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February 12, 2002

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*
Docket No. 01-00362

Dear Mr. Waddell:

This is to notify the Authority and parties that BellSouth expects to file the flow-through report and supporting documentation regarding Interrogatory No. 36 on Thursday, February 21, 2002. If this expected filing date changes, BellSouth will notify the Authority and parties immediately.

As indicated during the discussion in the agenda conference on February 5, 2002, the data for February 2001 is not expected to be available. We will file an explanation of the reasons for that at the time of the filing.

At the agenda on February 5, Director Greer indicated that he expected BellSouth's work papers to be filed with the response to Interrogatory No. 36. Director Greer indicated that he wanted this done so that no further discovery would be necessary in order to address BellSouth's response. If it was Director Greer's intent that the Authority's staff would be able to replicate the results that BellSouth will file, there are some issues that need to be addressed, so that we will know how to proceed.

According to BellSouth's experts in this area, reports like this are prepared by running special software programs against specific databases. In the case at hand, the database will span approximately 12 to 15 DLT-type computer tapes (roughly 636 to 795 standard CDs). Furthermore, in order to run the programs against the databases, specific additional kinds of software are required, software that BellSouth has, but that has only been tested on the specific kind of hardware platform BellSouth currently uses for this work. In other words, the software necessary to run these programs has only been used and tested with the specific types of computers that BellSouth utilizes.

To be more specific, our experts inform us that the database platform is Informix, and the code is written in a legacy language called Informix-4GL. This code and database run on a Sun 16CPU 8GB RAM Model E6000. To read the database tapes, a DLT-compatible drive technology is required, and the Informix's database loader programs are required. The Authority has not specified specific file formats for this data, so we are planning to provide this data using the native file formats used by the database software and platform, unless otherwise directed.

I realize that I am providing some very detailed information here, and we will be happy to have our information technology personnel discuss the specifics with the TRA's staff or information technology personnel. My point in raising this now, however, is to respectfully request that if the TRA does not intend, or cannot run the program or programs because of hardware and software limitations in the systems you have available, that you excuse us from copying the database in question to tape, which takes some time and is somewhat expensive.

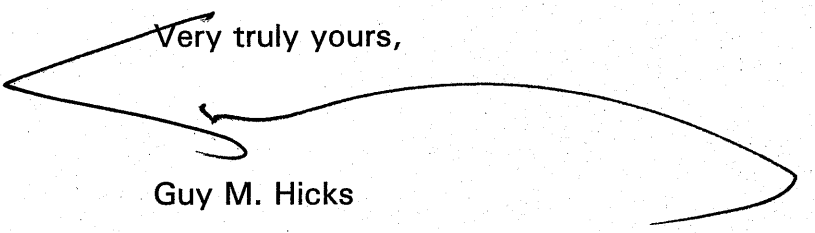
These data tapes, by the way, if produced will contain all of the information BellSouth has received from all the LSRs submitted to BellSouth by CLECs across the region. Consequently, we expect that the other CLECs in the region would object to AT&T and SECCA having this CLEC-specific information. We therefore respectfully request that the TRA provide direction to BellSouth in this regard as well. To put a point on the matter, BellSouth does not believe that it should turn this CLEC-specific database over to AT&T and SECCA unless the TRA directs us to do so, in which case we will be happy to comply.

Other than these issues, we are collecting the information that reflects what our people have done (and continue to do, as we are not finished with the project)

to obtain this information for the TRA and we will provide that to the TRA and the other parties in this proceeding.

A copy of this letter is being provided to counsel of record.

Very truly yours,



Guy M. Hicks

GMH:ch

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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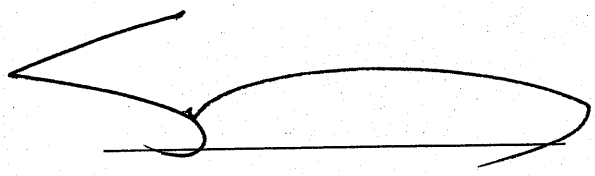

01-00362 124

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February 13, 2002

VIA HAND DELIVERY

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

Dear Mr. Waddell:

01-00362

Enclosed are the original and thirteen copies of BellSouth's Brief Regarding Imposition of Penalty Pursuant to Tennessee Code Annotated § 65-4-120 in the above-referenced proceeding. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH/jej

Enclosure

433872

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

Docket No. 01-00362

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING IMPOSITION OF PENALTY PURSUANT TO TENNESSEE CODE ANNOTATED § 65-4-120

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to notice issued by the Tennessee Regulatory Authority ("TRA"), files this Brief Regarding Imposition of Penalty Pursuant to Tennessee Code Annotated § 65-4-120. For the reasons discussed below, BellSouth respectfully urges that no sanction can or should be assessed pursuant to T.C.A. § 65-4-120 under the circumstances presented in this case.

BRIEF OVERVIEW OF PROCEDURAL HISTORY AND GENERAL COMMENTS

As discussed more fully in BellSouth's Motion for Reconsideration, this matter arises out of an interrogatory ("Interrogatory 36") served on BellSouth[1] seeking information that BellSouth does not report in the ordinary course of its business. The information sought, which has been termed the "flow-through report," consists of flow-through rates for CLEC orders in each of the various states in BellSouth's region.

It is uncontested that BellSouth does not, in the ordinary course, create the flow-through report sought by AT&T and that it would be necessary for BellSouth to manufacture such a report in order to provide it. No one has ever contended that

[1] The Interrogatory was served on BellSouth by AT&T Communications of the South Central States, Inc., TCG MidSouth, Inc., and the Southeastern Competitive Carriers Association (collectively "AT&T").

BellSouth had a flow-through report in its possession and was refusing to turn it over. Rather, the entire dispute at issue with respect to the flow-through report is whether BellSouth can be required to manufacture such a report and, if so, the appropriate amount of time BellSouth must be afforded to comply with that request.

BellSouth has a number of arguments, discussed in detail below, bearing on the appropriateness of the TRA's apparent intent to sanction BellSouth. In addition to those arguments, there is a fundamental issue of fairness and overarching due process that BellSouth wishes to highlight for the TRA, as a threshold matter.

BellSouth would not intentionally and knowingly violate an order of the TRA. If it had the material requested, BellSouth would have produced it promptly. In this case, however, the Pre-Hearing Officer has ordered BellSouth to produce a report that BellSouth does not have, in a time period BellSouth could not meet. Sanctioning BellSouth for failing to meet an impossible deadline is more than unfair; such an action deprives BellSouth of the substantive due process to which it, and anyone else appearing before the TRA, is entitled.

To fully appreciate this point, the place to begin is at the end, in the Pre-Hearing Officer's order dated December 31, 2001. In that Order, the Pre-Hearing Officer concluded that BellSouth had inflated the time necessary to respond to the request, finding instead that BellSouth was capable of responding in 45 days. (December 31 Order at page 9). Indeed, in that Order, the Pre-Hearing Officer challenged several of the time frames set out by BellSouth's witness on this matter. The bottom line, however, is that, based on the December 31 Order, even the Pre-Hearing Officer must be understood to have concluded that 45 days was a reasonable time within which to

respond to the request. Had the Pre-Hearing Officer believed otherwise, then, presumably, he would have selected a shorter time, consistent with his understanding of the evidence.

From that point, the determination of the Pre-Hearing Officer in this case was that 45 days was the appropriate time to allow BellSouth to produce the requested information (a period BellSouth obviously disagrees with). Starting from that premise, one must consider the various directives and orders to produce this material identified in the TRA's Notice of Complaint and Hearing, dated February 5, 2002, which the TRA has identified as orders on which it will consider basing sanctions. Specifically, BellSouth is in effect being called upon to show cause[2] why it should not be sanctioned for its failure to comply with the Pre-Hearing Officer's earlier directives to supply the report in a fraction of the 45-day period ultimately reached. For example, assuming that the November 8 directive was intended to require the production of the report, if technically feasible, and that the November 14 and November 21 orders were intended to require the production of the material by November 20 and November 29 respectively, none of those orders allowed nearly the 45 days of time that the Pre-Hearing Officer, in his December 31 order, found appropriate. Stated simply, even using the Pre-Hearing Officer's 45-day time period as the standard, it was literally impossible to produce the material in the time contemplated by the discussion on November 8, the written order of November 14, or the written order of November 21. Moreover, even assuming for sake

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[2] While at least one of the Directors indicated at the February 5 hearing that a show cause proceeding would be commenced, no such show cause complaint was issued. Accordingly, BellSouth does not understand this to be a show cause proceeding established by T.C.A. § 65-2-106.

of argument that 45 days was indeed a reasonable time in which to produce the material, it was impossible to produce the material by December 3, the beginning of the regionality hearing for which this material was supposedly relevant.[3]

Given these circumstances, BellSouth should not, and cannot, be sanctioned for not accomplishing the impossible. Where the evidence, even viewed in the light that the Pre-Hearing Officer has cast that evidence, demonstrates that compliance was impossible, sanctioning BellSouth for the failure to accomplish the impossible cannot withstand any impartial review.

In addition to the three instances described above, the TRA has also addressed sanctioning BellSouth for its failure to obey the December 3 oral directive of the Pre-Hearing Officer requiring production by January 18 (45 calendar days) and the December 31 Order also requiring production by January 18.

The question with regard to these orders, if they were lawful and legally enforceable in the first instance, is whether the 45-day period provided for preparation of the flow-through report was reasonable, or even doable.

While the TRA is certainly entitled to due deference with regard to the matters that fall within its expertise, in this instance the decision has been made by a single Director, not the TRA, and involves a matter related to information processing and computer programming, not matters within the scope of the expertise of an agency charged with regulating utilities.

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[3] BellSouth notes that counsel for AT&T conceded in an exchange with the Pre-Hearing Officer, that the material could perhaps be used in a later phase of this docket, further obviating the necessity or urgency of producing the information on an accelerated schedule. December 3 Transcript, Volume IB, at 184, lines 11-16; 186, lines 14-19.

There can be no presumption under Tennessee law that a single Director, or for that matter the TRA itself, is clothed with any special knowledge or insight regarding an issue that turns solely on matters of computer programming, information processing, or information technology. While an administrative agency can expect a court to defer to the agency in matters that fall within the agency's expertise, this is not such a circumstance. Specifically, neither the Pre-Hearing Officer nor the TRA can substitute its own judgment that, if one programmer can do a task in 28 days, two programmers can do the same task in 14 days, for actual evidence demonstrating such a conclusion. There is absolutely no basis in this record or in fact for such a conclusion, and this matter was directly addressed by the only witness in this proceeding competent to comment on such a matter. While the TRA may feel that it does not have to accept the sworn uncontradicted testimony of an expert, the orders of the TRA must demonstrate a rational connection between its conclusion and the evidence before it. Moreover, on a matter that so clearly is beyond the scope of its expertise, the TRA's own judgment is due no deference.

In such circumstances, fundamental fairness and due process dictate that the record must reflect substantial evidence to support the Pre-Hearing Officer's order in order for it to be valid. In this case there simply is not any such evidence. Even if the Pre-Hearing Officer disbelieved every single word uttered by Mr. Saville, which disbelief BellSouth submits would have been unreasonable, there is no evidence in the record as to the time necessary to produce the requested material. Accordingly, the 45-day period selected by the Pre-Hearing Officer lacks any evidentiary support and is arbitrary.

Indeed, this is precisely why BellSouth sought review by the entire TRA, for which no written order has yet been entered.

BellSouth regrets the position that it finds itself in, and regrets even more that a majority of the TRA or the Pre-Hearing Officer has apparently concluded that BellSouth has disobeyed lawful orders of the TRA. BellSouth is well aware that it is subject to the jurisdiction of the Authority, and that it is obligated to comply with lawful orders of the Authority. BellSouth endeavors to comply with such orders in every instance and believes it did so in this instance, although BellSouth is cognizant that individual Directors may disagree in whole or part. BellSouth has been placed in the tenuous position of choosing whether to forfeit its fundamental legal rights on the one hand or risk being labeled as an obstructionist for pursuing those rights faith on the other hand. This untenable choice unfortunately arises out of controversy over an interrogatory, which was not propounded in any of the other eight BellSouth states in which this matter was tried. BellSouth respectfully suggests that the dispute over the time required to respond to the interrogatory has been blown far out of proportion, sadly being perceived as a "test of wills." BellSouth regrets this progression and certainly has no desire to engage in such a test. BellSouth respectfully urges, however, that this is simply not an appropriate case in which the TRA may lawfully exercise its authority to sanction BellSouth.

ARGUMENT AND LEGAL AUTHORITY

There are a number of legal reasons, beyond the practical ones just discussed, that BellSouth should not, and cannot, be sanctioned under these circumstances. The

arguments are presented in no particular order, and any of the arguments standing alone presents sufficient reason to refrain from imposing sanctions in this case.

I. Compliance with Directives to Produce the Flow-Through Report in 45 Days Or Less Was Not Possible and Sanctioning BellSouth Under These Circumstances Would Be an Abuse of Discretion.

As noted above, BellSouth could not comply with any of the orders directing BellSouth to produce the report at issue within the time set forth in the specific order. The impossibility of compliance with the Pre-Hearing Officer's orders to produce the material requested, renders imposition of sanctions in this case an abuse of discretion.

BellSouth presented witness testimony from Mr. James Saville concerning the amount of time required to produce a flow-through report in response to Interrogatory 36. Mr. Saville's testimony was the only ***evidence*** in this docket addressing the ***amount of time*** that would be required to produce the document. As discussed at the Director's Conference on Tuesday, February 5, 2002, the Pre-Hearing Officer rejected Mr. Saville's testimony and, instead, entered an order requiring production of the document in half the time that Mr. Saville testified he had estimated would be required. Director Greer noted at the February 5 hearing on BellSouth's Motion for Reconsideration of the Hearing Officer's Order that:

> "the Authority is not legally bound to unconditionally accept [Mr. Saville's] testimony. Based on the Authority's expertise, Directors[4] agreed at the time that 45 days was a more reasonable time frame than the 90 days proposed by BellSouth."

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[4] While Director Greer characterized the decision as one made by "the Directors," it is clear from the transcript of the December 3 hearing, and from the order of December 31, that the decision was made by the Pre-Hearing Officer, and not by the Directors.

As noted above, while BellSouth concedes the Authority's expertise on many matters related to telecommunications, BellSouth respectfully asserts that the Authority possesses no inherent special expertise with respect to the time required to perform the computer programming and testing necessary to capture the underlying data and produce the flow-through report at issue in this case. The substitution of 45 days, in contrast to the 90 days estimated by the only witness to testify with respect to the time required for this process, was not supported by evidence in the record. As explained in BellSouth's Motion for Reconsideration, it was simply not possible for BellSouth to produce the flow-through report under the shortened timetable, and no evidence was submitted contradicting that position.

While the Authority is, as noted by Director Greer at the February 5 Directors' Conference, "not legally bound to unconditionally accept" the testimony of a particular witness, the Authority is not permitted to establish a time frame in which BellSouth is to act or face sanctions, in the absence of any evidence to support that number. Rather, T.C.A. § 4-5-322(b)(h) establishes that agency findings unsupported by evidence are subject to reversal. *See also Coastal Tank Lines v. ICC*, 690 F.2d 543 (6th Cir. 1982) (noting that agency must articulate a rational connection between facts found and choice made and post hoc rationalization of unsupported decision is insufficient to establish that agency did not act arbitrarily).

Imposition of sanctions in response to a party's inability to satisfy an impossible directive is patently unfair and offends standards of fair play required by due process. Courts, for instance, are imbued with inherent discretion to enter orders and sanctions for discovery violations, but even courts lack completely unfettered discretion to

sanction parties for noncompliance with discovery orders. Among the limitations on trial courts in the exercise of discretion regarding discovery sanctions is the common-sense requirement that parties should not be sanctioned for their non-compliance when compliance is impossible. *See, e.g., Mendelson v. Feingold*, 387 N.E.2d 363 (Ill. App. 1979) (finding that party could not be ordered to produce something that did not exist, and, therefore, party could not be sanctioned for failure to comply with such order); *Dorsey v. Academy Moving & Storage*, 423 F.2d 858 (5th Cir. 1970) (holding that it was error to impose sanction on party where failure to produce documents by date required was due to factors beyond parties control and where no showing was made that party was able to supply records or that failure was willful or in bad faith); *B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411 (5th Cir. 1964) (finding that trial court erred when it sanctioned party for failure to obtain written answers when it was physically impossible for party to obtain such answers); *Wiebusch v. Taylor*, 422 N.E.2d 875 (Ill. App. 1981) (noting that discovery sanctions are to be imposed only when noncompliance is unreasonable).

Clearly if it is an abuse of a court's discretion to sanction parties under the circumstances discussed in the referenced cases, it would be an equal abuse of the TRA's authority to sanction BellSouth under these circumstances, based on the facts in this record. There is absolutely no evidence to support an assertion that BellSouth could have complied with those directions. Under these circumstances, because the orders did not tell BellSouth to produce the requested information at the appointed time "or as soon thereafter as was reasonably possible," compliance with the orders was impossible and therefore, under the authority cited, no sanctions can be imposed.

II. T.C.A. § 4-5-311(b), not T.C.A. § 65-4-120, Governs the Agency's Power to Address Disobedience of a Lawful Agency Requirement for Information.

Even if sanctioning BellSouth under these circumstances would not constitute an abuse of discretion, the TRA does not have the authority under T.C.A. § 65-4-120, to impose sanctions under the facts presented here, which is a simple discovery dispute.

While the TRA is permitted, pursuant to T.C.A. § 65-2-111, to appoint a hearing examiner to conduct a contested case proceeding or any portion thereof, the TRA must follow the provisions of Tennessee law with respect to the power of such hearing officers. In this regard, Tennessee law establishes a specific procedure to be followed in the event that a hearing officer's order requiring the supplying of information is disobeyed. Pursuant to T.C.A. § 4-5-311(b), in case of disobedience to a lawful agency requirement for information, the agency may apply to the Circuit or Chancery Court for an order to compel compliance or the furnishing of information or giving of testimony. Pursuant to that section, it is the court's duty to determine whether the person's disobedience is unlawful, not the hearing officer or even the TRA. Pursuant to the provisions of Section 4-5-311, ***only the court***, and not the agency or its hearing officer, can issue an order requiring compliance, and disobedience of such a court order is to be punished, ***by the court,*** as contempt of court.[5]

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[5] Specifically, T.C.A. § 4-5-311(b) provides: In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify in any matter regarding which such person may be interrogated lawfully in a proceeding before an agency, the agency may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith, the court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the court shall enter an order requiring

Where the General Assembly has made a specific provision to govern a situation, the TRA cannot resort to a more general statute to avoid the application of the specific statute. *See, e.g., Lucius v. City of Memphis*, 925 S.W.2d 522 (Tenn. 1996) (noting that, where there is a conflict between a special statute and a general, the special is applied); *In re Harris*, 849 S.W.2d 334, 337 (Tenn. 1992) (same); *State v. Black*, 897 S.W.2d 680, 683 (Tenn. 1995) (same); *Washington v. Robertson County*, 29 S.W.3d 466, 475 (Tenn. 2000) (same). Consistent with this well-settled rule of statutory construction and application, the TRA cannot side step the specific procedure established by Section 4-5-311(b) by ignoring it and resorting instead to the more general Section 65-4-120. To do so would render Section 4-5-311(b), at best, merely optional and, at worse, practically meaningless. Indeed, attempting to use Section 65-4-120 to sanction BellSouth in this instance would constitute an end run around the requirements of T.C.A. § 4-5-311(b), which provide for an impartial, timely review by a court of the reasonableness and lawfulness of the orders in question.

The provisions of Section 4-5-311(b) are consistent with Tennessee law governing the power of administrative agencies to obtain information relating to agency proceeding by civil process. In *Dept. of Rev. v. Moore*, 722 S.W.2d 367 (Tenn. 1986), the Tennessee Supreme Court considered issues arising from the efforts of an administrative agency to obtain information relating to an agency proceeding using an investigative subpoena. The Supreme Court observed that, while agencies are often empowered to investigate, "legislative authorization of civil investigative process does

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compliance. Disobedience of such order shall be punished as contempt of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.

not exceed constitutional limitations as a general rule." *Id.* at 372. The Court went on to discuss the necessary constitutional limitations on such investigatory process, observing that, "while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain ***judicial review*** of the reasonableness of the demand ***prior to suffering penalties for refusing to comply.***" *Id.* at 373 (emphasis added).

This rule, requiring an opportunity for judicial review ***before*** suffering sanctions, imposes a necessary constitutional check on the power of the agency. Consistent with this rule, pursuant to T.C.A. § 4-5-311(b), before suffering sanctions, BellSouth should be afforded the opportunity to present its arguments regarding the production of the flow-through report to a judicial officer, who will decide the issue and enter an order. The court's order can in turn be enforced, pursuant to the statute, by a contempt sanction entered by the court.

T.C.A. § 4-5-311(b) provides for precisely the type of judicial review discussed by the Tennessee Supreme Court in the *Moore* decision. Section 4-5-311(b) has been modeled by the General Assembly specifically to address discovery disputes arising in agency proceedings, and its provisions balance the procedural needs of the agency with the constitutional due process protections addressed in *Moore*. In contrast, T.C.A. § 65-4-120 is a general provision, which, as discussed below, is applicable only to orders of the Authority, not orders of a hearing officer. To ignore the provisions of the specific statute in favor of the more general in this case would offend dual legal principles: First, it would violate the well-established rule that where a more specific statute exists, one

may not act under the general. Second, it would fly in the face of the due process concerns raised in *Moore* and preserved by Section 4-5-311(b).

III. T.C.A. § 65-4-120 is Inapplicable to the Disobedience of a Hearing Officer Discovery Order.

While it is clear that the remedy that should have been pursued if the Pre-Hearing Officer actually believed that BellSouth was in violation of his discovery orders is controlled by T.C.A. § 4-5-311(b), there is another compelling reason why sanctions should not and cannot be imposed upon BellSouth in this instance under T.C.A. § 65-4-120.

The plain language of Section 65-4-120 establishes its application only to the violation or failure to comply with a requirement of "the authority." The order of a single Director sitting as a pre-hearing officer is clearly not the "authority" for purposes of the statute. In this regard, the TRA, the authority within the plain language of the statute, has issued no order that BellSouth is accused of violating.[6]

It is well settled under Tennessee law that the plain meaning of words used in a statute are to be attributed to those words unless something indicates to the contrary. In this case, Section 65-4-120 uses the word "authority." The word "authority" is defined in § 65-2-101 to mean the "Tennessee Regulatory Authority." Section 65-2-111, on the other hand, clearly provides in pertinent part that "the authority may direct that the proceedings or any part thereof shall be heard by a hearing examiner to be appointed by the authority . . . ." Therefore the legislature clearly contemplated that a

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[6] Indeed, BellSouth sought the intervention of the entire TRA in this matter and the February 5 Notice of Complaint and Hearing does not reference the TRA's February 5 vote, which has not yet been entered as a written order, as an item on which it is considering basing sanctions.

distinction existed between the authority, which it defined as the Tennessee Regulatory Authority, and hearing examiners. If the legislature had intended that Section 65-4-120 would also apply to orders of hearing examiners, it could have said so.

Of course, it is not only Tennessee law that distinguishes between the TRA and its hearing officers. The TRA itself clearly distinguishes between the "Authority" and a hearing officer. For example, the TRA's rules specifically provide that any party that wishes to have a preliminary decision of a hearing officer reviewed by the Authority can ask for such review pursuant to TRA Rule 1220-1-2-.06. Clearly, because the TRA has reserved itself the authority to review a hearing officer's order, the order of a hearing officer is not the "order of the Authority." Moreover, TRA Rule 1220-1-2-.17 also specifically distinguishes between orders of the Authority and orders of the hearing officer. Even the various orders at issue in this sanction proceeding recognize that the Pre-Hearing Officer alone could not sanction BellSouth without review.[7]

At bottom, none of the various orders and directives set forth in the Authority's Notice of Complaint and Hearing constitutes an order of the Authority for purposes of T.C.A. § 65-4-120.[8] Therefore, BellSouth cannot be sanctioned for allegedly violating any of those "orders."

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[7] *See* "Order Denying Motion to Clarify and Compelling Discovery" dated November 21, 2001 at page 6 (noting that Pre-Hearing Officer would refer to Directors to consider sanctions).

[8] Moreover, as discussed above, even if the Authority had ordered the production of information, disobedience to such an order is governed by Section 4-5-311(b), which requires resort to a court and does not permit the Authority to sanction.

IV. In the Present Case, Directives of the Pre-Hearing Officer Were Never Entered as Orders Compliant with Section 65-2-111.

The next issue is whether any of the items identified in the February 5, 2002 Notice of Complaint and Hearing are legally valid and enforceable. Those items can be broken into two classifications, "orders" that were issued orally and orders that were reduced to writing.

With regard to the first class of "orders," those that were orally issued, such "orders" are not valid and legally enforceable orders that BellSouth can be sanctioned for allegedly violating. Hearing Officers are not authorized to issue oral orders, but rather are required to reduce their orders to writing, which writing must, under Tennessee law, contain findings of fact and conclusions of law upon which the order is premised.[9] *See* T.C.A. § 65-2-111.

The authority of a hearing officer to issue orders is defined by the applicable statutes. The statute that authorizes the use of hearing officers in the first instance is an appropriate starting point. No state agency, including the TRA, is authorized to appoint hearing officers without express statutory authority. *Cavallo v. University of Tennessee*, 1190 Tenn. App. LEXIS 252 (copy attached). As established in *Cavallo,* the

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[9] BellSouth will agree that a hearing officer, like the TRA itself, has the inherent authority to regulate the conduct of hearings as they occur. BellSouth notes that it is not at all clear what the remedy would be for violating an oral order of a hearing officer regarding the conduct of a hearing, such as a situation where an attorney or witness refused to comply with an oral order to cease speaking. However, that issue is not presented here. Here we are dealing with substantive orders requiring future conduct not occurring in the immediate presence of the hearing officer. It is clear that, whatever inherent authority is possessed by the TRA or its appointed Pre-Hearing Officer, the bounds of such "inherent" authority are defined by the explicit requirements of statutes passed by the General Assembly. Where, as here, the General Assembly has defined the remedy for disobedience to an order regarding discovery, there can be no "inherent" authority to disregard that procedure in favor of another.

power to appoint hearing officers is not inherent in an administrative body. Rather, the TRA's authority with regard to the appointment of hearing officers and what such hearing officers can do, is defined by the authorizing statute. When such power is granted to an agency, then the next question regarding the hearing officer's authority is answered by the Tennessee Administrative Procedures Act, T.C.A. Chapters 4-5.

Turning first to the TRA's statute, the TRA is authorized to appoint a hearing examiner to hear all "or any part thereof" of a contested case. T.C.A. § 65-2-111. BellSouth does not dispute that this statute authorizes the use of a hearing officer by the TRA to hear all or "any part" of a contested case. However, Section 65-2-111 imposes specific requirements on hearing examiners appointed by the Authority. To this point, that statute explicitly requires that whenever a contested case or any part thereof is heard by a hearing examiner, the hearing examiner "shall" make a proposal for decision in writing, which shall include findings of fact and conclusions of law made by the hearing examiner. Accordingly, pursuant to the provisions of this statute, a hearing officer is not empowered to make substantive orders from the bench or to issue orders that lack written findings of fact and conclusions of law. Moreover, it is clear from the provisions of the statute that the hearing officer's orders are to be reviewed by the Authority upon consideration of the record prior to the entry of a final order on behalf of the Authority, in conjunction with whatever matter the TRA has chosen to entrust to the hearing officer.

There is no other authority authorizing an oral order by the Hearing Officer that resolves any part of proceeding that has been entrusted to the hearing officer by the TRA. There is nothing in Chapters 4-5 that authorizes oral orders, as opposed to oral

statements by a hearing officer that are subsequently reduced to writing. In the absence of such authority, the hearing officer is obligated to reduce his findings of fact and conclusions of law to writing before they can become effective, and even in that instance it is the TRA's responsibility to review such orders upon request of an aggrieved party before such orders can become final. Those requirements have not been satisfied in this case. As a consequence, the Hearing Officer's "oral orders" of November 8 and December 3, are not legally enforceable orders, becoming such only when they were reduced to writing, setting forth findings of fact and conclusions of law upon which a review could be had. As a result, BellSouth cannot be sanctioned for supposedly violating these "orders."

This conclusion is not inconsistent with the decision of the Tennessee Court of Appeals in *Consumer Advocate Division v. Nashville Gas, et al.*, 1998 Tenn. App. LEXIS 428 (copy attached). The *Nashville Gas* case has no bearing in this proceeding. While the Tennessee Court of Appeals clearly did find that the TRA could issue legally enforceable oral orders, that finding was based upon the language of Section 65-2-112, which specifically authorizes the "authority" to issue orders that are merely "stated in the record." However, that section, by its terms, only applies to oral orders of the Authority, and then only when the order is a "final" order. It says nothing about orders of hearing officers. Finally, even that section requires that the oral orders issued by the Authority have to contain "a statement of the findings of fact and conclusions of law upon which the decision of the authority is based."[10] Nothing in the Pre-Hearing

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[10] Moreover, in the *Nashville Gas* case, the Court of Appeals explicitly noted that it did not express opinion regarding whether the oral decision at issue in that case

Officer's orders of November 8 and December 3 could fairly be described as findings of fact or conclusions of law, and indeed what was said from the bench orally on December 3 did not articulate any of the rationale contained in what was written on December 31.

This then leaves the question of whether BellSouth can be sanctioned for violating the written orders of the Pre-Hearing Officer. Pretermitting for the moment the issue of whether Section 65-4-120 applies to such orders, the answer is still that no sanction can be imposed for supposedly violating those orders.

First, consider the Pre-Hearing Officer's order of November 14, which ordered BellSouth to produce the report involved in this matter by November 20. To the extent that this order, which was issued on November 14, but actually not received by BellSouth until November 16, purports to require BellSouth to do something by November 13, compliance was, obviously, impossible. Moreover, the Pre-Hearing Officer has himself held that BellSouth did not violate the November 14 Order. Specifically, in a November 21 order, the Pre-Hearing Officer stated: "The Pre-Hearing Officer recognizes that BellSouth did not receive the November 14th Order until November 16, 2001 and therefore, does not find BellSouth in violation of that Order for its failure to provide the requested information by November 20, 2001." Clearly, BellSouth cannot be sanctioned for violating the November 14 order, given that the Pre-

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complied with the statutory mandate that the orders of the agency contain a statement of the findings of fact and conclusions of law upon which the decision was based. *Id.* at *9-10. The case went on to reiterate the necessity of such findings and conclusions, citing *Levy v. State Bd. of Examiners for Speech Pathology and Audiology*, 553 S.W.2d 909 (Tenn. 1977).

Hearing Officer himself found no violation of that order with regard to its instruction that certain information be filed by November 20.

The next written order was one issued on November 21, addressing BellSouth's request to clarify the Pre-Hearing Officer's written order of November 14. BellSouth filed its response to that order on the appointed day, November 29, in which it attempted to explain that it did not have the information sought, and to explain why it was technically infeasible to produce the report in question in the time allotted by the Pre-Hearing Officer. Indeed, this was the matter taken up by the Pre-Hearing Officer, during the proceeding on December 3, when BellSouth presented evidence in support of its position that the material could not be produced as requested. As noted above, instead of the entire TRA considering the matter, however, even though the TRA sitting as a body heard the evidence that demonstrated that BellSouth could not comply with the Pre-Hearing Officer's orders, it was the Pre-Hearing Officer that issued an oral ruling without first making a motion for vote by the Directors, requiring BellSouth to produce the report requested in 45 days.

That then leaves only the final written order of the Pre-Hearing Officer, issued December 31, 2001. BellSouth has already discussed the impossibility of complying with that order, even if it were otherwise valid. How can BellSouth be sanctioned for violating the December 31 order, which, if the order was valid and effective on December 31, gave BellSouth 18 days to do something the Pre-Hearing Officer had already determined would take 45 days. Moreover, upon receipt of that order, BellSouth sought review of the order by the TRA. On February 5, that motion was deliberated and, the Directors voted 2-1 to deny BellSouth's motion for reconsideration of the

January 18 due date. No written order articulating findings of fact and conclusions of law has been issued, and the Directors articulated no such findings of fact or conclusions of law regarding the matter. Even if the Directors' actions could be construed as an oral order within the meaning of T.C.A. § 65-2-112, the Authority did not comply with the law as interpreted by the Court of Appeals in the matter cited above.

Clearly in such circumstances, no impartial trier of the case could or should conclude that BellSouth should be sanctioned based on an alleged violation of the December 31, 2001 order, as compliance was simply not physically possible, even accepting for sake of argument, the 45-day period as doable.

V. Failure to Comply with the Pre-Hearing Officer's Order Regarding the Timetable for Production of the Flow-Through Report Did Not Prejudice Any Party.

One of the more interesting aspects of this entire episode is that this all originated with an interrogatory submitted by AT&T. However, AT&T did not consider this information so vital and necessary to its case that it even sought to delay the hearing in order to first obtain the flow-through report. No doubt, this failure to request a delay was due to reasons that were clear from AT&T's testimony on the last day of it's witnesses' testimony in this matter. Additionally, in questioning by the Directors, counsel for AT&T conceded the possibility that the information contained in the flow-through report could be utilized in a later proceeding regarding BellSouth's operational support systems. December 3 Transcript, Volume IB, at 184, lines 11-16; 186, lines 14-19. Moreover, counsel for AT&T was not able to say definitively whether this same request had been made in similar proceedings in other states suggesting that it was not

a necessary component of the case. *Id.* at 185-86. Accordingly, for all these reasons, no party was prejudiced by the failure of BellSouth to produce the flow-through report on the schedule ordered by the Pre-Hearing Officer. In fact, even assuming that the material could have been produced in 45 days, and assuming that the Pre-Hearing Officer had ordered the production of the material on November 8, that order would still have had the effect of requiring the information to be produced after the conclusion of the hearing. In these circumstances, since the material could not be produced before the hearing in any event, ordering the production of the reports in an inadequate time period served no valid purpose, which makes the requirement even more arbitrary than it otherwise would have been. The point here is that no one has been prejudiced by the timing of the filing of the requested information. Had BellSouth been given the longer period of time which it sought, AT&T would have been in no different position with respect to the ability to use the information at the hearing during the week of December 3. In these circumstances, sanctioning BellSouth cannot be the reasonable outcome of these proceedings.

CONCLUSION

BellSouth would like to conclude where it began: Namely, BellSouth did not intend any disrespect to the Pre-Hearing Officer appointed by the TRA in this matter. To the extent that any of its actions, or inactions, have been or could be construed as a lack of respect for the Pre-Hearing Officer, BellSouth apologizes and reiterates that no such disrespect was intended. While BellSouth stands by its legal arguments presented herein, BellSouth respectfully states that in the ordinary course of events, BellSouth has always endeavored to obey the direction of the TRA, whether such direction was issued

orally or in writing, whether it was done by a hearing officer or by the Authority and irrespective, in most instances, of whether, particularly in the case of discovery, BellSouth believed the request to be enforceable.

Notwithstanding BellSouth's concerns regarding the perception of its efforts in this matter, however, in this case BellSouth believes that no sanctions[11] are appropriate as a matter of law. The TRA is following the wrong process, as dictated by law, in conjunction with attempting to resolve a discovery issue. The procedure dictated by the General Assembly requires the TRA to go to court if it believes an order to produce information has been disobeyed. That procedure has not been followed. Further, the TRA is considering applying a statute that allows sanctions for violation of an Authority order, to an order of a hearing officer, which the law does not allow. Finally, the TRA is considering sanctions for orders that are not final, and that are not legally enforceable. This is simply not the place, time, or proceeding in which to impose sanctions, and BellSouth respectfully requests that the TRA reach that conclusion.

Although BellSouth hopes that its comments will dissuade the TRA from imposing sanctions, in the event that the Authority determines to do so, BellSouth respectfully

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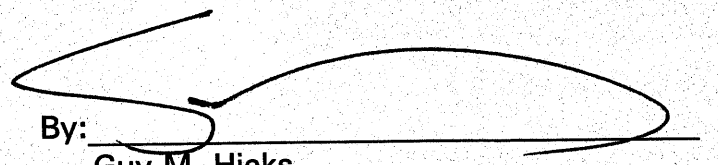
[11] While BellSouth, for the reasons articulated herein, strongly objects to the imposition of any monetary sanction under the circumstances in this case, BellSouth wishes for the purpose of preserving such arguments for appeal to note the following. First, the various orders, directives or comments forming the basis of this proceeding represent a series of instructions with respect to the production of a single item. The various due dates were altered from directive to directive, each supplanting the previous due date. Accordingly, it would be improper for the TRA to issue a sanction based on more than one order to the extent that the numerous orders or directives each addressed the same alleged transgression. Additionally, in calculating the number of days for a sanctions order under T.C.A. § 65-4-120, the TRA must exclude from that count the days on which the TRA was not open because on those days compliance was not possible. Accordingly, Sundays, Saturdays, and legal holidays would necessarily be excluded from any sanctions calculation.

moves the Authority to either stay such order or, in the alternative, to hold any monetary sanctions in a special account until such time as BellSouth can seek judicial review of such an order.[12]

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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[12] BellSouth understands that a sanction would be paid into a fund which the TRA may use to pay for community education efforts. BellSouth merely wishes to avoid the legal issue of whether the TRA is empowered to make a refund from such funds in the event a sanctions order is overturned.

JIMMY W. CAVALLO, Petitioner-Appellant, v. JAMES C. HUNT, CHANCELLOR, THE UNIVERSITY OF TENNESSEE AT MEMPHIS, Respondent-Appellee

No. 11

Court of Appeals of Tennessee, Western Section, at Jackson

1990 Tenn. App. LEXIS 252

April 9, 1990, Filed

PRIOR HISTORY: [*1]

From the Chancery Court of Shelby County at Memphis, Honorable Neal Small, Chancellor.

DISPOSITION: REVERSED AND REMANDED

CORE TERMS: appoint, hearing officer, contested case, chancellor, contested, hearing examiner, appointed, issuance, secretary of state, specifically enumerated, hearing conducted, writ of mandamus, state agencies, affirmatively, authorization, Public Acts, regulations, discipline, conferred, charter

COUNSEL: David Sullivan, Memphis, Attorney for the Petitioner/Appellant.

Beauchamp E. Brogan, General Counsel, Ronald C. Leadbetter, Associate General Counsel, JoAnn C. Cutting, Assistant General Counsel, Attorneys for the Respondent/Appellee.

JUDGES: FARMER, J., TOMLIN, P.J., W.S., HIGHERS, J., concur

OPINIONBY: FARMER

OPINION: FARMER, J.

Petitioner, a terminated University of Tennessee, Memphis employee, appeals from the Chancellor's order denying his petition for issuance of a writ of mandamus or injunctive relief.

Jimmy W. Cavallo ("Cavallo") was employed by the University of Tennessee ("UT") at Memphis as a police officer. On June 20, 1989 Cavallo was notified of his termination of employment at UT based on charges of gross misconduct. Cavallo was advised of his right to a due process hearing to protest his termination and was offered a choice between a hearing conducted in accordance with the University's informal hearing procedures and a formal hearing under the Administrative Procedures Act ("APA"), T.C.A. § 4-5-101 et seq. Cavallo elected to have the hearing conducted in accordance with the provisions of the APA.

Following **[*2]** Cavallo's hearing request, UT Chancellor James C. Hunt initially appointed Dr. Timothy Rogers, an Associate Dean at UT, Knoxville, as an administrative judge, to conduct the hearing. Chancellor Hunt later appointed another university employee, Dr. Francis M. Gross of UT, Knoxville, to serve as a hearing examiner.

Cavallo filed a Petition for Issuance of a Writ of Mandamus and Petition for Issuance of a Temporary Restraining Order and/or Injunction in the Chancery Court for Shelby County, Tennessee seeking to enjoin the conduct of the hearing by the hearing examiner appointed

by Chancellor Hunt and mandate the appointment of a hearing officer through the office of the Secretary of State. Following argument of counsel, the trial court ruled that Chancellor Hunt had lawful authority to appoint an administrative judge or hearing officer to conduct hearings in accordance with the APA.

The sole issue on appeal is whether the trial court erred in dismissing the petition for the issuance of a writ of mandamus on the basis that the chancellor of UT was authorized pursuant to T.C.A. § 4-5-301 (1985) to appoint an administrative judge or hearing officer in a contested case conducted in accordance **[*3]** with the APA.

This issue presents a question of law and this Court reviews questions of law de novo with no presumption for the correctness of the trial court's conclusion of law. Custer v. Custer, 776 S.W.2d 92 (Tenn. App. 1988).

The parties do not dispute the fact that UT must provide, upon request, contested case hearings conducted in accordance with the APA. Under T.C.A. § 4-5-102(3) (1985) a contested case is "a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." T.C.A. § 4-5-301(e) provides that:

Any agency not authorized by law to have a contested case conducted by an administrative judge, hearing officer or similar officer from the agency shall direct that the proceedings or any part thereof be conducted by an administrative judge or hearing officer employed in the office of the secretary of state. (Emphasis added)

Cavallo contends that UT is not authorized by law to appoint an administrative judge, hearing officer or similar officer, but instead must contact the office of the Secretary of State, **[*4]** which appoints an administrative judge or hearing officer to conduct the proceedings. UT asserts that it is authorized by law to appoint one of its employees to act as an administrative judge or a hearing officer to preside over APA contested cases and advances three arguments to support this assertion.

UT first argues that it was created by legislative charter as a "body politic and corporate," Public Acts of 1807, Ch. 64, § 1, with broad corporate powers, including not only specifically enumerated powers but also "all other rights, privileges and powers usually conferred upon Universities." Public Acts of 1839-40, Ch. 98, § 5. UT asserts that this extremely broad grant of general powers, which distinguish UT from unincorporated state administrative agencies, enables the University to function as other universities without having all its powers specifically enumerated. UT asserts that these specifically enumerated powers include the power to hire, discipline and dismiss faculty and other necessary employees and to make rules and regulations for the government of the University as required by law, and as a necessary incident of these specific powers is the power to discipline those **[*5]** employees in accordance with whatever process may be required by law. UT also asserts that the broad grant of general powers to the University plainly includes the power to conduct due process hearings and that it has long been authorized by law to conduct contested case hearings utilizing its own hearing officers and, in fact, was required by law to conduct such hearings long before the APA was enacted. We do not interpret the language of the charter as so all inclusive as to exempt UT from the requirements of T.C.A. § 4-5-301(e).

UT next argues that federal and state courts n1 have implicitly recognized UT's authority to appoint one of its employees as an administrative judge or hearing officer to conduct APA contested cases. These cases did not decide this issue. Each of the opinions merely summarizes that the aggrieved employee received an APA hearing conducted by a hearing officer or hearing examiner appointed by the chancellor of the university or that the administrative judge was a UT employee as part of the procedural history.

n1 University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S. Ct. 3220 (1986); Gilbert v. University of Tennessee, slip op. (Tenn. App. W.S. Sept. 26, 1984); Logan v. University of Tennessee, slip op. (Tenn. App. B.S. Jan. 14, 1988). **[*6]**

Finally UT asserts that it has adopted rules and regulations that provide it with authority to appoint its own employees to serve as hearing officers in APA contested cases which have been approved by the Attorney General and acknowledged by the Legislature of the State of Tennessee. Rule 1720-1-5-.01(3), Tennessee Administrative Register provides in part that:

The conduct of all aspects of a hearing provided in a contested case shall be by a hearing examiner designated by the appropriate Chancellor (or by the President when a contested case involves the University-wide administration).

The above-mentioned rule was approved as to its legality by the Attorney General pursuant to T.C.A. § 4-5-211 (1985) and reviewed by the Legislature of the State of Tennessee and its expiration date deleted in accordance with T.C.A. § 4-5-225 (Supp. 1989). Generally, administrative and procedural rules and regulations promulgated under a grant of legislative authority may not be inconsistent with the purpose and the intent of a legislative act nor may they remove or limit substantive rights granted by the enabling act. Knox County ex rel. Kessel v. Knox County Personnel Board, 753 S.W.2d 357, 360 **[*7]** (Tenn. App. 1988). Since the enactment of the APA the Legislature has affirmatively conferred by statute authorization for various state agencies to appoint administrative judges and hearing officers to conduct APA contested cases. An approval by the Attorney General and a review by the Legislature does not rise to the level of an "authorization by law" allowing UT to appoint its own employees as administrative judges or hearing officers in APA contested cases, contrary to the provisions of T.C.A. § 4-5-101(e).

We believe that the APA, which took effect in 1974, was adopted to clarify and bring uniformity to contested case hearing procedures of state agencies. The General Assembly has enacted legislation which affirmatively confers, in unequivocal terms, the right to various agencies to appoint their employees to conduct contested case hearings. n2 Since the adoption of the APA, UT has not been authorized by law to appoint one of its employees as an administrative judge or hearing officer to conduct contested cases in accordance with the APA.

n2 See T.C.A. § 53-11-201(h) (1983 and Supp. 1989) (Commissioner of the Department of Safety authorized to appoint hearing officer); T.C.A. § 67-1-105(b) (1989) (Commission of Revenue authorized to designate hearing officer or personally hold hearings); T.C.A. § 4-21-202(3) (1985 and Supp. 1989) (Tennessee Human Rights Commission authorized to appoint hearing examiners to conduct discrimination hearings); T.C.A. § 56-1-411 (1989) (Commissioner of Commerce and Insurance authorized to appoint person to conduct hearing); T.C.A § 50-7-304 (Supp. 1989) (Commissioner of Department of Employment Security authorized to appoint its employees to conduct hearings). **[*8]**

The order of the Chancellor is reversed and this cause is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are taxed to the appellee for which execution may issue if necessary.

CONSUMER ADVOCATE DIVISION, Petitioner/Appellant, VS. TENNESSEE REGULATORY AUTHORITY; NASHVILLE GAS COMPANY, Respondents/Appellees.

Appeal No. 01-A-01-9708-BC-00391

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

1998 Tenn. App. LEXIS 428

July 1, 1998, Filed

PRIOR HISTORY: [*1]

APPEALED FROM THE TENNESSEE REGULATORY COMMISSION AT NASHVILLE. No. 96-00977.

DISPOSITION: AFFIRMED AND REMANDED.

CORE TERMS: customer, advertising, staff, rate increase, rate of return, contested case, hearing officer, hearsay, spread, ex parte, decatherm, external, block, users, written order, interruptible, industrial, intervenor, tailblock, conclusions of law, statutory scheme, findings of fact, public utility, establishment, substantive issues, reasonably prudent, natural gas, investigator, complicated, compounding

COUNSEL: For Petitioner/Appellant: JOHN KNOX WALKUP, Attorney General & Reporter. L. VINCENT WILLIAMS, Assistant Attorney General, Nashville, Tennessee.

For Tennessee Regulatory Authority, Respondent/Appellee: H. EDWARD PHILLIPS, III, Tennessee Regulatory Authority, Nashville, Tennessee.

For Nashville Gas Company, Respondent/Appellee: T. G. PAPPAS, JOSEPH F. WELBORN III, Nashville, Tennessee. JERRY W. AMOS, Greensboro, North Carolina.

For Associated Valley Industries, Intervening Appellant: HENRY WALKER, Nashville, Tennessee.

JUDGES: BEN H. CANTRELL, JUDGE, CONCUR: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, WILLIAM C. KOCH, JR., JUDGE.

OPINIONBY: BEN H. CANTRELL

OPINION: OPINION

This petition under Rule 12, Tenn. R. App. Proc., to review a rate making order of the Tennessee Regulatory Authority presents a host of procedural and substantive issues. We affirm the agency order.

I.

On May 31, 1996 Nashville Gas Company (NGC) filed a petition before the Tennessee Public Service Commission requesting a general increase in its rates for natural gas service. The proposed **[*2]** rates would produce an increase of $ 9,257,633 in the company's revenue. The Consumer Advocate Division (CAD) of the State Attorney General's office filed a notice of

appearance on June 6, 1996 and Associated Valley Industries (AVI), a coalition of industrial users of natural gas, entered the fray on August 20, 1996.

The Public Service Commission was replaced on July 1, 1996 by the Tennessee Regulatory Authority (TRA), a new agency created by the legislature. By an administrative order, TRA laid down the procedure by which it would accept jurisdiction of matters previously filed before the Public Service Commission, and the parties successfully navigated the uncharted waters of the TRA to get the case ready for a final hearing on November 13, 1996.

At a scheduled conference on December 17, 1996, the TRA orally approved a general rate increase for NGC, effective January 1, 1997, that would produce approximately $ 4,400,000 in new revenue. When a final order had not been filed by December 31, 1996, NGC began charging the rates orally approved at the conference on December 17. On February 19, 1997 TRA filed its written order adopting the oral findings of December 17, 1996. The order **[*3]** allowed the increased rates "for service rendered on and after January 1, 1997."

II. The Procedural Issues

a.

Was the TRA required to appoint an administrative law judge or hearing officer to conduct the hearing?

The Tennessee Administrative Procedures Act provides that a contested case hearing shall be conducted (1) in the presence of the agency members and an administrative judge or officer or (2) by an administrative judge or hearing officer alone. Tenn. Code Ann. § 4-5-301 (a). The CAD asserts that the TRA's order in this case is void because the agency did not follow the mandate of this statute.

The TRA, however, is also governed by an elaborate set of procedural statutes. *See* Tenn. Code Ann § 65-2-101, et seq. Tenn. Code Ann. § 65-2-111 provides that the TRA may direct that contested case proceedings be heard by a hearing examiner, and we held in *Jackson Mobilphone Co. v Tennessee Public Service Comm.,* 876 S.W.2d 106 (Tenn. App. 1994), that the TRA's predecessor, the Public Service Commission, could conduct a contested case hearing itself or appoint a hearing officer. We think that decision is still good law and that it applies **[*4]** to the TRA.

b.

Did the TRA staff conduct its own investigation and improperly convey ex parte information to the TRA?

The CAD argues that the TRA violated two sections of the UAPA in the proceeding below: (1) the section prohibiting a person who has served as an investigator, prosecutor, or advocate in a contested case from serving as an administrative judge or hearing officer in the same proceeding, Tenn. Code Ann. § 4-5-303; and (2) the section prohibiting ex parte communications during a contested case proceeding, Tenn. Code Ann. § 4-5-304.

As to the first contention, there is nothing in the record that supports it. The Regulatory Authority members sat as a unit to hear the proof in the hearing below. We have held that they were entitled to do so. There is no proof that any of them had served as an investigator, prosecutor, or advocate in the same proceeding.

As to the second contention, it is based on the CAD's suspicion that members of the TRA staff had taken part in an investigation of NGC, had prepared a report for the Authority, and had, in fact, continued to communicate with NGC and relay that information to the Authority

members.

At the beginning of **[*5]** the hearing the Consumer Advocate moved to discover what he described as a report from the staff that augmented or boosted the position of one party or the other. He admitted that he did not know that such a report existed but that he believed it did, because of the past practice before the Public Service Commission.

The Authority chairman moved to deny the motion with the following explanation:

> I believe that as a director I have a right to have privileged communication with a member of my staff for the purpose of understanding issues and analyzing the evidence in the many complicated proceedings that this Agency has to hear. I reject your allegation that I have abdicated my responsibility as a decision maker. I rely on my staff expertise as the law permits me to do so. Therefore, I move that your motion be denied.

The Agency members unanimously denied the CAD's motion.

On this part of the controversy we are persuaded that the TRA was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to **[*6]** fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA. *See* Tenn. Code Ann. § 4-5-304(b). Otherwise, all support staff -- law clerks, court clerks, and other specialists -- would be of little service to the person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it.

The other part of the CAD's contention is more troubling. It contains an assertion that members of the TRA staff were passing along to the TRA evidence received from NGC. We would all agree that such ex parte communications are prohibited. *See* Tenn. Code Ann. § 4-5-304(a) and (c).

In support of his contention Consumer Advocate called the manager of the utility rate division who testified that he did an investigation of NGC under an audit. At that point the parties engaged in a general discussion about the Authority's prior ruling that the staff members' advice could not be discovered. A question about whether his advice was based on anything **[*7]** other than the facts in the record was excluded after an off-the-record discussion, and the witness was asked only one other question. He answered "yes" when asked if he had talked with the company or company officials since the time of the audit. There were no questions bearing on the nature of the conversations, or whether the witness received or disseminated any information pertinent to the NGC proceeding.

We cannot find on the basis of the evidence in this record that the Agency received any ex parte communications that were prejudicial to the CAD's position. We would add only one further point: that administrative agencies should ensure compliance with the Administrative Procedures Act.

c.

Did NGC unlawfully put its new rates into effect on January 1, 1997?

The CAD argues that since no written order had been entered allowing the rate increase, NGC

had no authority to start charging the increased rates, and the TRA's February order amounted to retroactive ratemaking.

The TRA has the power to fix just and reasonable rates "which shall be imposed, observed, and followed thereafter" by any public utility. Tenn. Code Ann. § 65-5-201. But the statutory scheme -- which **[*8]** is the same as it was during the existence of the Public Service Commission -- recognizes that a public utility may set its own rates, subject to the power given to the TRA to determine if they are just and reasonable. Tenn. Code Ann. § 65-5-203 (a). *See Consumer Advocate Division v. Bissell,* 1996 Tenn. App. LEXIS 528, No. 01-A-01-9601-BC-00049 (Tenn. App., Nashville, Aug. 26, 1996). The increased rates may be suspended for an outside limit of nine months while the TRA conducts its investigation, *id.,* but after six months the utility may, upon notice to TRA, place the increased rates into effect. Tenn. Code Ann. § 65-5-203(b)(1). The authority may require a bond in the amount of the proposed annual increase. *Id.*

In this case, NGC filed its petition on May 31, 1996. Because the Public Service Commission was replaced by the TRA on July 1, 1996, NGC refiled the petition on July 29, 1996. The CAD argues that the petition, therefore, had not been pending for the six months period that would allow NGC to put the rates into effect.

Under the circumstances of this case, however, we think that argument exalts form over substance. The TRA had heard the proof, and in an open meeting had announced its **[*9]** decision to allow part of the rate increase to go into effect on January 1, 1997. While a written order had not been entered, NGC notified the TRA that it would put the approved rates into effect on the date specified in the TRA's oral decision.

In our view, the increased rates had been pending since May. The hiatus between May and July was caused by a massive overhaul of the state regulatory machinery, and that fact cannot be attributed to NGC. So, under the statutory scheme, NGC had the power to put the approved rates into effect on January 1, 1997.

In addition, Tenn. Code Ann. § 65-2-112 says "Every final decision or order rendered by the authority in a contested case shall be in writing, or stated in the record . . . ." NGC could have used the TRA's oral decision as the basis for its action of putting the rates into effect. The decision had been "stated in the record" on December 17, 1996. We add this caveat, however. The statute goes on to say that either a written or oral decision "shall contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based." We do not express an opinion on whether the December 17 oral decision **[*10]** complies with that mandate. But we do agree that findings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. *See Levy v. State Bd. of Examiners for Speech Pathology & Audiology,* 553 S.W.2d 909 (Tenn. 1977).

III. The Substantive Issues

a. Hearsay

The CAD argues that some of the evidence offered by NGC's expert on the projected increase in company expenses was based on rank hearsay. We notice, however, that Tenn. Code Ann. § 65-2-109 allows TRA to admit and give probative effect to any evidence that would be accepted by reasonably prudent persons in the conduct of their affairs. The same statute relieves the TRA from the rules of evidence that would apply in a court proceeding.

The CAD does not address the question of whether the evidence it calls hearsay is, nevertheless, of the kind that would be relied on by reasonably prudent persons in the conduct of their affairs. NGC argues that the evidence was not hearsay because it was based

on the company records that are kept in the ordinary course of business. *See* Tenn. R. Evid. 801, 803(6). We need not decide whether the proffered evidence **[*11]** was hearsay because we are satisfied that the evidence was reliable and could be considered by the TRA. The TRA heard the objections to the evidence and the CAD's argument that its evidence on the same subject should have been received. The TRA chose NGC's evidence as more reliable. We find no fault with the TRA's decision on this issue.

b. Advertising

This is an issue on which the briefs of the principal parties seem to be speaking different languages. The following explanation is the best we can glean from the record. In 1984 the Public Service Commission adopted a rule that disallowed as a recoverable expense by a utility any "promotional or political advertising." The prohibition covered advertising for the purpose of encouraging any person to select or use gas service or additional gas service. It did not cover (among other things) advertising informing customers how to conserve energy or to reduce peak demand for gas, or advertising promoting the use of energy efficient appliances. *See* former Rule 1220-4-5-.45, Tenn. Regis.

In a 1985 proceeding involving a rate increase application by NGC, the Commission deviated from the rule and allowed advertising expenses up **[*12]** to .5% of revenues. In March of 1996 the Commission repealed 1220-4-5-.45 and proposed a new rule that would allow a utility to recover "all prudently incurred expenditures for advertising." Apparently the rule had not made it completely through the adoption procedure when the TRA heard this case below.

Nevertheless, based on proof of $ 1,486,000 in external advertising expenses, $ 800,000 in marketing personnel payroll and $ 300,000 in miscellaneous sales expenses, the TRA allowed the recovery of all but approximately half of the external advertising expenses. The CAD urged disallowance of all the related expenses except approximately $ 647,000 and NGC claims that the TRA erred in reducing the external operating expenses because there was no proof that they were imprudently incurred.

We think the TRA was justified in its conclusion on this issue. Based on the testimony in the record that the advertising expenses were incurred to meet competition, to add new customers on existing mains, and to get existing customers to use more gas, the TRA concluded that the rate payers benefited from at least part of the external advertising.

c. The Long Term Incentive Plan

The TRA **[*13]** allowed NGC to recover approximately one-half of the cost of its Long Term Incentive Plan. The CAD opposes the allowance of any of this expense on the basis that the plan encourages executives to seek growth through rate increases instead of through performance gains. According to the CAD, the plan does not promote improved service.

NGC offered evidence, however, that the plan had increased employee efficiency and had reduced the number of company employees per customer in Tennessee. The savings amounted to $ 7 million annually in wages and salaries. The same witness rebutted the CAD witness who testified that the plan encourages employees to seek rate increases rather than improved efficiency.

None of the parties to the appeal cited any authority governing the allowance of incentive payments in utility rate cases. The proof included some references to cases in other jurisdictions where that state's utility commission had allowed either 100% of the incentive payments or some fraction thereof. The consensus seems to be to look at each plan on a case by case basis and view each plan in the context of the utility's total compensation package.

We do not think the TRA erred in the treatment **[*14]** of the long term incentive plan in this case.

d. Rate of Return

NGC requested a rate of return on equity in the range of 13% to 13.25%. The CAD requested an 11% rate of return and offered expert testimony showing that monthly compounding of the company's income would raise the rate of return to 11.60%. The TRA set a rate of return of 11.5%.

We fail to see how either side could make much of a case on appeal. The TRA's findings and conclusions are supported by evidence in the record that is both substantial and material. *See* Tenn. Code Ann. § 4-5-322(h). A proper rate of return is not a point on a scale, *Tennessee Cable Television Ass'n v. PSC,* 844 S.W.2d 151 (Tenn. App. 1992), it covers a fairly broad range, as indicated by the testimony of the competing experts in this case. We affirm the TRA's decision on this point.

We take no position on the issue of the compounding effect of the company's receipts. It is a concept that is new to us in utility regulation, and its merits need to be explored more thoroughly than they have been in this record.

IV. The Rate Design

The intervenor, AVI, challenges the part of the TRA's order that raised the "tailblock" rate **[*15]** for gas supplied to NGC's largest interruptible customers. The tailblock rate is the lowest rate charged per unit and it applies to usage of over 9,000 decatherms per month. n1 NGC's petition did not seek any increase in the rates falling in this category. The CAD's proof proposed that any changes be spread to all customer classes, but the intervenor sought an overall rate decrease. AVI's witness testified that industrial rates were set well above costs and should not be increased The TRA's order increased the tailblock rate from $ 0.21 per decatherm to $ 0.228 per decatherm. The TRA said in its order:

> After careful consideration of the testimony and exhibits of the parties, the Authority finds that the rate increase approved herein should be spread equally to all customers. It is the intent of the Authority to spread this increase to all ratepayers, including interruptible Sales customers, Transportation customers, and Special Contract customers, in order to minimize the overall impact of this rate change. In addition, the Authority concludes that the residential customer charge should be increased from $ 6.00 per month to $ 7.00 per month.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 There are three other blocks in the interruptible industrial category of users. Block one applies to usage of 1-1,500 decatherms per month; block two covers the 1,501-4,000 category; and block three applies to the 4,001-9,000 category.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - **[*16]**

We think the question of whether to spread the rate increase to all classes of users was within the discretion of the TRA. In *CF Industries v. Tenn. Pub. Serv. Comm.,* 599 S.W.2d 536 (1980), our Supreme Court said:

> Specifically, there is no requirement in any rate case that the Commission receive and consider cost of service data, or what such data, if in the record, are to be accorded exclusivity. It is self-evident that cost of service is of great significance in the establishment of rates but is of lesser value in arriving at rate design. A fair rate of return to the regulated utility is one thing; the establishment of rates among various customer classes is quite another.
>
> 599 S.W.2d at 542.
>
> * * *
>
> Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence **[*17]** and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test -- nothing more, nothing less.
>
> 599 S.W.2d at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design -- on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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