such order imposes "forced speech" upon BAPCO in violation of the First Amendment of the Constitution of the United States, both the AT&T case and the Nextlink case are reversed.

Opinion, at 20 (emphasis in original).

The Court of Appeals explained that the real question before it was *not* the procedural mechanism (i.e., rulemaking vs. contested case proceeding) used by the TRA to decide the issue, "but rather whether or not TRA had jurisdiction to compel BAPCO against its wishes" to display the name and commercial logo of competing local service providers on the cover of its "White Pages" directory. The Court concluded "that neither federal nor state law provides the [TRA] with such jurisdiction." *Id.* at 11.

The Court, in reaching this decision, cited the United States Supreme Court's decision in AT&T Corp. v. Iowa Utilities, Bd., 525 U.S. 366 (1999) and found that BAPCO's "White Pages" directory cover is among items that do not meet the statutory definition of 'network element.'" Opinion at 12 (emphasis added). The Court also concluded that the branding of "White Pages" directory covers "is not an essential public service, subject to regulation by the TRA." *Id.* at 14.

The Court also held that requiring BAPCO to advertise the name and commercial logo of unrelated local service providers on the cover of its directories imposes "forced speech" in violation of the First Amendment of the United States Constitution. *Id.* at 20. The author of the Court's opinion, Judge Cain, concurred in Section VI of Judge Koch's concurring opinion

entitled "Constitutional Limitations on the TRA's Authority to Compel Commercial Speech." *Id.* at 16; Concurring Opinion of Judge Koch, at 9.

Thus, the majority agreed that "BAPCO and [BST] have a constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors." Concurring Opinion of Judge Koch, at 11.

Having resolved the appeal on other dispositive grounds, the Court chose not address the state and federal trademark issues or the constitutional question of confiscatory taking in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article 1 Section 8 of the Constitution of Tennessee. The Court, however, did nothing diminish the merit of those arguments, which still apply to the directory cover issues implicated in the instant rulemaking proceeding.

For all the above reasons and the decision of the Court of Appeals, as described above and attached, BAPCO submits that the TRA must reject the Proposed Directory Cover Rule

III. PROPOSED RULE 1220-4-2-.09 (1) THROUGH (8)

In addition to the preliminary comments filed by BAPCO, which are incorporated herein by reference, BAPCO submits the following comments and proposed wording for the subsections of Proposed Rule 1220-4-2-.09 as set forth below.

(1) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> Telephone directories shall be published regularly, in periods not to exceed fifteen (15) months unless otherwise authorized by the Authority, and shall contain at a minimum the name, address and telephone number of all customers, except public telephones and those customers who have informed the Local Telecommunications Service Provider to not list their information.

The language submitted above is taken from the existing rule with a clarification suggested at Workshop I adding specificity to the term, "regularly." BAPCO believes that the above wording is more appropriate for two reasons.

First, directories can, and periodically must, vary from a strictly annual publishing cycle. Issues such as the introduction of new area codes, changes in extended area service, changes in printing cycles and combining or splitting of directories can each cause a directory to vary from an annual publishing cycle. Most such changes are only a matter of days or weeks, but they are common enough that the Proposed Rule must reflect this reality. Use of the term "regularly" in the existing rule is more accurate and has not resulted in any confusion or issue in the many years it has been in place. If the word "annual" were substituted as proposed, the TRA could be required to amend the rule each time a change in any publication date for a directory is made.

Second, as directories begin to be published in electronic media, which is already the case in some areas, they can be updated more often, rendering the "annual" concept outdated. Such developments could even reduce the need for yearly publication of some directories.

At Workshop I, the staff expressed concern that the word "regularly" in the existing rule could need clarification. Accordingly and as proposed in the Workshop, we have inserted the clarifying phrase, "in periods not to exceed fifteen (15) months unless otherwise authorized by the Authority."

(2) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> All Local Telecommunications Service Providers shall make available, free of charge to their customers, white page telephone directory(ies) for the local calling area where the customer is located. Directories for areas outside the local calling area shall be made available to the customer for a reasonable cost.

The language submitted makes clear that local calling area directories are to be "made available" to customers, rather than "provided," as would be required under the Proposed Rule. For cost and environmental reasons, it is most appropriate and consistent with customer preferences for directories outside the community where a customer lives to be made available upon request. Indeed, many customers do not desire to receive directories at all, much less for the entire local calling area prescribed. For these reasons and given the lack of differing comments at Workshop I by the industry or the staff, BAPCO suggests that the above be substituted for the Proposed Rule.

(3) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> In the event of an error in the listed number of any customer and provided the number is in service, the Local Telecommunications Service Provider shall intercept all calls to the listed number for a reasonable period of time not to exceed the life of the directory containing the error, provided existing central office equipment will permit. If the error is due to the Local Telecommunications Service Provider's fault, there shall be no charge to the customer for the intercept. In the event of an error or omission in the listed name of a customer, such customer's correct name and telephone number shall be in the files of the information or intercept operators and the correct number furnished the calling party either upon request or interception.

As proposed, the rule confuses two types of errors that each requires significantly different resolution. BAPCO submits that the approach contained in the existing rule better reflects the remedy required.

Intercepts generally provide no benefit when an error occurs in a listed name and could compound the inconvenience to the customer since the customer's assigned number would need

to be changed to accommodate the intercept. Instead, directory assistance should be provided with the corrected listing, as set out in the existing rule and as suggested above.

Intercepts are appropriate for a reasonable period of time, as the existing rule states, when errors occur in listed numbers. As suggested at Workshop I, the phrase "not to exceed the life of the directory containing the error" has been added to clarify further the intended meaning. Accordingly, BAPCO suggests that the above be substituted for the Proposed Rule.

(4) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> The Authority's toll-free telephone number and Internet address shall be listed on the inside cover or the first page of the directory. Telecommunications Service Providers shall not charge the Authority for the listing of the above information.

This wording would allow for publication of the Authority's information on either the inside front cover or the first page of a directory as suggested by BAPCO and Sprint representatives at Workshop I. The inside cover of directories in Tennessee is often sold as advertising for interested businesses, while the first page and subsequent section is reserved for, and most often used by consumers to find, general information, such as that called for in the proposed rule. BAPCO recommends that the TRA not engage in a potential taking of valuable advertising space and suggests that the rule permit publishing of the TRA's information in either location.

(5) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> Telecommunications Service Providers shall provide the Authority, upon request and without charge, at least one (1) copy of its directories at the time of publication.

Under the existing rule, the TRA has requested directories and replacements as needed. BAPCO recommends that the existing practice remain in place. As directories become available in electronic formats, such as CD-ROM, for use on computers or servers, the TRA may prefer these alternatives to the burden of storing and managing all print directories. The language set out above allows for this alternative, while allowing the TRA to request copies as needed. This language also makes clear that the TRA would receive requested copies without charge.

(6) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> The directory shall contain instructions concerning placing local and long distance calls, calls to repair, calls with regard to billing questions as well as information services, and the mailing address of the Local Telecommunications Service Provider. Publication shall be subject to applicable advertising charges for each Local Telecommunications Provider.

The language submitted above is as contained in the Proposed Rule. In addition, it adds and makes clear that a directory publisher may charge Telecommunications Service Providers for publishing such information on their behalf. Since most directories are not published by Telecommunications Service Providers, this addition would avoid any potential confusion over the cost of publishing such information. BAPCO believes that this wording reflects the views

expressed by it, the industry and the Staff at Workshop I and submits it as an addition to the Proposed Rule.

(7) The following language reflects the comments of the staff, the industry and BAPCO, as expressed in the discussions in Workshop I and is submitted to replace that in the proposed rules:

> The area included in the directory along with the month and year of the issuance of or the intended period of use for the directory shall appear on the cover of the directory. Information pertaining to emergency calls such as for the police and fire department shall appear conspicuously in the front section of the directory.

BAPCO has long published the phrase "Use Until..." followed by a date on the covers of its directories and has found this phrase to be more useful to the consumer, particularly since users do not always discard old directories immediately upon receipt of a new issue. The suggested change above would accommodate this helpful practice without requiring all publishers to change their own practices. BAPCO requests that its submitted wording be substituted for that in the Proposed Rule.

(8) Neither the industry nor BAPCO had any comments or objections in Workshop I related to this provision as it appears in the proposed rules.

IV. CONCLUSION

For the reasons set forth by the Court of Appeals of Tennessee in BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority, Nos. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV (Tenn. Ct. App. Feb. 16, 2001), and by BAPCO in its briefs and arguments before the Court of Appeals and in its preliminary comments to the TRA,

BAPCO respectfully submits that the Proposed Cover Rule would be an invalid rule if implemented and must be rejected by the TRA.

BAPCO further submits, for the reasons stated in its preliminary comments, its statements at Workshop I and as provided herein, that Proposed Rule 1220-4-2-.09 (1) through (8) should be amended and revised to reflect the language submitted above.

Accordingly, BAPCO respectfully moves the TRA to withdraw or reject the Proposed Cover Rule and to amend and revise Proposed Rule 1220-4-2-.09 (1) through (8), as set forth above.

Respectfully submitted this 7th day of March, 2001.

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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
at Nashville, Tennessee
Nos. 96-01692 & 98-00654

No. M1998-00987-COA-R12-CV & M1998-01012-COA-R12-CV
Filed February 16, 2001

In these cases consolidated on appeal, Bellsouth Advertising & Publishing Corporation (BAPCO) appeals from the action of the Tennessee Regulatory Authority requiring it to brand the covers of its "White Pages Directory" with the names and commercial logos of local telecommunication companies in competition with its parent corporation Bellsouth Telecommunications, Inc. (BST). We reverse the judgment of the Tennessee Regulatory Authority. Judge Cottrell dissents.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Regulatory Authority Reversed

WILLIAM B. CAIN, J., delivered the opinion of the court. WILLIAM C. KOCH, JR., J., filed a concurring opinion with Judge Cain specifically concurring in Part VI thereof. PATRICIA J. COTTRELL, J., filed a dissenting opinion.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, and James F. Bogan, III and Daniel J. Thompson, Jr., Atlanta, Georgia, for the appellant, Bellsouth Advertising & Publishing Corporation.

Henry Walker and K. David Waddell, Nashville, Tennessee, for the appellees, Nextlink Tennessee, L.L.C. and Tennessee Regulatory Authority.

OPINION

This case represents the consolidation of two different, but intricately linked, administrative appeals concerning BellSouth Advertising & Publishing Corporation (BAPCO). The first, *BellSouth Advertising and Pubublishing Corp. v. Tennessee Regulatory Authority, et al* (the AT&T case hereinafter) concerned a claim originally brought by American Telephone & Telegraph, Inc. (AT&T) seeking to have its name and logo placed on the covers of the "White Pages" directories published

by BAPCO. By order entered March 19, 1998, the Tennessee Regulatory Authority (TRA) Required BAPCO to place AT&T's name and logo on the cover of its "White Pages".

The aforementioned AT&T declaratory order was interpreted and applied in a proceeding wherein NEXTLINK L.L.C., and similarly situated telecommunications companies sought to "brand" BAPCO's "White Pages" cover along with AT&T. Because of the substantial similarity of the issues, these two cases were consolidated for consideration in this court. While certain issues raised in the Nextlink case are of no consequence in the AT&T case, and thus must be considered separately, the crucial issues are common to both cases.

This crucial, sub-constitutional issue presents the question of whether or not the TRA, under Tennessee law and Tennessee Regulatory Authority Rule 1220-4-2-.15, can compel BellSouth Advertising and Publishing Corporation to display, on the cover of its "White Pages" telephone directory, the name and commercial logo of local telecommunication companies that are competitors of BellSouth Telecommunications, Inc., giving such competing names and commercial logos equal prominence with the "BellSouth" name and logo.

I. HISTORICAL BACKGROUND

In the decade of the 1990's, many states, including Tennessee, were running legislatively parallel to the Congress of the United States in converting, from a monopoly environment to a competitive environment, the providing of local telephone services.

On January 25, 1999, the United States Supreme Court issued its decision in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). This decision was a detailed construction of the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.* Justice Thomas, concurring in part and dissenting in part, traced the history of telecommunications in the United States and the effect of the Telecommunications Act of 1996.

> From the time that the commercial offering of telephone service began in 1877 until the expiration of key patents in 1893 and 1894, Alexander Graham Bell's telephone company--which came to be known as the American Telephone and Telegraph Company--enjoyed a monopoly. In the decades that followed, thousands of independent phone companies emerged to fill in the gaps left by the telephone giant and, in most larger markets, to build rival networks in direct competition with it. As competition developed, many municipalities began to adopt ordinances regulating telephone service.
>
> During the 1900's, state legislatures came under increasing pressure to centralize the regulation of telephone service. Although the quasicompetitive system had significant drawbacks from the consumers' standpoint--principally the refusal of competing systems to interconnect--perhaps the strongest advocate of state regulation

was AT&T itself. The company's arguments that telephone service was naturally monopolistic and that competition was resulting in wasteful duplication of facilities appealed to Progressive-era legislatures. By 1915, most States had established public utility commissions and charged them with regulating telephone service. Over time, the Bell Companies' policy of buying out independent providers coupled with the state commissions' practice of prohibiting competitive entry led back to the monopoly provision of local telephone service.

. . . .

In the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.*, Congress transferred authority over interstate communications from the ICC to the newly created Federal Communications Commission (FCC or Commission). As in the Mann-Elkins Act, Congress chose not to displace the States' authority over intrastate communications. . . .

Congress enacted the Telecommunications Act of 1996 (Act), Pub. L. 104-104, 110 Stat. 56, against this backdrop. To be sure, the 1996 Act marked a significant change in federal tele-communications policy. Most important, Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies. It also required incumbent local exchange carriers to allow their competitors to access their facilities in three different ways. . . . [I]ncumbents must: interconnect their networks with requesting carriers' facilities and equipment, provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, and offer to resell at wholesale rates any telecommunications service that they provide to subscribers who are not telecommunications carriers. The Act sets forth additional obligations applicable to all telecommunications carriers and all local exchange carriers. To facilitate rapid transition from monopoly to competitive provision of local telephone service, Congress set forth a process to ensure that the incumbent and competing carriers fulfill these obligations.

Section 252 sets up a preference for negotiated interconnection agreements. To the extent that the incumbent and competing carriers cannot agree, the Act gives the state commissions primary responsibility for mediating and arbitrating agreements. Specifically, Congress directed the state commissions to mediate disputes between carriers during the voluntary negotiation period and--after the negotiations have run their course--to arbitrate any "open issues." In conducting these arbitrations, state commissions are directed to ensure that open issues are resolved in accordance with the requirements of §251, "establish . . . rates for interconnection, services, or network elements" according to the standards that Congress set forth in §252(d), and to provide a schedule for implementing the agreement reached during arbitration.[1]

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[1] As this extensive quotation is for historical background, many citations of supporting authority in the opinion have been omitted.

AT&T Corp., 525 U.S. at 402-06. (Thomas, J., concurring in part and dissenting in part).

While both cases at bar are based on Tennessee law, it is well to note that this dispute first came before the TRA in 1996 when American Telephone and Telegraph Company filed a petition for arbitration against BellSouth Telecommunications, Inc. (BST), the incumbent local exchange carrier, under section 252 of the Federal Telecommunications Act of 1996. In this action, AT&T asserted that the T R A should resolve, under the federal act, the question of whether AT&T had the right to have its commercial logo displayed on the cover of directories published by BAPCO for BST. Following the lead of Georgia (Georgia PSC Docket No. 6801-U Sept. 26, 1996), Massachusetts (Order of Massachusetts DPU in NYTEX/AT&T/MCI/Sprint Arbitration Dec. 4, 1996), and North Carolina (Order of North Carolina Utilities Commission in AT&T/BST Arbitration Dec. 23, 1996), the TRA held that the directory cover issue was not arbitrable under the federal act and stated that "private negotiations are the preferred method of resolving this issue, and the parties are encouraged to resolve this matter through negotiation." Private negotiations, however, reached an impasse because AT&T would not agree to cease the display of its commercial logo on the covers of directories published by competitors of BAPCO.

II. CHRONOLOGY OF THE TENNESSEE LITIGATION

BAPCO is a wholly owned subsidiary of BellSouth Enterprises, Incorporated, which is itself a wholly owned subsidiary of BellSouth Corporation. BST is the "incumbent local exchange telephone company" as defined in our state act, Tennessee Code Annotated section 65-4-101(d) (1999) and is also a wholly owned subsidiary of BellSouth Corporation.

AT&T and interveners Nextlink Tennessee, L.L.C. (Nextlink), M.C.I. Telecommunications Corporation (MCI), and American Communications Services, Inc. (ACSI) are "competing telecommunications service providers" within the meaning of Tennessee Code Annotated section 65-4-101(e).

Both federal law [47 U.S.C. §271(c)(2)(B)(viii)] and Tennessee law [Tenn .Code Ann. § 65-4-124(c)] require BST to publish a directory of "White Pages", containing not only the names of its own subscribers but also the names of subscribers of competing carriers. It is undisputed that the "White Pages" of BellSouth are published in full compliance with both federal and state law. The "White Pages" directories required of BellSouth Telecommunications Company are, in fact, published by BAPCO under contract with BST. The issues in this case involve only the covers of BellSouth "White Pages" directories.

The Tennessee legislative parallel to the Telecommunications Act of 1996 actually predates the federal act. Chapter 408 of the Public Acts of 1995 became effective on June 6, 1995. This Tennessee act amended several sections of Title 65 of the Tennessee Code and established certain new sections relative to the regulation of telecommunications carriers in Tennessee. *See* Tenn. Code Ann. §§ 65-5-208 to -213 (1999).

Following the refusal of the TRA to arbitrate the "cover" issue under the federal act and the failure of negotiations between the parties, AT&T filed its petition for a declaratory ruling on December 16, 1996. This proceeding sought a decision from the TRA as to whether Tennessee Code Annotated sections 65-4-104, 65-4-114(1), 65-4-117(3) and 65-4-122(c), along with TRA Rule 1220-4-2-.15 apply to the covers of "White Pages" telephone directories, published and distributed on behalf of BST by BAPCO and containing the names and telephone numbers of customers of AT&T. In its petition, AT&T requested the TRA to convene a contested case under Tennessee law with BAPCO and BST as parties respondent. AT&T sought a decision from TRA regarding whether this statutory and rule authority required BAPCO to place AT&T's name and logo on the covers of such directories. Thereafter, TRA convened a contested case pursuant to Tennessee Code Annotated section 4-5-223 and Tennessee Code Annotated section 65-2-104.

In its petition, AT&T asserted:

> [T]he TRA [should] issue a declaratory order declaring that telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as BST; and that the covers of directories, published and distributed by BAPCO on behalf of BST which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of BST, or include no company's name and logo, including the name "BellSouth."

In Re: Petition of AT&T for Declaratory Order, Petition of AT&T to the Tenn. Regulatory Auth., No. 96-01692 (filed Dec. 16, 1996).

By order dated February 20, 1997, TRA granted the request of AT&T to convene a contested case proceeding with BST and BAPCO as party respondents. In the process, the TRA also granted intervention to MCI, ACSI and Nextlink so that each party would have an opportunity to participate in the proceeding. On July 17, 1997, the hearing was held before the TRA. On September 23, 1997, the TRA publicly deliberated and announced its decision. On March 19, 1998, the TRA issued its order holding that TPSC Rule 1220-4-2-.15 required the appearance of the name and logo of AT&T on the cover of the "White Pages" directory published by BAPCO under the same terms and conditions as were provided to BST by contract. On May 15, 1998, BAPCO filed its Petition for Review in this court.

III. THE DECISION OF TRA

TRA Rule 1220-4-2-.15 provides in its entirety as follows:

> (1) Telephone directories shall be regularly published, listing the name[,] address, and telephone number of all customers, except public telephones and number unlisted at customer's request.

(2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.

(3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover. Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages.

(4) The directory shall contain such instructions concerning placing local and long distance calls, calls to repair and information services, and location of telephone company business offices as may be appropriate to the area served by the directory.

(5) Information operators shall have access to records which include all listed telephone numbers (except telephone numbers not listed or published at customer request)in the area for which they are responsible for furnishing information service.

(6) In the event of an error in the listed number of any customer, the telephone utility shall intercept all calls to the listed number for a reasonable period of time provided existing central office equipment will permit and the number is not in service. In the event of an error or omission in the name listing of a customer, such customer's correct name and telephone number shall be in the files of the information or intercept operators and the correct number furnished the calling party either upon request or interception.

(7) Whenever any customer's telephone number is changed after a directory is published, the utility shall intercept all calls to the former number for a reasonable period of time, and give the calling party the new number provided existing central office equipment will permit, and the customer so desires. Provided, however, the telephone utility may refuse to take such action for good and sufficient reason.

(8) When additions or changes in plant, records or operations which will necessitate a large group of number changes are scheduled, reasonable notice shall be given to all customers so affected even though the additions or changes may be coincident with a directory issue.

(9) The inside cover of the directory all contain the Commission's telephone number: 1-800-342-8359 (toll free).

This rule, adopted in 1968, long before federal and state statutory policy changes mandating the conversion from a monopolistic environment to a competitive environment in the provision of local telephone services, provides only that the cover of the "White Pages" directory should disclose the name of the telephone utility, the area included in the directory, and the month and year of issue of the directory. In the monopoly environment of 1968, there was only one telephone utility; that

utility was the only local service provider, and thus, it was the only telephone utility locally serving the customers listed in the directory.

The policy of the Tennessee Telecommunications Act of 1995 is stated 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. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 1999).

The majority of the TRA held that the policy declarations in Tennessee Code Annotated section 65-4-123, together with proper construction of Rule 1220-4-2-.15, provide sufficient authority to compel BST through BAPCO to display, on the cover of its "White Pages" directory, the name and commercial logo of AT&T in equal prominence with the BellSouth name and commercial logo and on the same terms and conditions as are given by BAPCO to BST. The dissenting member of the TRA agreed that the end result was correct but felt that it should not be attained in a contested case construing the Rule but rather that a rule-making proceeding was needed to revise the Rule so as to apply in a competitive environment. This issue is so clearly drawn and articulated in the majority and dissenting opinions of the TRA that extensive quotation from the declaratory order is desirable in order to focus appellate consideration.

Chairman Greer, speaking for himself and Director Kyle, stated the majority position of the TRA in the declaratory order of March 19, 1998 as follows:

> Following the disposition of the pending motions, each Director openly deliberated in great detail on the merits of the case and stated his or her position as to the proper disposition of the issues. After the deliberations were concluded, the motion as stated by Chairman Greer prevailed. The motion and supporting comments are as follows:
>
> > As a regulator in Tennessee, I am bound by the parameters of federal law, state law and existing rules of this Agency. However, I am also charged with the duty of promoting telecommunications competition in this state according to the [state and federal] Telecommunications Act[s] of 1995 and 1996, and with the duties of protecting the interest of both the consumers of Tennessee and the utility providers. Sometimes the fulfillment of all of these duties conflicts, not

only with each other but with the applicable laws involved. I feel that the production of one complete phone book containing the names and numbers of all customers, promotes competition, reduces consumer confusion and best serves the needs of Tennessee. I feel this solution of one complete directory fulfills my policy goals and I would encourage this action to be taken by the parties involved.

All of that said, however, I must now determine what I am allowed to do under the law. The original petition brought four (4) statutes and one (1) Tennessee Public Service Commission/TRA rule in question. And I will explore each of these.

First, [Tenn. Code Ann. §] 65-4-104 deals with the TRA's jurisdiction over public utilities. The TRA obviously has jurisdiction over BellSouth Telecommunications and the fulfillment of their obligations as a utility. By virtue of contract, then, BAPCO, as BellSouth's agent, becomes responsible for the fulfillment of BellSouth's utility obligations under the law. . . .

[Tenn. Code Ann. §] 65-4-114(1) empowers the Authority to require every public utility to provide safe, adequate and proper service, but it does not require that utility to provide such service to customers other than its own. This statute, then, in my opinion, is not really applicable to this case.

[Tenn. Code Ann. §] 65-4-117(3) enables the Authority, after hearing, by order in writing, to fix just and reasonable standards to be applied to any utility. This statute seems to be envisioning rules, which truly requires a rule-making proceeding. Thus, this statute is not applicable, in my opinion, to this case.

[Tenn. Code Ann. §] 65-4-122(c) mandates that a public utility shall not make or give any undue preference to anyone. However, this statute applies more to the ratepayers than to the utilities, as evidenced in New River Lumber Company versus Tennessee Railway, 1921, thus, this statute is not relevant to this case either.

Now, Tennessee Public Service Commission Rule [TRA Rule] 1220-4-2-.15 mandates that a telephone directory be published regularly containing the names and numbers of all customers and distributed to all customers served by that directory. The directory must have the name of the utility, the area served, and the month and year of issue on the cover. . . .

I have been charged with the interpretation of this rule in resolving this issue. I feel that it is important to note that this rule was created in 1968, long before the 1996 Telecommunications Act and the push for competition. Keeping this

in mind, and realizing that no more than one utility existed at the time of this statute to address, I believe that the plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, then, I believe that if more than one utility's customers are inside the same directory, then more than one utility's name would be on the cover. I do not believe I have the authority to allow a telephone book with no name on the cover.

The charges of law in this docket bring another important statute into focus, and that is [Tenn. Code Ann. §] 65-4-123. This statute discusses not only the policy of this state to permit competition in all telecom services markets, but also that this regulation shall protect the interest of the consumers. **This Agency has ruled that directory assistance is not a basic service for Tennessee consumers, therefore, in my opinion, the white pages listing is a basic service and an essential tool the customer needs to efficiently and fairly use the network.** This telephone directory, then, needs to be complete and as easy to understand as possible. In my opinion, the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory.

Therefore, after reading all of the testimony and briefs filed in this docket, and after a hearing on the merits, and after contemplation of both my duties as a regulator and my interpretation of the applicable rules and the statutes, I feel that the name or names of the utility or utilities, whose customers are inside the directory, by contract, should be allowed to be included in the cover in the same format. So, if a carrier contracts with another carrier or publisher to have their customers included in combined directory, then the included carrier should have its name on the directory cover in a like format. **Thus, I move that AT&T be allowed to contract with BAPCO to have its name on the cover of the directory under the same terms and conditions as that of BellSouth's name. And further, BAPCO and/or BellSouth must offer the same terms and conditions to AT&T in a just and reasonable manner.**

In Re: Petition of AT&T Communications, Declaratory Order, Tenn. Regulatory Auth.,, No. 96-01692 (March 19, 1998) (citations and footnotes omitted)(emphasis in original).

Thus, does the majority of the TRA hold in clear and unambiguous language that the policy of Tennessee Code Annotated section 65-4-123 and Rule 1220-4-2-.15, in its present form, authorize the action sought by AT&T in a "contested case" proceeding for a declaratory order.

With equal clarity, Director Melvin Malone asserts that the result reached by the majority is correct but should be accomplished in a "rule-making" procedure rather than a "contested case" proceeding for a declaratory order.

Says Director Malone:

> In this declaratory order action, AT&T has requested that the Authority issue a declaratory ruling on whether T.C.A. §§ 65-4-104, 65-4-114(1), 65-4-117(3), 65-4-122(c), or TRA Rule 1220-4-2-.15 require BellSouth to place AT&T's name and logo on the front cover of the local directory that is published by BellSouth Advertising and Publishing Company ("BAPCO") on behalf of BellSouth.
>
> Consistent with the majority, in my opinion, this case turns upon the application of the Rule, as opposed to other state statutes relied upon by AT&T in this cause. The plain language of TRA Rule 1220-4-2-.15 mandates that "the name of the telephone utility" must appear on the front cover of the local phone directory. The controlling question here is whether the Rule requires BellSouth to place AT&T's name and logo on the cover of BellSouth's local phone directory, or the local phone directory published on its behalf, when AT&T's customers are listed in said directory.
>
> Unlike the majority, however, I have concluded that applying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provider distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning or intent of the Rule into anything other than what it is. Nonetheless, I am persuaded that the imposition of such a daunting requirement as would be mandated by the plain language of the Rule and its original intent at this stage in Tennessee's transition to a competitive environment may result in crippling consequences to the development of competition.
>
> For the foregoing and other reasons, I have concluded that the most appropriate path in this case is to declare that neither the Rule nor §§ 65-4-114(1), 65-4-117(3), or 65-4-122(c) require BellSouth to place AT&T's name and logo on the front cover of the local directory published by BAPCO on behalf of BellSouth when AT&T's customers are listed therein. Being ever mindful of the clear and unambiguous policy of the State of Tennessee to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets and this agency's general supervisory and

> regulatory power, jurisdiction, and control under § 65-4-104, I am persuaded that the most judicious manner in which to proceed is with a rulemaking to revise TRA Rule 1220-4-2-.15 and/or to develop a rule to apply in a competitive environment.

In Re: Petition of AT&T Communications, Separate Opinion of Director Melvin Malone, Tenn. Regulatory Auth., No. 69-01692 (March 19, 1998) (footnotes omitted).

While Director Malone asserted that a rule-making procedure was the preferable way to dispose of the case, he chose in the end to join with the majority in result, observing "Hence, while I conclude that the path that I would choose to resolve this matter is more appropriate than that chosen by the majority, the result is the same - all competitors names on the front cover of Bell South's local phone Directory." *Id.*

IV. JURISDICTION OF TENNESSEE REGULATORY AUTHORITY

The question in this case is not the method used by TRA in hearing and deciding this case, but rather whether or not TRA had jurisdiction to compel BAPCO against its wishes to display the name and commercial logo of AT&T on the cover of its "White Pages" directory. We conclude that neither federal nor state law provides the authority with such jurisdiction.

As stated *supra*, before this contested case was ever filed, AT&T had filed a petition for arbitration against Bellsouth Telecommunications, Inc. under section 252 of the Federal Telecommunications Act of 1996. The TRA held that the issue of whether or not AT&T was entitled to have its commercial logo displayed on the cover of directories published by BAPCO for Bellsouth Telecommunications Company was not a subject for arbitration under section 252 of the Federal Act. Administrative agencies in Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, Texas and Vermont have reached the same conclusion. Administrative agencies in Arizona, Iowa, Kentucky, Montana, and Washington have concluded otherwise.

Inherent in the findings of the majority of state regulatory agencies considering the issue (including Tennessee in this case), is a finding that the cover of the incumbent's "White Pages" directory is not a "network element" within the meaning of 47 U.S.C. § 153 (29) which provides:

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29)( ).

Bellsouth's obligation under the federal act is to provide "White Pages directory listings for customers of the other carrier's telephone exchange service." 47 U.S.C. § 271(c)(2)(B)(viii)( ).

The TRA rightly acknowledges that the goal in all of the legislative law in these cases is to "unbundle" the network elements of an incumbent local exchange carrier in order to foster nondiscriminatory entry into the competive market of telecommunications services. With very little by the way of explanation, the TRA held that the branding of "White Pages" directory covers was in the nature of a network or utility function. This holding, if correct, brings the issue of directory cover branding within the ambit of the Telecomunications Act of 1996, the FCC rules regarding enforcement of the act's provisions, and Tennessee's Telecommunications Act of 1995.

The term "network element" is broadly defined to include more than simply the physical facilities and equipment of an ILEC. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). Providing directory listings necessary to local customer service is in the nature of a "network element" to be provided at cost-based rate. *See AT&T of Va. v. Bell-Atlantic Va., Inc.*, 197 F.3d 663, 674 (4th Cir. 1999). Yet inherent in the TRA's ruling was the finding that the *branding* of the cover of a local white pages directory is an element of BST's network as well, and thus, must be provided to competing LEC's on an unbundled basis.

In this discussion the following is persuasive:

> There is a point, though, at which a particular service is too remote to justify inclusion as a network element. . . . Some things the CLEC's must do for themselves. The unbundling requirement is aimed at making available to CLEC's, those network features, which a CLEC needs to provide competitive local telephone service, . . . or which competitors could not otherwise duplicate in a timely manner or at a reasonable cost. The unbundling requirement ordinarily should not extend to general business services that can be replicated by competitors.

MCI Telecomm. Corp. v. GTE Northwest, Inc., 41 F.Supp. 2d 1157, 1180-81 (D.Or. 1999).

The incumbent's "White Pages" directory *cover* is among "items that do not (as they must) meet the statutory definition of 'network element' " *AT&T Corp.*, 525 U.S. at 386.

So ends the federal inquiry in this case. We now turn to Tennessee law, primarily the Telecommunications Act of 1995 codified as part of Tennessee Code Annotated Title 65, chapters 4 and 5. First, it is well to observe that the Federal Telecommunications Act of 1996 is not preemptive of state legislation, but rather compatible therewith, and state law is preempted only to the extent that it conflicts with the federal act. *See Bellsouth Telecomm. v. Greer*, 972 S.W.2d 663, 671 (Tenn. Ct. App. 1997).

This Court has held:

> The Commission, like any other administrative agency, must conform its actions to its enabling legislation. *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn.1977); *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948). It has no authority or power except that found in the statutes. *Tennessee-Carolina Transp., Inc. v. Pentecost*, 206 Tenn. 551, 556, 334 S.W.2d 950, 953 (1960). While its statutes are remedial and should be interpreted liberally, *see* Tenn. Code Ann. § 65-4-106 (Supp.1996), they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law. *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. at 161, 208 S.W.2d at 1016.

Bellsouth Telecomm., 972 S.W.2d at 680 (Tenn. Ct. App. 1997.)

The Supreme Court of Tennessee has held:

> Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power. *Pharr v. Nashville, Chattanooga and St. Louis Railway*, 186 Tenn. 154, 208 S.W.2d 1013 (1948); *Nashville, Chattanooga and St. Louis Railway v. Railroad and Public Utilities Commission et al*, 159 Tenn. 43, 15 S.W.2d 751 (1929). In either circumstance, the grant of power to the Commission is strictly construed.

Tennessee Pub. Serv. Comm'n v. Southern Ry. Co., 554 S.W.2d 612, 613 (Tenn. 1977).

As with the question of arbitration under the federal statute we are dealing in this case with a very limited issue. We are concerned not with the "White Pages" listings of competing local telecommunications service providers, which BST, as the incumbent local exchange telephone company, is required by both federal and state law to provide, but rather with the branding of the *cover* of such "White Pages" directory.

Tennessee Code Annotated section 65-4-124 provides in pertinent part as follows:

> (a) All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local

exchange telephone service or unbundled features or functions with services of other providers.

(c) These rules shall also ensure that all tele-communications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing, provide access to 911 emergency services, provide free blocking service for 900/976 type services, provide access to telecommunications relay services, provide Lifeline and Link-Up Tennessee services to qualifying citizens of the state and provide educational discounts existing on June 6, 1995.

Tenn. Code Ann. § 65-4-125(a-c) (Supp. 1999).

The same reasons that impelled the TRA, and a majority of other state regulatory commissions, to reject arbitration of the branding of "White Pages" directory covers under the federal act impel the conclusion that branding of "White Pages" directory covers is not an essential public service, subject to regulation by the TRA. *National Merchandising Corp. v. Public Serv. Comm'n*, 5 N.Y.2d 485, 490, 158 N.E.2d 714, 716, 186 N.Y.2d 47, 50 (1959). The TRA is mandated by Code section 65-4-124(c) to, by rule, insure that each "customer" of all telecommunications service providers who provide basic local exchange telephone service get a "White Pages" directory listing, and it is undisputed in this record that Bellsouth and BAPCO have complied - rule or no rule - with this statutory mandate, which is the same mandate required by federal law.

The TRA held that under section 65-4-104of the Code, it had jurisdiction over BST and the fulfillment of its obligation as a utility. It further held: "By virtue of contract, then, BAPCO, as Bellsouth's agent becomes responsible for the fulfillment of Bellsouth's utility obligations under the law." While it is correct to say that BST may not avoid the fulfillment of its statutorily mandated utility functions by either agency or contract, *See Smith v. Southern Bell Tele. and Tel. Co.*, 51 Tenn. App. 146, 151, 364 S.W.2d 952, 955 (1962); *Loring v. Bellsouth Adver. & Publ'g. Corp.*, 339 S.E.2d 372, 374 (Ga. Ct. App. 1985), it does not follow that TRA has jurisdiction to regulate the activities of BAPCO in non-utility endeavors.

At this point, the separate identity of BST and BAPCO becomes critical. Both are wholly owned subsidiaries of Bellsouth Corporation. BST is a "telecommunications services provider" under Title 65, Chapters 4-5 of Tennessee Code Annotated and thus subject to regulation by the TRA. BST is also an "incumbent local exchange" company under the Federal Telecommunications Act of 1996. On the other hand, BAPCO is not a public utility company, subject to regulation by Tennessee Regulatory Authority, but rather a corporation engaged in the competitive business of publishing telephone directories. Having fulfilled the utility obligations of BST by providing "each customer a basic White Page directory listing" [Tenn. Code Ann. § 65-4-124(c)], BAPCO has fulfilled all utility functions mandated by Tennessee statute and TRA has no further power under either state law or federal law to regulate the non-utility activities of BAPCO. *See U. S. West Communications, Inc. v. Minnesota Pub. Utils.*, 55 F.Supp. 2d 968, 983-985 (D. Minn. 1999).

Tennessee Regulatory Authority correctly held that sections 65-4-114(a), 65-4-117(3) and 65-4-122(c) of the Code, statutes relied on by AT&T in its petition for a declaratory ruling, were inapplicable to this case. The authority based its decision on the general policy statement of Tennessee Code Annotated section 65-4-123, the jurisdictional provisions of the Code section 65-4-104 and the provisions of TRA Rule 1220-4-2-.15. The rule is brought unchanged into a statutorily mandated competitive environment. As observed by Director Malone:

> [A]pplying the plain language of the Rule, irrespective of its original intent and purpose, in the current environment would result in each local telecommunications services provider distributing or providing, directly or indirectly, its own phone book with its name on the front cover to its customers. No law was submitted nor phalanx of language offered in this case that resulted in a metamorphic effect on the plain meaning or intent of the Rule into anything other than what it is.

Opinion Director Malone, Tenn. Regulatory Auth., *In Re: Petition of AT&T.*

It is well to add that this observation comports precisely with Tennessee Code Annotated § 65-4-124, which applies by its terms not to just an "incumbent local exchange telephone company" but rather to "all telecommunications services providers" who provide basic local exchange telephone service.

However laudable the desire of the Tennessee Regulatory Authority to have produced "one complete phone book containing the names and numbers of all customers," the language of the controlling statutes and of TRA Rule 1220-4-2-.15 simply cannot be stretched to provide TRA with authority to compel a non-utility publishing company to brand the cover of its White Pages directory, not just with the name, but also the commercial logo of a telephone utility in competition with BST.

We hold that TRA is without authority under present statutes and rules to compel BAPCO to brand its "White Pages" directory cover with the name and commercial logo of AT&T or any other telecommunications service provider who provides basic, local exchange telephone service.

V. CONSTITUTIONAL QUESTIONS

BAPCO on appeal asserts that the action of TRA in compelling BAPCO to brand the cover of its White Pages directory with the name and commercial logo of AT&T constitutes "forced speech" in violation of the First Amendment of the Constitution of United States. *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241, 257 (1974). BAPCO further asserts that the TRA order effects a confiscatory taking of property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article 1 section 8 of the Constitution of Tennessee.

Since the majority of this Court is in agreement that the TRA order underlying this appeal is invalid on grounds other than those constitutional issues presented, I would prefer to pretermit the

constitutional issues under *Teague v. Campbell County*, 920 S.W.2d 219 (Tenn. Ct. App. 1995) and *Watts v. Memphis Transit Management Co.*, 224 Tenn. 721, 462 S.W.2d 495 (Tenn. 1971). Judge Koch, however, prefers to address the First Amendment "forced speech" question, and since on the merits of this constitutional question I agree with him, I concur in section VI of his separate concurring opinion entitled "Constitutional Limits on the TRA's Authority to Compel Speech."

VI. TRADEMARK ISSUES

BAPCO asserts that the TRA order violates state and federal trademark law and promotes marketplace confusion.

We have held that TRA has no jurisdiction over BAPCO in its non-utility functions. The only utility function performed by BAPCO in this case was under its contract with BST whereby it undertook to perform for BST the utility duties mandated by federal and state law. It is undisputed that BAPCO has performed these utility duties for BST. We have further held that the branding of the "White Pages" directory cover produced by BAPCO is a non-utility function. These rulings have disposed of all issues necessary to the determination of this case. We therefore pretermit the trademark issues. *See General Outdoor Adver. Co. v. Coley*, 23 Tenn. App. 292, 131 S.W.2d 305 (1938); *Deaton v. Evans*, 192 Tenn. 348, 241 S.W.2d 423 (1951); *Tennessee Cable Television Ass'n v. Public Serv. Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992).

VII. THE NEXTLINK CASE

In the disposition of these consolidated cases, our holding in the AT&T case is necessarily dispositive of the Nextlink case.

Nextlink Tennessee LLC, MCI Telecommunications Corporation and American Communications Services, Inc. are all "competing telecommunications service providers" within the meaning of Tennessee Code Annotated § 65-4-101(e) in competition with BST. All of these parties were allowed to intervene in the AT&T case and participate therein. Their application to intervene sought no specific relief for themselves but rather strongly supported the position of AT&T. When the TRA released its 1998 order sustaining the position of AT&T, it granted the relief sought by AT&T without specific adjudication of the Nextlink, MCI, and ACSI interventions.

When BAPCO appealed the March 19, 1998 order in the AT&T case, no stay order issued, and the March 19, 1998 order remained effective. Tenn. Code Ann. § 4-5-322(c); *Underwood v. Liberty Mut. Ins. Co.*, 782 S.W.2d 175, 177 (Tenn. 1989). Nextlink then approached BAPCO about putting the name and commercial logo of Nextlink on the front cover of the BAPCO "White Pages" directory, only to be rebuffed by BAPCO on an assertion that the March 19, 1998 order only adjudicated the claim of AT&T and did not apply to Nextlink. On September 23, 1998, Nextlink filed its petition in this case seeking to compel BAPCO to comply with the declaratory order of March 19, 1998 as it related to Nextlink and to implement sanctions against BAPCO.

The Nextlink case was heard on oral argument on October 15, 1998, and on November 2, 1998. TRA entered an order enforcing Rule 1220-4-2-.15 against BAPCO holding in pertinent part:

> The fundamental issue raised by NEXTLINK's petition and BAPCO's response is whether the Authority may enforce TRA Rule 1220-4-2-.15, as interpreted in the Declaratory Order, pending appeal of the Declaratory Order. On October 15, 1998, following the submission of briefs and oral arguments, the Authority deliberated and concluded that, in the absence of a stay of the Declaratory Order, BAPCO must comply with TRA Rule 1220-4-2-.15 as interpreted in the Authority's Declaratory Order of March 19, 1998, and as applied to all similarly situated carriers. In support of that decision, the Authority makes the following findings of fact and conclusions of law.
>
> 1. NEXTLINK is a certified, competitive local exchange telephone company. *See* Docket No. 95-02502 (September 29, 1995) and Docket No. 96-00728 (April 12, 1996). NEXTLINK offers local telephone service to subscribers in Memphis and Nashville in competition with BellSouth. *See* Docket No. 97-00309, Tr. Vol. VIII B, pages 112-113. NEXTLINK's customer listings are contained within the White Pages directories published by BAPCO on behalf of BellSouth. *See* Docket No. 97-00309, Tr. Vol. XIA, pages 10-11. As required by federal law, the White Page Directories published by BAPCO on behalf of BellSouth must include the names and telephone numbers of NEXTLINK's local customers. The facts from the foregoing dockets were officially noticed by the Authority in a letter dated October 16, 1998, without objection from the parties.
>
> 2. In its Declaratory Order, the Authority declared that the rule on White Pages directories applies to competitive local exchange carriers and that such carriers should be allowed the opportunity to appear on the cover of the White Pages under the same terms and conditions as BellSouth itself. Although the ordering clause of the decision grants relief only to AT&T, the Order was based squarely on the Authority's interpretation and application of the agency's rule on White Pages directories and therefore, the agency's holding concerning the interpretation of the rule must not be applied only to AT&T but it must equally be applied to all similarly situated carriers that seek the same relief.
>
> By definition, an agency rule is a "statement of general applicability." *See* Tenn. Code Ann. § 4-5-102(10). Consequently, an interpretation of a rule necessarily applies to all similarly situated companies. NEXTLINK is similarly situated to AT&T in that it too is a certificated competing local exchange provider. Moreover, NEXTLINK, is in fact, providing service. Therefore, since there are no relevant differences between NEXTLINK and AT&T regarding the application of the rule on White Pages directories, no contested case hearing was required on this issue.

3. In the absence of a stay, the Authority's decision in its Declaratory Order remains in effect pending appeal. Under Tennessee law, the filing of a petition for review "does not itself stay enforcement of the agency decision." *See* Tenn. Code Ann. § 4-5-322(c). BAPCO itself concedes that the Declaratory Order is now in effect, at least as it applies to BAPCO and AT&T. *See* also Transcript of October 15, 1998, at 32. Therefore, the Authority's interpretation of Rule 1220-4-2-.15 is effective and enforceable. *See Underwood v. Liberty Mutual*, 782 S.W.2d 175, 177 (Tenn. 1989) holding that "judgment may continue to be enforced pending an appeal unless a stay is ordered."

4. BAPCO's argument that NEXTLINK's claim is barred by res judicata is not persuasive. Similarly, BAPCO's argument that the Authority cannot now modify the terms of the Declaratory Order has no merit, because NEXTLINK has not asked the Authority to amend its Declaratory Order nor is any such modification necessary to grant NEXTLINK's petition. The Declaratory Order interprets and applies the Authority's rule as to White Pages directories and that interpretation necessarily applies to any other, similarly situated carrier covered by that rule.

5. In its Declaratory Order, the Authority directed BAPCO to negotiate with AT&T for "the same terms and conditions" which BAPCO offers to BellSouth. BAPCO acknowledges that no such terms and conditions exist at this time. *See* Transcript of October 15, 1998, at p. 6. BAPCO is therefore obliged to negotiate with NEXTLINK for the opportunity to appear on the cover of the White Pages directories in a size and style comparable to the name and logo of BellSouth.

In Re: Petition of Nextlink to Sanction Bellsouth, Order enforcing T.R.A. Rule 120-4-2-.15 and denying sanctions, Tenn. Regulatory Auth. No. 98-00654 (Nov. 2, 1998)(footnotes omitted).

TRA declined to impose sanctions upon BAPCO and BAPCO timely appealed the November 2, 1998 order.

BAPCO on appeal asserts three issues.

1. That BAPCO's procedural due process rights were violated when the TRA refused to allow BAPCO to submit evidence on whether or not Nextlink was a "similarly situated competitive local exchange carrier."

2. The March 19, 1998 order, which is the subject of the AT&T appeal, is *res judicata* of the claims of Nextlink.

3. That BAPCO's appeal of the AT&T order divested the TRA of any jurisdiction of the Nextlink case.

The TRA's November 2, 1998 order is so completely and correctly dispositive of these three issues on appeal as to require little discussion. Nextlink is a certified, competitive local exchange

telephone company providing local service in competition with BST, and its White Pages customers are published in the BAPCO "White Pages" directories. It is, thus, in the only context at issue, "similarly situated" as a matter of law, and further proof is neither necessary nor proper.

> If the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the factfinding process, simply because the agency does not need to resolve any factual controversies. This is a familiar principle that administrative law borrows from the concept of summary judgment in civil procedure.

Kenneth C. Davis & Richard S. Pierce, Sr., Administrative Law Treaties, § 9.5 (3d ed.1994).

Likewise, *res judicata* is not applicable to this case. Intervention in this case is governed by Tennessee Code Annotated § 4-5-310 and not by Rule 24 of the Tennessee Rules of Civil Procedure. Rule 24.03 Tennessee Rules of Civil Procedure provides that one seeking to intervene must accompany his intervention motion with a " ... pleading setting forth the claim or defense for which intervention is sought." Tenn. R. App. P. R. 24.03. Tennessee Code Annotated § 4-5-310 does not require a petitioner for intervention to seek affirmative relief. In the AT&T case Nextlink did not seek or receive specific affirmative relief.

In the AT&T action for a declaratory order TRA Rule 1220-4-2-.15 was already long in existence having been adopted in1968. The AT&T adjudication sought an interpretation of this rule.

> Administrative agencies typically perform both legislative and adjudicative functions. These functions are closely related, and the line between them is not always clear.
>
> Rule making is essentially a legislative function because it is primarily concerned with considerations of policy. It is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority.

Tennessee Cable, 844 S.W.2d at 160-61 (citations omitted).

In the *AT&T* case the TRA interpreted its rule. The *Nextlink* case sought to enforce the previous interpretation of this same rule. Application of this rule is an executive or administrative function. *In re: Cumberland Power Co.*, 147 Tenn. 504, 509-513, 249 S.W. 818, 819-20 (1923). The TRA correctly held that Nextlink is not barred by *res judicata*.

Finally, no stay order having been issued in the AT&T appeal, the TRA was free to enforce its decision in the Nextlink proceeding. *See* Tenn. Code Ann. § 4-5-322(c).

IX. CONCLUSION

Because we find that neither state nor federal law allows the TRA to compel BAPCO to brand its White Pages *cover* with the name and commercial logo of "competing telecommunications service providers" in competition with BST, and because we further find, as articulated by Judge Koch in his separate concurring opinion, that such order imposes "forced speech" upon BAPCO in violation of the First Amendment of the Constitution of the United States, both the AT&T case and the Nextlink case are reversed. The issues of alleged violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, together with the trademark issues asserted in the AT&T case, are pretermitted. The other issues raised by BAPCO in the Nextlink case are without merit. Costs of the AT&T case are assessed against AT&T. Costs of the Nextlink case are assessed one-half against Nextlink and one-half against BAPCO.

WILLIAM B. CAIN, JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
Nos. 96-01692 & 98-00654

Nos. M1998-0987-COA-R12-CV & M1998-01012-COA-R12-CV
Filed February 16, 2001

WILLIAM C. KOCH, JR., J., concurring.

This appeal presents a relatively straightforward question of state law – whether Tenn. Comp. R. & Regs. r. 1220-4-2-.15 (1999) is broad enough to empower the Tennessee Regulatory Authority to compel BellSouth Advertising & Publishing Corporation ("BAPCO") to permit competing local exchange carriers to place their names and logos on the cover of the white pages directories that BAPCO publishes for BellSouth Telecommunications, Inc. Despite the lengthy analyses of the federal Telecommunications Act of 1996 in the opinions prepared by Judges Cain and Cottrell, the answer to this question can be found in the plain language of the state regulation. Like the TRA's chairman, I find that the regulation cannot be stretched to apply to the current competitive local telephone market. In addition, I find that the TRA's effort to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of its white pages telephone directory violates U.S. Const. amend. I and Tenn. Const. art. I § 19.

I.
CHANGES IN FEDERAL TELECOMMUNICATIONS POLICY

For almost two decades after telephone service was first offered in 1877, the Bell System[1] enjoyed a monopoly in both the interstate and intrastate telephone markets. However, this market dominance began to evaporate when several key patents controlled by the Bell System expired in 1893 and 1894. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 403, 119 S. Ct. 721, 741 (1999) (Thomas, J., concurring in part and dissenting in part). During the ensuing years, many independent telephone companies entered the telephone market and built rival networks to compete with the Bell System.

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[1] For the purposes of this opinion, the "Bell System" refers to the Alexander Graham Bell's telephone company which came to be known as American Telephone & Telegraph Company ("AT & T"), as well as to its later created subsidiary and affiliated companies, including Bell Telephone Laboratories, Inc., Western Electric Company, and the twenty-two operating companies providing local telephone service.

The Bell System responded to this competition by advocating the need for centralized governmental regulation of telephone markets. It argued that telephone service was inherently monopolistic and that competition was wasteful because it would lead to the unwarranted duplication of expensive physical facilities. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 389, 119 S. Ct. at 735 (Thomas, J., concurring in part and dissenting in part). These arguments proved persuasive, and the federal government, as well as many state governments, established commissions to regulate telephone service.[2] Thus, there arose a dual system of governmental regulation for telephone service. The federal government, first through the Interstate Commerce Commission and later through the Federal Communications Commission, regulated the interstate and international aspects of telephone service, and the various states regulated intrastate local telephone service. These federal and state regulatory schemes were considered to be distinctly separate. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148, 51 S. Ct. 65, 68 (1930).

State regulation of intrastate telephone service reflected the Bell System's belief that telephone service was essentially monopolistic. Typically, states granted one telephone service provider an exclusive franchise in each local service area and then prohibited other competitors from entering the market. Over time, the Bell System again assumed a commanding position in both the interstate and intrastate telephone markets as a result of its policy to buy out competitors and the state governments' practice of prohibiting competitive entry into local telephone markets. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part). It controlled virtually all interstate long-distance telephone service, most local telephone service, a substantial amount of telephone equipment manufacturing, and one of the leading communications research and development facilities in the world. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 413, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 222 (D.D.C. 1982).

The Bell System's dominance of the telecommunications industry ended in 1982 when the United States District Court for the District of Columbia issued a decree settling a series of antitrust actions brought by the United States against various Bell System companies. The District Court concluded that the key to the Bell System's ability to maintain its market dominance was its control over local telephone service. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 223. Accordingly, the central remedy approved by the District Court required AT & T to divest itself of the twenty-two operating companies that were providing local telephone service. The decree prohibited these operating companies from providing long distance telephone service or manufacturing telephone equipment but permitted them to market customer premises equipment and to produce, publish, and distribute yellow pages directories.

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[2] The Mann-Elkins Act of 1910 extended the jurisdiction of the Interstate Commerce Commission to cover the interstate and international aspects of telephone service. By 1915, most states had created public utilities commissions and had empowered these commissions to regulate telephone service. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part).

In apparent recognition of the monopolies over local telephone service permitted by the states, the decree stated explicitly that the twenty-two operating companies "will possess monopoly power over local telephone service." *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 224. Thus, the antitrust consent decree did not introduce competition into the local telecommunications market but rather left each market in the hands of a single state-regulated local telephone service provider. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 413-14, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part).

Competition was not reintroduced to the local telecommunications markets until the Congress enacted the Telecommunications Act of 1996.[3] The Act fundamentally restructured local telephone markets by preempting state laws that had protected the existing local telephone service providers from competition. It also encouraged competition in these markets by requiring existing local telephone service providers to share their existing networks with their competitors rather than requiring these competitors to construct their own networks. The Act also provided a legal process through which local telephone service providers could enter the long distance market from which they had been excluded since 1982.

Despite these fundamental changes in the federal telecommunications policy, the Congress did not displace the role played by the states in the regulation of local telephone service providers. The Telecommunications Act of 1996 itself clearly gives the state regulatory commissions a pivotal role in implementing telecommunications policy. *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 672 (Tenn. Ct. App. 1997). State commissions are required to assure that existing local telephone service providers comply with 47 U.S.C.A. § 251 and the pricing standards in 47 U.S.C.A. § 252(d) and to provide a forum for resolving disputes between existing local telephone service providers and their competitors seeking access to an existing telephone network.

II.
CHANGES IN TENNESSEE'S TELECOMMUNICATIONS REGULATORY POLICY

Tennessee's statutes regulating local telephone service providers were undergoing a similar transformation at the same time the Congress was considering the Telecommunications Act of 1996. Because the Congress had been working to bring competition to local telephone markets for several years, the Tennessee General Assembly was aware of the impending changes in the federal regulatory policies regarding local telephone service. Demonstrating remarkable legislative prescience, the General Assembly enacted sweeping reforms to Tennessee's regulation of local telephone service providers in 1995. First, it replaced the Tennessee Public Service Commission with the Tennessee Regulatory Authority.[4] Second, the General Assembly replaced the statutes granting monopolies to existing local telephone service providers with statutes designed to permit

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[3] Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 251 *et seq.*).

[4] Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.

competition in all telecommunications markets.[5] Tenn. Code Ann. § 65-4-123 (Supp. 2000). Anticipating the Telecommunications Act of 1996, Tenn. Code Ann. § 65-4-124(a) (Supp. 2000) requires existing local telephone service providers to furnish other providers nondiscriminatory interconnection to their public networks.

III.
WHITE PAGES DIRECTORY LISTINGS

Printed white pages telephone directories have traditionally been an integral part of local telephone service. These directories, which contain the names, addresses, and telephone numbers of the persons living in a particular local calling area, provide a convenient, inexpensive means for obtaining telephone numbers. Without these directories, or some other similarly convenient means for obtaining the same information, a local telephone network cannot provide ubiquitous telecommunications services in its calling area because the public will not have ready access to the telephone numbers needed to use the service.

Because of the importance of providing convenient access to subscribers' telephone listings, the Tennessee Public Service Commission and now the TRA has, at least since 1968, required local telephone service providers to publish a telephone directory listing the name, address, and telephone number of all their customers, except for the customers who have requested an unlisted number. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(1) (1999). When the General Assembly opened up the local telephone markets to competition in 1995, it directed the TRA to promulgate rules ensuring that all local telephone service providers providing "basic local exchange telephone service" must supply each customer with a "basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c).[6]

The Telecommunications Act of 1996 likewise reflects the Congress's awareness of the importance of white pages directory listings. The Act requires local telephone service providers desiring to furnish long distance telephone service to provide white pages directory listings for customers of the other local telephone service providers serving the same area. 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp. 2000). Similarly, 47 U.S.C.A. § 222(e) (West Supp. 2000) requires telephone service providers to make subscriber information available to directory publishers on a nondiscriminatory basis, and 47 U.S.C.A. § 251(b)(3) (West Supp. 2000) requires telephone service providers to provide "dialing parity" to their local competitors by giving nondiscriminatory access to telephone numbers and directory listings with no unreasonable delay.

In implementing the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") promulgated rules relating to nondiscriminatory access to telephone numbers and directory listings. These rules also require local telephone companies to permit their competitors access to telephone numbers and directory listings on a nondiscriminatory basis. 47 C.F.R. §

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[5] Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703.

[6] Rather than promulgating a new rule, the TRA has apparently relied on Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to discharge this responsibility.

51.217(c)(1), (3) (1999). Accordingly, the FCC has emphasized the local telephone service providers must provide their competitors with the same access to directory information and listings that they have. 47 C.F.R. § 51.271(a)(2)(ii); *In re Implementation of the Telecommunications Act of 1996, Third Report and Rule in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273* (Sept. 9, 1999). Construing the FCC's rules and orders, one United States District Court has held that an exiting local telephone service provider that publishes a white pages telephone directory must place the listings of its competitors' subscribers in its directory in a nondiscriminatory manner. *U. S. West Communications, Inc. v. Hix*, 93 F. Supp. 2d 1115, 1132 (D. Colo. 2000).

All these authorities establish beyond question that white pages directory listings are network elements subject to state and federal regulatory oversight. The term "network elements" includes more than simply the physical facilities and equipment of a local telephone service provider. *AT & T v. Iowa Utils. Bd.*, 525 U.S. at 388, 119 S. Ct. at 734. While there is a point where a particular feature is too remote to be considered a network element, *MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1180-81 (D. Or. 1999), the directory listings necessary to provide telephone service to local customers are integral parts of a local telephone network and are, therefore, network elements. *AT & T of Va. v. Bell-Atlantic Va., Inc.*, 197 F.3d 663, 674 (4th Cir. 1999).

In clear contrast to the state and federal treatment of the listings in white pages telephone directories, there has been very little regulatory attention paid to the covers of white pages telephone directories. This is understandable because a telephone directory's cover is far less important than its contents. I can find no federal statute or regulation touching on white pages directory covers or any other federal precedent relating to the content of white pages directory covers. There is a similar dearth of state authority regarding white pages directory covers. The only mention of the covers of white pages telephone directories appears in Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3) which directs that "[t]he name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover." As discussed in Section V of this opinion, this regulation is outmoded because it was promulgated at a time when local telephone service providers in Tennessee monopolized the local markets they served.

Unlike the entries in a white pages telephone directory, the cover does not significantly assist the public's use of a local telephone network. Accordingly, I would conclude that the cover of a white pages telephone directory is a feature that is too remote to be considered a network element.

IV.
BELLSOUTH'S WHITE PAGES TELEPHONE DIRECTORIES

In February 1996, contemporaneous with the effective date of the Telecommunications Act of 1996, BAPCO and AT & T began negotiating for directory publishing services. There was no dispute about the terms and conditions for including the listings for AT & T's customers in the white pages telephone directories. However, virtually from the outset of the negotiations, AT & T insisted that its logo appear somewhere on the cover of these directories and offered to pay for this service.

Even though BAPCO was concerned about possible confusion regarding the authorship of its directories, it decided to accommodate AT & T's request as long as (1) BAPCO retained control of the size, appearance, and location of the logo and (2) AT & T agreed not to use its logo on the covers of other white pages directories published by BAPCO's competitors.

BAPCO sent AT & T several mock-ups of covers showing possible ways that AT & T's logo could be incorporated. AT & T responded to these proposals by suggesting that BAPCO remove its own logo from the cover. Eventually, the negotiations reached an impasse because AT & T refused to refrain from placing its logo on the covers of directories published by BAPCO's competitors. At this juncture, AT & T, invoking the arbitration provisions in the Telecommunications Act of 1996, requested the Tennessee Regulatory Authority ("TRA") to arbitrate its demand that its name and logo be placed on the cover of the white pages directories published by BAPCO for BellSouth Telecommunications, Inc. On October 21, 1996, the TRA rejected this petition on the ground that the contents of the cover of white pages directories was not arbitrable under 47 U.S.C. § 252.[7]

Not to be deterred, AT & T filed a petition with the TRA on December 16, 1996, seeking a declaratory order that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 (1999) required that its name and logo be placed on the cover of the white pages directories prepared for BellSouth Telecommunications, Inc. by BAPCO. The TRA later permitted three other new local telephone service providers, MCI Telecommunications Corporation, NEXTLINK Tennessee, LLC ("NEXTLINK"), and American Communications Services, Inc., to intervene in the proceeding. Following a July 1997 hearing, the TRA issued an order on March 19, 1998. Invoking Tenn. Comp. R. & Regs. r. 1220-4-2-.15, the TRA directed BAPCO to provide AT & T with the opportunity "to contract with BAPCO for the appearance of AT & T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT & T in a just and reasonable manner."

BAPCO perfected a timely appeal to this court. While this appeal was pending, NEXTLINK, relying on the TRA's March 19, 1998 order, requested BAPCO to include its name and logo on the directories BAPCO prepared for BellSouth Telecommunications, Inc. When BAPCO refused its request, NEXTLINK sought relief from the TRA. Following a hearing in October 1998, the TRA entered an order on November 12, 1998, concluding that its interpretation of Tenn. Comp. R. & Regs. r. 1220-4-2-.15 in its March 19, 1998 order required BAPCO to include NEXTLINK'S name and logo on its directories. BAPCO again appealed. We have consolidated the appeals involving AT & T and NEXTLINK because they share common questions of law and fact.

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[7] The TRA's conclusion regarding arbitrability is similar to conclusions reached by its counterparts in Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, and Vermont.

V.
THE APPLICABILITY OF TENN. COMP. R. & REGS. R. 1120-4-2-.15

The majority of the TRA based its decision to order BAPCO to include AT & T's name and logo on the covers of the white pages telephone directories it was preparing for BellSouth Telecommunications, Inc. on Tenn. Comp. R. & Regs. r. 1120-4-2-.15. Accordingly, this appeal requires us to determine whether that regulation applies to the current dispute between BAPCO and AT & T.

The rules and principles of statutory construction also guide the courts in the task of interpreting administrative rules and regulations. *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993); *Rice v. Arizona Dep't of Econ. Sec.*, 901 P.2d 1242, 1246 (Ariz. Ct. App. 1993); *Board of Trustees of Univ. of Ill. v. Illinois Educ. Labor Relations Bd.*, 653 N.E.2d 882, 886-87 (Ill. Ct. App. 1995); 2 Charles H. Koch, *Administrative Law & Practice* § 11.26[2] (2d ed. 1997). Accordingly, our search for the meaning of a regulation begins with its words. *See Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 3 (Tenn. 1986). These words draw their meaning from the context of the entire regulation, *see Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994), and from the regulation's general purpose. *See City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). Unless the context requires otherwise, we read a regulation's works with an eye toward their straightforward and common sense meaning. *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000); *Westland West Cmty. Ass'n v. Knox County*, 948 S.W.2d 281, 283 (Tenn. 1997); *Wilson World, Inc. v. Tennessee Dep't of Transp.*, No. 01A01-9001-CH-00031, 1990 WL 150034, at *3 (Tenn. Ct. App. Oct. 10, 1990) (No Tenn. R. App. P. 11 application filed).

The courts must give effect to unambiguous administrative regulations. *See Spencer v. Towson Moving & Storage, Inc.*, 922 S.W.2d 508, 510 (Tenn. 1996). Accordingly, there is no room for applying the rules of construction if the language of the regulation is plain and clear. *See Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 842 (Tenn. 1996). Thus, when the words of a regulation plainly mean one thing, we cannot give them another meaning under the guise of construing them. *See Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952); *State ex rel. Barksdale v. Wilson*, 194 Tenn. 140, 144-45, 250 S.W.2d 49, 51 (1952).

Administrative regulations cannot be inconsistent with statutes covering the same subject. *Tasco Dev. & Bldg. Corp. v. Long*, 212 Tenn. 96, 102, 368 S.W.2d 65, 67 (1963); *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995). When there is congruence between a regulation and applicable statutes, the courts must defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the plain language of the regulation. *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 356, 120 S. Ct. 1467, 1476 (2000); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994).

Tenn. Comp. R. & Regs. r. 1220-4-2-.15 was enacted at a time when local telephone service providers monopolized their service areas. They had no competition from other local telephone service providers, and thus all residents of the area obtained telephone service from the same local telephone service provider. When viewed in this context, Tenn. Comp. R. & Regs. r. 1220-4-2-.15 makes perfect sense. The local service provider was required to publish a white pages directory containing the names, addresses, and telephone numbers of its customers. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(1); it was also required to provide each of its customers with a copy of its directory, Tenn. Comp. R. & Regs. r. 1220-4-2-.15(2); and it was required to place its name, the area covered by the directory, and the date the directory was issued on the cover of the directory. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3).

These regulatory provisions make far less sense and, in fact, prompt some absurd results when they are superimposed on a local calling area served by more than one local telephone service provider. As TRA Director Melvin Malone pointed out, the rule would require each local telephone service provider to produce a directory containing the listings of its subscribers. Thus, rather than prompting a single directory containing the listings for all telephone customers in a local calling area, the rule would precipitate the proliferation of many telephone directories. Not only would this cause great public inconvenience, it would also be inconsistent with the federal and state policy favoring a single white pages directory for each calling area. To avoid these results, I would agree with Judge Cain and Director Malone that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 is inapplicable to current circumstances where more than one telephone service provider serves a local telephone market.

No amount of administrative or judicial construction can provide the additional substance needed for Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to operate sensibly in a multi-provider market. The courts cannot graft onto the current rule provisions regarding the choice of the entity or entities responsible for preparing a single white pages directory, the determination of the costs to each local telephone service provider for including its subscribers in the directory, or the format of the content or the cover of the directory. The TRA is likewise unable to remedy the regulation's deficiency without following the UAPA's rulemaking procedures. In the absence of these necessary provisions, regulatory prudence cautions against placing the sort of reliance on Tenn. Comp. R. & Regs. r. 1220-4-2-.15 that the majority of the TRA placed on it.

Like Judge Cain and Director Malone, I find that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 cannot be reasonably construed to apply to the current local telephone market in Tennessee. Thus, we are not required to defer to the TRA's interpretation of the rule because it is plainly erroneous and inconsistent with the plain meaning of the rule's language.[8] If the regulation is inapplicable to the current competitive environment in Tennessee, then the TRA's order must be set aside because

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[8] Additional reasons exist for declining to defer to the TRA's interpretation of this rule. The record contains no evidence of long-standing history of either the TRA's or its predecessor's interpretation of this rule. In fact, such history is non-existent because this case provided the TRA with its first opportunity to consider the rule in the multi-provider context. Moreover, the TRA can lay claim to no special expertise in applying the rules of construction or to marketing or intellectual property issues.

the rule forms the legal foundation for the TRA's decision. I would set aside the TRA's March 19, 1998 order because it lacks legal support.

VI.
CONSTITUTIONAL LIMITS ON THE TRA'S AUTHORITY TO COMPEL COMMERCIAL SPEECH

Rather than grappling with the interpretative morass created by attempting to rely on Tenn. Comp. R. & Regs. r. 1220-4-2-.15, Judge Cottrell undertakes to salvage the TRA's decision by asserting that Tenn. Code Ann. §§ 65-4-123, -124(a) supply sufficient authority for the TRA's order in this case. I agree that the General Assembly has given the TRA authority to enter orders and promulgate rules to promote competition in Tennessee's local telephone markets. I also agree that these rules and orders may, to some extent, be directed at mitigating the effects of former monopolistic practices of the incumbent local telephone service providers. I do not agree, however, that the TRA has the authority to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of BellSouth's white page directories. Neither BAPCO nor BellSouth Telecommunications, Inc. can be compelled to use their facilities to promote the commercial interests of their competitors.

Purely commercial speech is no longer considered to be unprotected by the federal and state constitutions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 & n.24, 96 S. Ct. 1817, 1830 & n.24 (1976); *Horner-Rausch Optical Co. v. Ashley*, 547 S.W.2d 577, 578-79 (Tenn. Ct. App. 1976). As long as the commercial speech is truthful and does not propose an illegal transaction, it is entitled to constitutional protection from unwarranted governmental interference. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 1930 (1999); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351 (1980); *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 444-45 (Tenn. Ct. App. 1999).

The scope of the constitutional protection that commercial speech receives is another question. Truthful commercial speech currently does not receive the same level of constitutional protection as political or ideological expression. While the constitutional protection for non-broadcast political speech is near absolute, *United Foods, Inc. v. United States*, 197 F.3d 221, 223 (6th Cir. 1999), *cert. granted* ___ U.S. ___, 121 S. Ct. 562 (2000), commercial speech receives what the Tennessee Supreme Court has called "qualified" constitutional protection. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 451 (Tenn. 1979). Thus, governmental restrictions on commercial speech receive only "intermediate" scrutiny, as opposed to the strict scrutiny to which governmental restrictions on political or ideological speech are subjected. *Douglas v. State*, 921 S.W.2d 180, 184 (Tenn. 1996). Currently, the intermediate scrutiny test employed by the United States Supreme Court and the Tennessee Supreme Court is found in the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* opinion. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. at 183, 119 S. Ct. at 1930 (declining requests to reexamine the *Central Hudson* test); *Douglas v. State*, 921 S.W.2d at 184.

The freedom of speech protected by U.S. Const. amend. I and Tenn. Const. art. I, § 19 includes the freedom to speak and the freedom to refrain from speaking. This principle has been applied not only in cases involving political or ideological speech, *Miami Herald v. Tornillo*, 418 U.S. 241, 254-58, 94 S. Ct. 2831, 2838-40 (1974) (holding that a newspaper may not be compelled to publish replies to stories by political candidates); *West Virginia v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943) (holding that school children may not be compelled to participate in a flag salute ceremony), but also financial activities such as charitable fund-raising. *Riley v. National Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 2677 (1988) (holding that professional fund-raisers may not be required to disclose the percentage of funds turned over to charity).

In light of the freedom to refrain from speaking, the United States Supreme Court has recognized that individuals and corporations may not be compelled to use their property or resources to advance the ideological views of others. *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20, 106 S. Ct. 903, 914 (1986) (holding that a regulatory commission may not compel a utility to include its environmental opponents' statements in its customer newsletter); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977) (holding that a person could not be compelled to display an objectionable state motto on their license plate).

The United States Supreme Court has departed from these principles in only one case involving compelled commercial speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130 (1997), involved a challenge to a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. The order required all California growers of nectarines, plums, and peaches to make financial contributions to a common fund used to produce generic advertising extolling the benefits of "California Summer Fruits." The advertising was intended to promote the common interest of all producers of these fruits, and the Court "presumed" that all the producers agreed with the central message conveyed by the generic advertising. Rather than employing the *Central Hudson* test as the United States Court of Appeals for the Ninth Circuit had done, the *Glickman* Court determined that the challenged marketing order did not infringe the grower's First Amendment rights because (1) it was part of a pervasive governmental regulatory scheme that had replaced competition with collectivization for the benefit of the producers, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 475-76, 117 S. Ct. at 2141, (2) it did not prevent the producers from doing their own advertising, (3) it did not require the producer to engage in any actual or symbolic speech, and (4) it did not compel the producer to endorse or to finance any political or ideological speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 469-70, 117 S. Ct. at 2138.

The *Glickman* Court considered the entire agricultural program as an economic regulation established by Congress that enabled competing agricultural producers to participate in joint ventures for their common benefit. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 476, 117 S. Ct. at 2141-42. Thus, it viewed the financial assessments for common advertising simply as the price the competing producers had to pay for the benefit of being protected from free competition in the marketplace.

The majority's decision in *Glickman v. Wileman Bros. & Elliott, Inc.* has not been without its critics, including four members of the United States Supreme Court. *Leading Case, Commercial Speech–Compelled Advertising*, 111 Harv. L. Rev. 319 (1997). The United States Court of Appeals for the Sixth Circuit has held that the *Glickman* holding applies only when the industry involved is no longer part of the free market because it has been "fully collectivized" by the government and the challenged regulation does not compel political or ideological speech. *United Foods, Inc. v. United States*, 197 F.3d at 224. Accordingly, the United States Court of Appeals for the Sixth Circuit invalidated a federal program requiring mushroom producers to contribute funds to a regional advertising program because no other part of the mushroom business was collectivized or regulated. *United Foods, Inc. v. United States*, 197 F.3d at 224-25.

Following the reasoning of the United States Court of Appeals for the Sixth Circuit in *United Foods, Inc. v. United States*, I would find that the *Glickman* decision does not apply to the local telephone markets in Tennessee because the government is no longer protecting the local telephone service providers from competition. To the contrary, both the state and the federal governments are marching in the opposite direction – to return free competition to the local telephone market. In addition, nothing in the current state or federal regulatory scheme smacks of the sort of "collectivization" that is the earmark of the marketing program upheld in *Glickman*. Accordingly, the TRA's order must be tested against the constitutional standards normally applicable to compelled speech cases.

There is no question that BAPCO and BellSouth Telecommunications, Inc. have a constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors. Thus, the TRA's March 19, 1998 order can be upheld only if the TRA has some compelling justification for its order. I find no such justification in this case. Even if promoting competition in accordance with Tenn. Code Ann. § 65-4-123 could be considered a compelling justification, the TRA's order is more extensive than necessary to advance that interest.[9]

What purpose does placing the names and logos of BellSouth's competitors on the cover of the white pages telephone directory serve? Does it promote the ability of the public to identify the local telephone service providers who serve the calling area covered by the directory? There is little direct evidence in this record that it does. What the record does demonstrate is that providing this information on the cover of the directory would simply be redundant because similar information in much more detail is already included in the directory itself. For example, the cover of the current white pages directory for Greater Nashville contains a statement that the directory contains customer listings for all local telecommunications companies. The "Customer Guides" section at the beginning of the directory contains the names of all the local telephone service providers, as well as their telephone numbers to establish service, to arrange for repairs, or to obtain billing information.

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[9] The *Central Hudson* test is generally applied when the government is attempting to regulate or prohibit commercial speech. It has not been used in compelled speech cases. However, I would reach the same result using that *Central Hudson* test because the TRA's order is more extensive than necessary to promote competition in the local telephone markets.

Thus, even without the names and logos on their covers, BellSouth's white pages directories provide material assistance to anyone attempting to identify local telephone service providers in the particular local calling area covered by the directory.

Based on the record, I conclude that AT & T's demand that its name and logo appear on the cover of the white pages directory prepared by BAPCO for BellSouth Telecommunications, Inc. was motivated by a desire to increase the public awareness of its brand without incurring the expense of a marketing campaign. By forcing BAPCO to place its name and logo on the cover of BellSouth's white pages directories, AT & T can take advantage of the wide distribution of the BellSouth directories without bearing the expense associated with their distribution. Permitting AT & T to be a free rider in the name of promoting competition goes too far for constitutional purposes.

WILLIAM C. KOCH, JR., JUDGE