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Reply to:
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March 9, 2004

Honorable Deborah Taylor Tate
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

IN RE: TARIFF TO RECLASSIFY RATE GROUPING OF CERTAIN BELLSOUTH EXCHANGES

Docket 04-00015

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Consumer Advocate and Protection Division's Memorandum in Opposition to BellSouth's Motion for Summary Judgment in regards to Docket No. 04-00015. Kindly file same in this docket. Copies are being sent to all parties of record. If you have any questions, kindly contact me at (615) 741-1671. Thank you.

Sincerely,

Joe Shirley
Assistant Attorney General

CC: All Parties of Record.

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IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
TARIFF TO RECLASSIFY RATE GROUPING OF CERTAIN BELLSOUTH EXCHANGES — TARIFF NO. 2004-0055	)	**DOCKET NO. 04-00015**
	)	
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CONSUMER ADVOCATE AND PROTECTION DIVISION'S MEMORANDUM IN OPPOSITION TO BELLSOUTH TELECOMMUNICATION, INC.'S MOTION FOR SUMMARY JUDGMENT

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, and hereby submits the *Consumer Advocate and Protection Division's Memorandum in Opposition to BellSouth's Motion for Summary Judgment.*

I. INTRODUCTION

On March 2, 2004 BellSouth Telecommunications, Inc. ("BellSouth") filed *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment,* claiming that the Consumer Advocate's *Complaint and Petition to Intervene* raised solely legal issues which should be rejected.[1] For the reasons set forth below, the Tennessee Regulatory Authority ("TRA") should deny BellSouth's Motion.

In support of this Memorandum, the Consumer Advocate files and serves herewith the

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[1] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 1

Affidavit of Mark H Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc 's Motion for Summary Judgment

II. ARGUMENT

A. CONTRARY TO BELLSOUTH'S ALLEGATION, ITS REGROUPING TARIFF WOULD INCREASE EXISTING RATES FOR BASIC LOCAL EXCHANGE TELEPHONE SERVICES.

Without regard for economic reality, BellSouth states that its regrouping tariff "is not a rate increase," rather "[t]he BellSouth tariff simply corrects rate groups" by applying "a different (but previously existing) rate."[2] This BellSouth allegation is belied by the undisputed facts of this case. The certain truth of the matter is that the "different rate" that BellSouth wants to start applying is greater than the billed rate that BellSouth currently applies.[3] Thus, if BellSouth has its way, affected residential customers will pay more money (from 2.6% to 19.8% more) for basic local telephone services.[4] This rate hike translates into millions more for BellSouth in coming years.[5]

Of course, BellSouth cannot concede the obvious truth that it will collect millions more under its plan by increasing telephone rates for thousands of Tennesseans, for to do so would undercut its legal position in this case. Even BellSouth cannot deny that the General Assembly prohibits the

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[2] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 1-3.

[3] *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts* at ¶ 2.

[4] *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts* at ¶ 3.

[5] *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts* at ¶¶ 5-6.

company from "increasing" the rate of residential basic local exchange service in any one year by more than the percentage change in inflation, *see* Tenn. Code Ann. § 65-5-209(f) (Supp. 2003), and from "adjusting" telephone rates by more than the maximum rates permitted by its price regulation plan, *see* Tenn. Code Ann. § 65-5-209(e) (Supp. 2003).

In an effort, then, to circumvent the General Assembly's requirements, BellSouth resorts to "word games" — referring to this 2.6% to 19.8% rate hike as a "reclassification," a "regrouping," a "correction," a "different (but previously existing) rate," as anything other than an "increase" or "adjustment" in rates. Apparently, one of BellSouth's arguments is that — notwithstanding hard facts proven by mathematical, accounting, economic and common-sense analyses — its avoidance of the statutory nomenclature should allow it to prevail. This unsubstantiated argument must fail.

B. BELLSOUTH'S ARGUMENT THAT ITS A3.4 TARIFF IS A "LAW" THAT REQUIRES APPROVAL OF ITS REGROUPING TARIFF IS WITHOUT ANY MERIT.

BellSouth incorrectly argues that its regrouping plan must be approved in accordance with its A3.4 tariff, which states:

> **A3.4 Regrouping**
> 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.

BellSouth notes that this tariff was approved by the Tennessee Public Service Commission and cites authority for the proposition that this tariff is the "law" that must be followed in this

instance.[6] BellSouth is incorrect.

Within the hierarchy of laws, it is an elementary principle that the acts of the legislature have greater force than the acts of an administrative agency. *See South Cent. Bell Tel. Co v. Olsen,* 669 S.W.2d 649, 652 (Tenn. 1984); *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995). Indeed, an agency is a creature of the legislature, and its orders, rules and regulations may be issued only under statutory authority. *See BellSouth Telecomm., Inc. v. Greer,* 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997). Thus, any potential conflict between a statute enacted by the General Assembly and an administrative rule, regulation or order approved by the Tennessee Public Service Commission (or the TRA) must be resolved in favor of the statute.

In Tenn. Code Ann. § 65-5-209, the General Assembly declared that a price-regulated company's "price regulation plan shall maintain affordable basic and non-basic rates by permitting a maximum annual adjustment that is capped" by a formula incorporating the national inflation rate. Subsection 209(e). The General Assembly further declared that "an incumbent local exchange telephone company may adjust its rates . . . only so long as . . . such changes do not exceed . . . the maximum rates permitted by the price regulation plan," subsection 209(e), and 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," subsection 209(f).

Here, BellSouth's regrouping proposal would frustrate the General Assembly's plain mandate to enforce these price regulation requirements in order to maintain affordable rates for the customers

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[6] *BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at 2.

of this price-regulated company.[7] If the regrouping proposal is approved, the basic local telephone rates for thousands of residential customers would increase by far more than the national inflation rate,[8] and BellSouth would not count the new revenues generated from this rate increase against the maximum rates permitted by its price regulation plan.[9]

Such results directly contravene the General Assembly's well-defined goal of maintaining "affordable rates" under price regulation, *see United Telephone-Southeast, Inc. v. Tennessee Regulatory Auth.*, 2001 WL 266051 at *3-*5 (Tenn. Ct. App. 2001). Accordingly, BellSouth's reliance on an A3.4 tariff approved by the Tennessee Public Service Commission years before passage of the price regulation statute cannot be used to set aside this legislative policy.[10]

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[7] In construing the meaning of a statute, one should strive to ascertain and give effect to its intent and purpose. In doing so, one should assume that the legislature means what it said and, accordingly, construe the statute as written. The words in the statute are to be given their natural and ordinary meaning, and only when the words of a statute are ambiguous or when it is unclear what the legislature intended should one delve into legislative history or extraneous circumstances. *See BellSouth Telecomm* , 972 S.W.2d at 673. Here, the General Assembly's intent and purpose is clear from the face of Tenn. Code Ann. § 65-5-209 In order to maintain "affordable rates" under price regulation, price-regulated companies shall not adjust rates by more than the maximum permitted by its price regulation plan, and residential rates shall not be increased in any one year by more than the national inflation rate. This price regulation policy must be enforced.

[8] *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts* at ¶¶ 3-4.

[9] *Consumer Advocate and Protection Division's Statement of Undisputed Material Facts* at ¶ 7.

[10] The Consumer Advocate would also point out that BellSouth's regrouping plan is not even filed in accordance with the A3.4 tariff on which it so heavily relies. The A3.4 tariff itself provides that any regrouping tariff must be filed "in accordance with the statutory provisions . . . of the Commission [which is now the TRA]." The regrouping tariff in this docket is not filed in accordance with controlling statutory provisions, particularly Tenn. Code Ann. § 65-5-209.

C. BELLSOUTH'S ASSERTION THAT THE CONSUMER ADVOCATE CLAIMS THAT RATE GROUPING IS PROHIBITED BY THE PRICE REGULATION STATUTE IS ERRONEOUS.

BellSouth states "[t]he CAD's claim that the price regulation statute somehow prohibits rate grouping fails as a matter of law."[11] BellSouth misses the point. In this case, the Consumer Advocate does not take a position that rate grouping is prohibited by Tenn. Code Ann. § 65-5-209 (or any other law), nor does the Consumer Advocate's claim rest on any such proposition. Rather, the Consumer Advocate claims that the proposed regrouping plan that BellSouth filed in this docket raises the rates of residential customers by more than the legally-prescribed limit and fails to account for new regrouping revenues in accordance with price regulation requirements.[12] There is nothing in this claim that addresses the legality or propriety of rate groups *per se*.

Thus, if BellSouth wants to set forth a plan to reclassify rate groups or to somehow alter the rate group rate structure, then it should do so — but do so in accordance with the law. At this point, the Consumer Advocate would only note that a decision on the merits of any such filing (i.e., deciding the appropriate rates that should be charged to particular customers or classes of customers) is a decision that could not be accomplished strictly as a matter of law because it involves issues of fact.

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[11] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 2.

[12] Consumer Advocate and Protection Division's *Complaint and Petition to Intervene* at ¶¶ 21-23.

D. BELLSOUTH'S ARGUMENT THAT FAILURE TO APPROVE ITS REGROUPING TARIFF WOULD RESULT IN AN "IRRATIONAL DISTINCTION" BETWEEN CUSTOMERS IS LEGALLY FLAWED AND UNSUPPORTED.

BellSouth asserts that, "as a matter of law," failure to approve its regrouping tariff would result in an "irrational distinction" between customers.[13] Interestingly, BellSouth cites no "law" in support of its "irrational distinction" legal argument.[14] Moreover, the Consumer Advocate's survey of the law failed to find any law that either accepts, rejects or discusses "irrational distinction" between or among public utility customers. Accordingly, the Consumer Advocate submits that BellSouth's legal argument in this regard is unsupported by law and, therefore, is without any merit. *Debile fundamentum fallit oppus.*

Of course, BellSouth could be attempting to raise, in roundabout fashion, arguments regarding prohibition of unjust discrimination and/or unreasonable preferences, which, unlike "irrational distinctions," are recognized legal theories. *See* Tenn. Code Ann. §§ 65-4-122 and 65-5-204 (1993 & Supp. 2003). BellSouth does claim that the rates that will be charged under its regrouping tariff have already been determined to be just and affordable.[15]

Even if BellSouth properly raises these arguments, however, they should fail because the TRA has already determined that the purported misclassification of rate groups does not prevent telephone rates from being just, reasonable and affordable. Specifically, in accordance with Tenn. Code Ann. § 65-5-209(c), the TRA approved BellSouth's rates existing on June 6, 1995, as the

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[13] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 4.

[14] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 4.

[15] *BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at 3.

initial, just, reasonable and affordable rates of BellSouth's price regulation plan.[16] *See Order Approving BellSouth Telecommunications, Inc 's Application for Price Regulation Plan,* Docket No. 95-02614, pp. 20-21 (Tenn. Reg Auth. Dec. 9, 1998). Moreover, according to its own numbers, BellSouth acknowledges that some of the 56 telephone exchanges that it seeks to regroup in this docket qualified for the proposed reclassification over 16 years ago! In fact, according to BellSouth 38 of the 56 telephone exchanges that are included in BellSouth's regrouping tariff qualified for reclassification before June 6, 1995[17] — the date on which BellSouth's telephone rates were just, reasonable and affordable as determined by the TRA. Thus, the situation that BellSouth might claim is unjustly discriminatory or unreasonably preferential (or "irrationally distinctive") today — i.e., the purported misclassification of rate groups for certain exchanges — is the very same situation that existed in large numbers when the TRA previously determined that BellSouth's rates were just, reasonable and affordable as a matter of law. Accordingly, any BellSouth argument that regrouping must be done to cure unjust discrimination or unreasonable preferences is without merit.

Moreover, any BellSouth argument that its regrouping tariff should be approved to remedy unjust or unreasonable conditions and circumstances is not supported by the undisputed material facts of this record. Here, BellSouth's counsel makes unsubstantiated statements about what, in counsel's opinion, was the intent and purpose of BellSouth's A3.4 tariff, and then counsel concludes

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[16] *See BellSouth BSE, Inc. v Tennessee Regulatory Auth* , 2003 WL 354466 at *3 (Tenn. Ct. App. Feb. 18, 2003) (stating that rates to be charged by companies opting to be under a price regulation plan must be "just and reasonable," which is defined as "affordable" as determined by the TRA).

[17] *See* BellSouth's January 23, 2004 Response to TRA Staff's January 16, 2004 Data Request, Docket No. 04-00015, Item No. 3, Attachment B ("Rate Group Tracking Report").

that some customers are being charged in a manner that is inconsistent with this tariff.[18] But this position could hardly support a finding of unjust discrimination or unreasonable preferences based on this record.

In a previous case involving a BellSouth Welcoming Reward tariff, for example, BellSouth strenuously argued that "any fact" could explain or rationalize discrimination.[19] As BellSouth so aptly stated in that case, "Tennessee law does not prohibit a public utility from offering different rates — it only prohibits a utility from offering different rates to similarly situated customers."[20] Even in this case, BellSouth recognizes that "[p]erhaps some fact could be articulated to create a post-hoc rationalization for this disparate treatment."[21]

One such fact that is often used to rationalize disparate treatment is cost of service — the logic being that differences in cost may reasonably explain differences in price. *See Southern Ry Co.*, 330 S.W.2d at 325. The TRA itself recently recognized the principle that a difference in cost of service is a material fact that can rationalize what would otherwise be unjust discrimination among BellSouth's customers. *See Order Dismissing Petition to Suspend Tariff,* Docket No. 03-00060, p. 11 (Tenn. Reg. Auth. Apr. 14, 2003). Although these costs are viewed by authorities and

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[18] *BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at 4.

[19] *See Reply of BellSouth Telecommunications, Inc to Comments Regarding Substitute Tariff,* TRA Docket No. 03-00060, p. 5 (*citing Southern Ry. Co v Pentecost,* 330 S.W.2d 321, 325 (Tenn. 1959)).

[20] *Reply of BellSouth Telecommunications, Inc to Comments Regarding Substitute Tariff,* TRA Docket No. 03-00060, p. 5.

[21] *BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at 4.

experts as a key factor to consider in addressing discrimination issues, the record in this docket is deficient of such cost information.[22] It would be inappropriate, therefore, for the TRA to grant summary judgment to BellSouth based on its discrimination argument. Before any decision is made concerning the justness of BellSouth's rates in this case, the parties should be allowed to set forth all facts pertinent to deciding the issue.

E. CONTRARY TO BELLSOUTH'S ALLEGATION, ITS REGROUPING TARIFF WOULD ALTER EXISTING RATES IN BELLSOUTH'S APPROVED PRICE REGULATION PLAN.

BellSouth is simply wrong when it alleges that approval of its regrouping tariff would not require alteration of existing rates in BellSouth's price regulation plan.[23] Specifically, if the regrouping tariff is approved, the existing rates used to compute the price regulation plan's service price index ("SPI") must be adjusted. If BellSouth denies this, it should be required to do so through a witness under oath because the proof in this record is contrary to BellSouth's conclusory statement.[24]

The SPI is a price regulation calculation that is included in BellSouth's annual price cap

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[22] *Affidavit of Mark H. Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at ¶¶ 9-10.

[23] *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at 1.

[24] While the Consumer Advocate does not concede that BellSouth's argument in this regard is a relevant claim of "material fact," BellSouth nevertheless relies on its unsupported allegation that existing price regulation plan rates would not be altered in order to support its summary judgment motion. (The inadequacy of this argument is addressed in Section II.A., *supra*.) In this section, the Consumer Advocate merely sets forth its position that such rates would be altered. Accordingly, the TRA should not accept BellSouth's naked assertion of fact as support for its request for summary judgment.

filing. The SPI is computed in order to isolate revenue changes attributable only to service price adjustments.[25] In the decision approving BellSouth's price regulation plan, the TRA ordered that "[a]nnual adjustments in BellSouth's basic and nonbasic rates pursuant to Tenn. Code Ann. § 65-5-209(e) shall be calculated from December 1, 1998, and the calculation of the Service Price Index for basic and nonbasic services shall be based upon service volumes for the month of December for the year of the annual filing and upon service prices in effect on December 1, 1998". *Order Approving BellSouth Telecommunications, Inc.'s Application for Price Regulation Plan,* Docket No. 95-02614, p. 21 (Tenn. Reg. Auth. Dec. 9, 1998).

The SPI is a mathematical comparison of revenues generated from current-year telephone rates based on current-year volumes relative to revenues generated from base-year telephone rates based on current-year volumes. The numerator of the index is expressed as follows:

$$\mathbf{P_1 \times Q_1 = R_1}$$

(where P_1 represents current-year telephone rates, Q_1 represents current-year volumes, and R_1 represents revenues based on current-year telephone rates at current-year volumes).

The denominator of the SPI is computed as follows:

$$\mathbf{P_0 \times Q_1 = R_0}$$

(where P_0 represents base-year telephone rates ("service prices in effect on December 1, 1998"), Q_1 represents current-year volumes, and R_0 represents revenues based on base-year telephone rates at current-year volumes). The SPI is computed by dividing R_1 by R_0: SPI = $R_1 - R_0$ (where R_1

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[25] *Affidavit of Mark H. Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* at ¶¶ 3-4.

represents revenues based on current-year prices and R_0 represents revenues based on base-year prices).[26]

The P_1 telephone rates are the current-year prices that BellSouth actually charges customers for telephone services — not general rate group prices that, in BellSouth's opinion, should be applied. Likewise, the P_0 telephone rates are the base-year prices that BellSouth actually charged customers on December 1, 1998 — not inapplicable rate group prices that BellSouth may have desired to bill and collect. Because the actual telephone charges on customers' bills would increase under BellSouth's regrouping tariff, the SPI methodology ordered by the TRA will require an adjustment to reflect the increase in current-year prices (P_1) for customers of affected telephone exchanges.[27] In order for BellSouth to create the illusion that its price regulation plan is not affected by its regrouping proposal, BellSouth also will have to adjust the SPI calculation to reflect the base-year prices (P_0) that would have applied if BellSouth's regrouping tariff had been in effect on December 1, 1998.[28] On the annual price regulation schedules filed to compute its SPI, BellSouth likely will accomplish these adjustments by shuffling the customers that have been regrouped into their new rate group categories.[29] It is illogical to conclude that BellSouth's regrouping tariff has no

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[26] *Affidavit of Mark H. Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at ¶ 5.

[27] *Affidavit of Mark H Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc. 's Motion for Summary Judgment* at ¶ 6.

[28] *Affidavit of Mark H Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc. 's Motion for Summary Judgment* at ¶ 7.

[29] *Affidavit of Mark H. Crocker, CPA, In Opposition to BellSouth Telecommunications, Inc 's Motion for Summary Judgment* at ¶ 8.

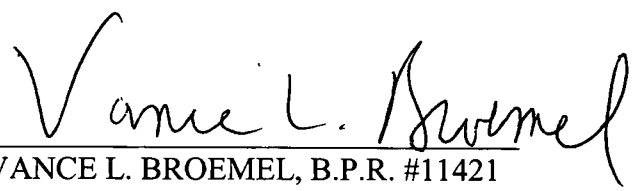
affect on BellSouth's price regulation plan when approval of the tariff would require adjustments on the schedules used to compute BellSouth's service price index under that plan.

III. CONCLUSION

For the foregoing reasons, the Tennessee Regulatory Authority should enter an order denying *BellSouth Telecommunications, Inc.'s Motion for Summary Judgment* in this matter. BellSouth has failed to demonstrate that it is entitled to a judgment as a matter of law based on the undisputed material facts of this record. Further, based on the record in this docket, the Tennessee Regulatory Authority should enter an order granting the *Consumer Advocate and Protection Division's Motion for Summary Judgment.*

RESPECTFULLY SUBMITTED,

PAUL G. SUMMERS, B.P.R. #6285
Attorney General
State of Tennessee



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Dated: March 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile or first-class U.S. Mail, postage prepaid, on March 9, 2004, upon:

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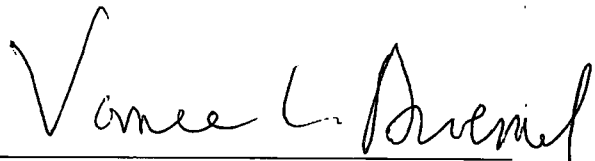

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