

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**June 15, 2009**

**IN RE:**

**RULEMAKING FOR THE PURPOSE OF  
IMPLEMENTING TOLL-FREE  
COUNTYWIDE CALLING RULES**

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**DOCKET NO.  
04-00205**

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**ORDER CLOSING DOCKET**

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This docket came before Chairman Eddie Roberson, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (the “Authority” or “TRA”), under section one business, at a regularly scheduled Authority Conference held on May 18, 2009 to consider closing the docket.

This docket was opened by Authority action adopting the recommendation of Director Ron Jones as set forth in Director Jones’ Report on Workshop Meeting Held November 7, 2003 and Recommendation of Moderator filed December 5, 2003 in Docket No. 03-00502.

On August 31, 2004, the Authority filed a Notice of Rulemaking Hearing with proposed rules with the Secretary of State. The rulemaking hearing was held on November 9, 2004 before the Authority to consider the proposed rule amendments of the above mentioned chapter pursuant to Tenn. Code Ann. §§ 4-5-202 and 65-2-102.

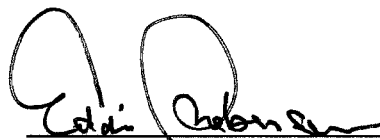
Written comments were submitted by interested persons prior to and following the hearing on November 9, 2004. The proposed rules were approved by the Directors during the February 28, 2005 Authority Conference. On April 11, 2005, the rules as approved were submitted for review to the Attorney General. On September 29, 2006, the TRA received a letter from the Attorney General rejecting the rules as submitted, stating the rules are “in violation of the Due Process Clause of the

United States Constitution and Article I, Section 21, of the Tennessee Constitution.” A copy of the Attorney General’s letter is attached as Exhibit A.

After the rejection of the proposed rules by the Attorney General, the Authority worked on revising the rules to address the concerns articulated by the Attorney General’s Office. After completing these changes, new language was submitted to the Attorney General for consideration. If the new language resolved the Attorney General’s concerns, such language would then be included in a new draft of the proposed rules. After a lengthy review process, the Attorney General’s Office informed the Authority that the new language would not cure the infirmities originally noted by the Attorney General. In addition, the Authority was informed that the Attorney General was not likely to approve any version of the proposed rules because of the perceived constitutional problems with the basic premise underlying the proposed rules. For these reasons, the Authority is of the opinion that the proposed rules cannot be modified to fully implement Tenn. Code Ann. § 65-21-114 and meet the constitutional requirements articulated by the Attorney General.

During the May 18, 2009 Authority Conference, the panel voted unanimously to terminate this rulemaking and close the docket.<sup>1</sup>

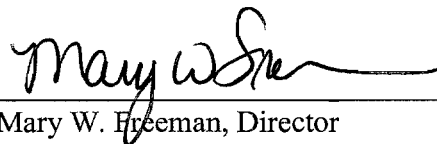
**IT IS SO ORDERED.**



Eddie Roberson, Chairman



Sara Kyle, Director



Mary W. Freeman, Director

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<sup>1</sup> The panel noted that terminating this rulemaking and closing the docket in no way diminished carriers’ responsibility to provide toll-free countywide calling pursuant to Tenn. Code Ann. § 65-21-114.

STATE OF TENNESSEE

Office of the Attorney General



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September 29, 2006

The Honorable Sara Kyle, Chairman  
The Honorable Pat Miller, Director  
The Honorable Ron Jones, Director  
The Honorable Eddie Roberson, Director  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

Re: Proposed Telecommunications Rules Implementing  
Toll-Free County-Wide Calling, Chapter 1220-4-12

Dear Chairman Kyle and Directors Miller, Jones, and Roberson:

Pursuant to your submission, I have reviewed in accordance with Tenn. Code Ann. § 4-5-211 the proposed Telecommunications Rules Implementing Toll-Free County-Wide Calling. I have determined that I cannot approve these proposed rules in their present form because they do not provide for or identify a means for compensating carriers that are required to complete long-distance calls across LATA boundaries, but within the same county. Without such a mechanism, which is not apparent in these proposed rules, such a requirement in certain instances would constitute a "taking" of services without just compensation, in violation of the Due Process Clause of the United States Constitution and Article I, Section 21, of the Tennessee Constitution.

In spite of the laudable intent of these rules and their design to effectuate Tenn. Code Ann. § 65-21-114, their implementation in many circumstances would appear to require interLATA telephone carriers to render a service free of charge. In *AT&T v. Cochran*, 1995 WL 256662 (May 3, 1995), the Court of Appeals struck down as unconstitutional an Order of the former Public Service Commission that attempted to

Exhibit A

accomplish the same goal in virtually the same manner. As pointed out in Op. Tenn. Att'y Gen. No. 01-115 (July 20, 2001), the enactment of Tenn. Code Ann. § 65-21-114 did not alter this basic constitutional analysis. Copies of this decision and opinion are attached. The mention of a fair rate of return in proposed Rule 1220-4-12-.02(3) is not sufficient to remedy this problem, as the Court of Appeals discussed in the *AT&T* decision.

In order fully to implement toll-free county-wide calling in Tennessee (without a modification of LATA boundaries at the federal level), it would be necessary for the Authority to provide or identify compensation for the services provided by interLATA carriers which complete such calls. While the proposed rules contain many appropriate features that provide some of the mechanics for toll-free county-wide calling, we are not assured by the rules themselves or the information available to us that they satisfy the constitutional requirements.

I regret that I cannot approve these rules in the form in which they have been submitted to this Office. I am therefore returning the unsigned rules to you with this letter. This Office will be happy to work further with the TRA to develop a means of establishing toll-free county-wide calling that will fully implement T.C.A. § 65-21-114 and meet the constitutional requirements.

Please contact this Office if you have any additional questions or would like to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Paul G. Summers". The signature is written in dark ink and includes a small flourish at the end.

PAUL G. SUMMERS  
Attorney General

PGS/CLL:dh  
Enclosures  
cc: Richard Collier, Esq.  
T.R.A. General Counsel

148566

Westlaw.

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Not Reported in S.W.2d, 1995 WL 256662 (Tenn.Ct.App.)  
(Cite as: Not Reported in S.W.2d)

**H**

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

A T & T COMMUNICATIONS OF THE SOUTH  
CENTRAL STATES, INC., MCI

Telecommunications Corporation and Sprint

Communications Company, L. P.,

Petitioners/Appellants,

v.

Frank COCHRAN, Chairman, Keith Bissell,

Commissioner, and Steve Hewlett, Commissioner

Constituting the Tennessee Public Service

Commission, Respondents/Appellees.

No. 01A01-9409-BC-00427.

May 3, 1995.

Rehearing Denied June 7, 1995.

Appeals of Tennessee Middle Section at Nashville.

Van Sanford and John Knox Walkup of Gullett,  
Sanford, Robinson and Martin, Nashville, TN.

Jeanne Moran, Nashville, TN.

Paul S. Davidson of Stokes & Bartholomew,  
Nashville, TN.

T.G. Pappas of Bass, Berry & Sims, Nashville, TN.

Charles L. Howorth, Nashville, TN.

**OPINION****TODD.**

\*1 The captioned petitioners have petitioned this Court pursuant to T.R.A.P. Rule 12 for review of a final order of the Tennessee Public Service Commission (hereafter "Commission") requiring petitioners to render free service to a particular group of telephone users in respect to a particular class of telephone calls.

Petitioners do not operate local telephone exchanges which are designated by the acronym, "L.A.T.A." Petitioners are designated "inter LATA"

or "IXC's" because they furnish long distance telephone connections between local exchanges. Petitioners compete for the patronage of local telephone subscribers who designate their choice among available long distance carriers. The long distance carriers are compensated by billing the local customer through the local exchange.

Not all Tennessee counties are served by county-wide local exchanges. In each of twelve counties of the State there are at least two local exchanges; so that, in these counties, some intra-county telephone calls require the service of inter LATA, or long distance connection between exchanges.

The Commission has adopted a policy of eliminating long distance charges on telephone calls within a single county. Pursuant to this policy, on October 13, 1993, the Commission served upon petitioners an order captioned:

In Re: Show Cause Proceeding Against Certified ICX's to Provide Toll Free, County-Wide Calling

Following responses and hearing, the Commission entered its order providing:

2. All IXC's (long distance carriers) providing intrastate service in Tennessee will provide inter LATA intra-county calling toll free to all Tennessee customers effective October 15, 1994;....

In their petition to this Court for review, petitioners present the following issues:

1. Whether the Commission followed the proper standard or criteria in construing its statutory powers.

2. Whether the Commission's Final Order, requiring the petitioners to provide toll-free service to a particular category of customers on a geographic basis, is within the statutory powers of the Commission.

3. Whether the Commission's Final Order

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constitutes a taking of the particular services or property of the petitioners, without compensation, in violation of Article I, Section 21 of the Tennessee Constitution and the Fifth Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment.

4. Whether the Commission's Final Order deprives the petitioners of due process of law in violation of Article I, Section 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.

5. Whether the Commission adopted the policies it seeks to implement in this proceeding in accordance with governing procedural law.

Petitioners summarize their argument:

1. The powers of the Commission are only those conferred by statute as limited by the Federal and State Constitutions.

2. The Commission has no power to compel petitioners to furnish free service under the circumstances of this case.

\*2 3. The action of the Commission is invalid because it is based upon incorrect "show cause" procedure rather than rule-making procedure.

T.C.A. Section 65-5-201 authorizes the Commission to fix "just and reasonable rates" for utility service, but no statutory provision is cited or found for requiring a utility to furnish its service to a particular customer without charge.

The Commission points out that its present tariffs require local telephone exchanges to furnish free directory service to its subscribers, but the relation of a local exchange with its subscribers is completely different from that of a long distance carrier and its intermittent customers. For a lump sum monthly charge, the exchange furnishes a package of services including directory service. Long distance telephone companies charge on a call by call basis, whereby they are paid for each call made. A more reasonable comparison would be with a public pay station telephone service.

The Commission asserts that it has the power to "distribute the load" of utility costs by lowering the rates charged one class of customers because of profits derived from another class of customers. Whatever the merits of this argument, the statute does not authorize the requirement of service without any charge to one class of customers even though the loss to the utility may be replaced by overcharging another class of customers.

The direction of petitioners to render free long distance service between exchanges serving customers in a single county is not authorized by statute.

Article I, Section 21 of the Constitution of Tennessee reads as follows:

Sec. 21. No man's services or property taken without consent or compensation. That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

The protection of this provision extends to corporations as well as to individuals. *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S.W. 955 (1899); 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55 (1901); *Home Tel. Co. v. People's Tel. & Tel. Co.*, 125 Tenn. 270, 141 S.W. 845 (1911).

The order of the Commission demands "particular service." In *Henley v. State*, 98 Tenn. 665, 41 S.W. 352 (1897), the Supreme Court said:

Particular services must mean peculiar services; limited services; not ordinary or general services of an individual. It is not an easy matter to draw the distinction between particular and ordinary services in every instance, still some general rules may be given to mark the line. It seems clear that ordinary services, such as may be required of all citizens, or officials, by general or valid special laws, are not particular services. A single illustration may suffice: A physician cannot be required to give his time and services and skill and scientific knowledge in making an examination to qualify him to speak as an expert witness. If, however, the same physician may have already made an examination and come

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into the possession of facts material to be disclosed to attain justice and administer the law, he may be required to testify to them as any other witness may.

\*3 *Henley*, Id. at 684.

The order of the Commission "demands" or "takes" property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand. The right to compensation is "property" which may not be taken without just compensation. *Southern Bell Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm.*, 202 Tenn. 465, 304 S.W.2d 640 (1957).

The Constitution requires "just compensation" for services or property taken by public authority. Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit. It does not mean forcing a person not benefitted to pay the compensation for the benefitted non-payer.

The action of the Commission also violates the Fifth Amendment of the Constitution of the United States which is made applicable to the states by the Fourteenth Amendment. *Dolan v. City of Tygard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Because of the statutory and constitutional infirmities of the order of the Commission, it is unnecessary to discuss or determine the procedural issue which is pretermitted.

There are other constitutional and authorized means of accomplishing the ends sought by the Commission, but it is not within the province of this Court to render advisory opinions.

The order of the Commission is reversed and vacated. Costs of this appeal are taxed against the Commission. The cause is remanded to the Commission for such further proceedings as may be necessary and appropriate.

Reversed, Vacated and Remanded.

Tenn.App.,1995.

AT&T Communications of South Cent. States, Inc.  
 v. Cochran

Not Reported in S.W.2d, 1995 WL 256662  
 (Tenn.Ct.App.)

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