

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 13, 2004

IN RE:

TARIFF TO RECLASSIFY RATE GROUPING  
OF CERTAIN BELL SOUTH EXCHANGES -  
TARIFF NUMBER 2004-0055

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DOCKET NO.  
04-00015

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ORDER GRANTING CONSUMER ADVOCATE'S MOTION FOR SUMMARY  
JUDGMENT, DENYING BELL SOUTH TELECOMMUNICATIONS INC.'S  
MOTION FOR SUMMARY JUDGMENT AND DENYING TARIFF

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This matter came before Chairman Deborah Taylor Tate, Director Pat Miller and Director Ron Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on March 22, 2004, for consideration of motions for summary judgment filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") and BellSouth Telecommunications, Inc. ("BellSouth").

Upon review of the record in this proceeding, including consideration of the parties' oral arguments, the motion for summary judgment filed by the Consumer Advocate is granted and the motion for summary judgment filed by BellSouth is denied. Based upon the Authority's conclusion that Tenn. Code Ann. § 65-5-209 (Supp. 2003) applies to the tariff filed in this docket and the undisputed facts in the record, the *Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges – Tariff Number 2004-0055* is denied as to residential customers.

**Background**

On January 15, 2004, BellSouth filed a *Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges – Tariff Number 2004-0055* ("Regrouping Tariff"). The Regrouping Tariff

sought to amend BellSouth's existing tariff ("A3.4 Tariff"), which provides:

When the number of main station lines and private branch exchange trunks in the local service area of an exchange increases or decreases to the extent that such exchange moves into a different rate group, the Company shall file a revised tariff in accordance with the statutory provisions and the rules and regulations of the Commission, making effective the rates for the appropriate higher or lower group after a waiting period of six months from the last day of the month in which the exchange moved into the different group.<sup>1</sup>

Pursuant to the above provision of the A3 4 Tariff, BellSouth sought to reclassify fifty-six (56) local exchanges into rate groups with higher rates.

The Consumer Advocate filed a *Complaint and Petition to Intervene* on January 26, 2004, arguing that for purposes of residential rate adjustments, Tenn Code Ann. § 65-5-209 (Supp. 2003) limited the increase in residential rates in the Regrouping Tariff to the annual percentage change in the inflation rate for the United States. BellSouth filed a response on February 6, 2004, asserting that the Regrouping Tariff merely reclassified customers and had no effect on the rate charged each group. The Consumer Advocate filed a reply on February 9, 2004.

At a regularly scheduled Authority Conference held on February 9, 2004, the voting panel assigned to this docket unanimously accepted the Consumer Advocate's complaint, thereby convening a contested case and granting the intervention. The panel also appointed Director Pat Miller to serve as Hearing Officer to hear preliminary matters prior to the Hearing, to rule on any petitions for intervention, and to set a procedural schedule to completion.<sup>2</sup> On February 13, 2004, United Telephone-Southeast, Inc. ("Sprint") filed a *Petition to Intervene* in this matter. At a Status Conference held on February 17, 2004, the Hearing Officer granted Sprint's *Petition to Intervene* and suspended the Regrouping Tariff through February 23, 2004.<sup>3</sup> At the regularly scheduled Authority Conference held on February 23, 2004, the Hearing Officer re-suspended the

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<sup>1</sup> BellSouth's *Motion for Summary Judgment*, p. 2 (March 2, 2004)

<sup>2</sup> See *Order Convening a Contested Case Proceeding and Appointing a Hearing Officer* (March 4, 2004)

<sup>3</sup> See *Order Granting Petition to Intervene and Suspending Tariff* (February 18, 2004)

Regrouping Tariff through March 22, 2004. An Order memorializing the re-suspension and the Procedural Schedule agreed upon by the parties at a Status Conference held on February 20, 2004, was issued on February 24, 2004 <sup>4</sup>

Pursuant to the Procedural Schedule, the Consumer Advocate and BellSouth each filed motions for summary judgment on March 2, 2004, and each filed a response to the motions for summary judgment on March 9, 2004. Sprint filed a letter in support of BellSouth's position on March 9, 2004. Oral arguments on the motions for summary judgment were held before the voting panel assigned to this docket on March 12, 2004

### **Positions of the Parties**

#### **BellSouth**

BellSouth asserts that its Regrouping Tariff does not constitute a rate increase under Tenn Code Ann. § 65-5-209(f) (Supp. 2003) as argued by the Consumer Advocate.<sup>5</sup> BellSouth argues that the "rate adjustment" language in the price regulation statute contemplates the creation of a new rate and that Tenn. Code Ann. § 65-5-209(f) (Supp 2003) limits the "adjustment" of a previously-approved rate to a new "adjusted" rate.<sup>6</sup> Over time, some ratepayers have been retained in groups even though their locations no longer meet the rate group definition and are being grouped with other ratepayers in an arbitrary manner that is inconsistent with the A3 4 tariff<sup>7</sup> Rather than being a rate change, BellSouth asserts the regrouping is analogous to the situation where a customer physically moves from one location to another.<sup>8</sup> The A3 4 tariff has not been preempted or invalidated and rate groups and rate grouping are still in effect.<sup>9</sup> There is no irreconcilable conflict between the tariff and the price regulation statute and the two reasonably

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<sup>4</sup> See *Order Re-suspending Tariff and Setting Procedural Schedule* (February 24, 2004)

<sup>5</sup> See *Response of BellSouth to Consumer Advocate Division's Motion for Summary Judgment*, p 2 (March 9, 2004)

<sup>6</sup> *Id* at 9

<sup>7</sup> *Id* at 10-11

<sup>8</sup> *Id* at 2.

<sup>9</sup> *Id*

can be construed to operate together.<sup>10</sup> The A3.4 tariff contains mandatory language regarding regrouping, but does not permit BellSouth to regroup whenever it desires additional revenue<sup>11</sup>

BellSouth argues that it is not seeking to create a new category of revenue not subject to price regulation accounting.<sup>12</sup> BellSouth states that the tariff filing itself neither requires nor creates “headroom”; nevertheless, BellSouth also asserts that it has responded to data requests that the additional revenues for the Regrouping Tariff will be reflected in the local exchange portion of BellSouth’s 2004 annual price regulation filing<sup>13</sup>

### **Consumer Advocate**

The Consumer Advocate argues that, by electing the price regulation methodology for the regulation of its rates, BellSouth is subject to the limitations in Tenn. Code Ann § 65-5-209(e) (Supp. 2003)<sup>14</sup> and § 65-5-209(f) (Supp 2003).<sup>15</sup> The General Assembly intended the procedures in Tenn Code Ann § 65-5-209 (Supp 2003) to be used to establish and maintain affordable rates

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<sup>10</sup> *Id* at 6

<sup>11</sup> *Id* at 5-6

<sup>12</sup> *Id* at 8

<sup>13</sup> *Id*

<sup>14</sup> Tenn Code Ann § 65-5-209(e) (Supp 2003) states

(e) A price regulation plan shall maintain affordable basic and non-basic rates by permitting a maximum annual adjustment that is capped at the lesser of one half (1/2) the percentage change in inflation for the United States using the gross domestic product-price index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An incumbent local exchange telephone company may adjust its rates for basic local exchange telephone services or non-basic services only so long as its aggregate revenues for basic local exchange telephone services or non-basic services generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan

<sup>15</sup> Tenn Code Ann § 65-5-209(f) (Supp 2003) states

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone service rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation. At the expiration of the four-year period, an incumbent local exchange telephone company is permitted to adjust annually its rates for basic local exchange telephone services in accordance with the method set forth in subsection (e) provided that in no event shall the rate for residential basic local exchange telephone service be increased in any one (1) year by more than the percentage change in inflation for the United States using the gross domestic product-price index (GDP-PI) from the preceding year as the measure of inflation

for customers of price regulated companies.<sup>16</sup> The Consumer Advocate argues that the reclassification of rate groups is an adjustment of rates for basic local exchange telephone service and is subject to the limitations of the price regulation statutes.<sup>17</sup> The adjustment means that residential rates will go up and customers will pay more (from 2.6% to 19.8% more) for basic local exchange service.<sup>18</sup> Therefore, the Consumer Advocate asserts the regrouping plan would cause the residential rates to increase more than the national inflation rate in violation of Tenn. Code Ann. § 65-5-209(f) (Supp. 2003).<sup>19</sup> In addition, BellSouth's refusal to account for new revenues in accordance with its price regulation plan would violate Tenn. Code Ann. § 65-5-209(e) (Supp. 2003).<sup>20</sup> The Consumer Advocate argues that BellSouth would experience at least an estimated \$1.9 million annual revenue increase attributable to residential customers and an estimated \$154,475 annual revenue decrease attributable to non-residential and business customers that would not be offset against existing "headroom" per BellSouth's price regulation plan.<sup>21</sup>

### **Sprint**

Sprint argues that facts may change that cause a different, higher rate to become effective that is not subject to the statutory limitations of Tenn. Code Ann. § 65-5-209(f) (Supp. 2003). In support of its argument, Sprint refers to two examples covered by Sprint's General Subscriber Services Tariff where a higher rate can become effective without being subject to the statutory limitation: a residential customer being charged a residence rate obtains a yellow pages listing for a home business and a residential customer exceeds a five-line threshold for service terminating at

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<sup>16</sup> See Memorandum in Opposition to BellSouth's Motion for Summary Judgment, p. 9 (March 2, 2004)

<sup>17</sup> See Memorandum of Law in Support of Motion for Summary Judgment, p. 4 (March 2, 2004)

<sup>18</sup> See Memorandum in Opposition to BellSouth's Motion for Summary Judgment, p. 2 (March 9, 2004)

<sup>19</sup> See Memorandum of Law in Support of Motion for Summary Judgment, p. 12 (March 2, 2004)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 13.

his or her residence.<sup>22</sup> Therefore, Sprint states that it supports BellSouth's position that classifying customers in the proper rate group is not considered a rate adjustment subject to the limitations of Tenn. Code Ann. § 65-5-209(f) (Supp. 2003).<sup>23</sup>

### **Standard for Summary Judgment**

Rule 56.04 of the Tennessee Rules of Civil Procedure provides that summary judgment is appropriate when: (1) no genuine issues with regard to the material facts relevant to the claim remain to be tried; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.<sup>24</sup> The moving party bears the burden of proving that its motion satisfies these requirements.<sup>25</sup> To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense.<sup>26</sup> In reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the non-moving party.<sup>27</sup>

Both BellSouth and the Consumer Advocate indicated in their motions for summary judgment that the issues raised could be determined as a matter of law and that there was no disagreement as to the facts relevant to the Regrouping Tariff.<sup>28</sup>

### **Findings and Conclusions**

The Authority finds that the decision by BellSouth to operate under price regulation<sup>29</sup> subjects BellSouth's subsequent tariff filings, including the Regrouping Tariff, to the provisions

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<sup>22</sup> See Letter from James B. Wright, United Telephone-Southeast, Inc., to Chairman Deborah Taylor Tate (March 9, 2004).

<sup>23</sup> *Id.*

<sup>24</sup> See Tenn. R. Civ. P. 56.04, see also *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000).

<sup>25</sup> See *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991).

<sup>26</sup> See *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998), *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997).

<sup>27</sup> See *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

<sup>28</sup> See *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment*, p. 1 (March 3, 2004), *Consumer Advocate and Protection Division's Motion for Summary Judgment*, p. 1 (March 3, 2004).

<sup>29</sup> See *In re Application of BellSouth Telecommunications, Inc. for a Price Regulation Plan*, Docket No. 95-02614, *Order Approving BellSouth Telecommunications, Inc. Application for Price Regulation Plan* (December 9, 1998).

of the price regulation statute, Tenn. Code Ann. § 65-5-209 (Supp. 2003). The Authority finds that the price regulation statute not only provides pricing flexibility and restrictions with respect to exchange rates, but also provides that flexibility and those restrictions to individual subscribers within a given exchange. The price regulation statute includes the limitation found in Tenn Code Ann. § 65-5-209(f) (Supp. 2003), which states that “in no event shall the rate for residential basic local exchange service be increased in any one (1) year by more than the percentage change in inflation for the United States using the gross domestic product index (GDP-PI) from the preceding year as the measure of inflation” (Emphasis added) The Authority finds that the General Assembly had, at minimum, constructive knowledge of BellSouth’s A3.4 Tariff when it enacted the price regulation statute and the “in no event” language of Tenn. Code Ann. § 65-5-209(f) (Supp. 2003) evidences an intent by the legislature to limit existing tariffs or rules at the time of its enactment. As a result, the Authority finds that although BellSouth can increase residential rates pursuant to its A3.4 Tariff, it can do so only within the statutory limitations of Tenn Code Ann. § 65-5-209(f) (Supp. 2003).

Based on the *Statement of Undisputed Facts* filed by the Consumer Advocate and not objected to by any other Party, the Authority further finds the percentage increase that affected residential customers would pay under the regrouping tariff would range from 2.6% to 19.8%, depending on the exchange being regrouped,<sup>30</sup> and that the increase in the rate of inflation for the United States using the gross domestic product price index (GDP-PI) for the preceding year was 1.6%.<sup>31</sup> Because the rate increase for residential customers set forth in the Regrouping Tariff would exceed the percentage change in inflation from the preceding year, the Authority concludes the Regrouping Tariff as filed would violate Tenn. Code Ann. § 65-5-209(f) (Supp. 2003) as applied to residential customers. Based upon the foregoing findings, the Authority concludes that

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<sup>30</sup> *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts*, ¶ 3 (March 2, 2004)

<sup>31</sup> *Id.* at ¶ 4

the Regrouping Tariff should be denied as to its provisions that apply to residential customers

However, the Regrouping Tariff also contains proposed rate increases for non-residential or business customers. As previously noted, Tenn. Code Ann § 65-5-209(f) (Supp. 2003) states that “in no event shall the rate for residential basic local exchange service be increased in any one (1) year by more than the percentage change in inflation for the United States using the gross domestic product index (GDP-PI) from the preceding year as the measure of inflation.” (Emphasis added). The Authority finds that this statutory limitation by its terms only applies to residential rate increases and does not apply to non-residential or business rate increases. Therefore, the Authority concludes that the proposed rate increases for non-residential or business customers may be implemented even though such increases may be at a rate in excess of the percentage change in inflation as specified in Tenn. Code Ann § 65-5-209(f) (Supp 2003).<sup>32</sup> Therefore, the Authority concludes that the *Motion for Summary Judgment* filed by the Consumer Advocate should be granted, and the *Motion for Summary Judgment* filed by BellSouth should be denied.

**IT IS THEREFORE ORDERED THAT:**

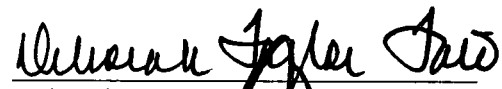
1. The Motion for Summary Judgment filed by the Consumer Advocate is granted,
2. The Motion for Summary Judgment filed by BellSouth Telecommunications, Inc is denied;
3. The *Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges – Tariff Number 2004-0055* is denied as to its provisions that apply to residential customers;
4. BellSouth may file revisions to its tariff applicable to non-residential or business customers only consistent with this Order;
- 5 Any party aggrieved by the Authority’s decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days from the date of this Order; and


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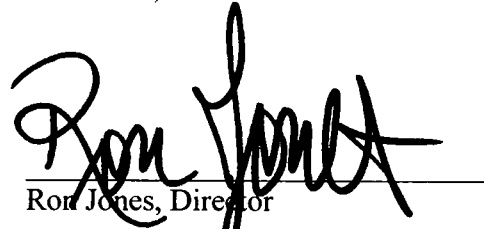
<sup>32</sup> Such increases can only be approved if they do not cause BellSouth to violate the “headroom” provision of Tenn. Code Ann § 65-5-209(e) (Supp 2003)



6. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

  
Deborah Taylor Tate, Chairman

  
Pat Miller, Director

  
Ron Jones, Director