BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

February 14, 2008

IN RE:	)	
	)	
UNITED TELEPHONE-SOUTHEAST, INC.	)	**DOCKET NO.**
D/B/A EMBARQ CORPORATION TARIFF FILING	)	**07-00269**
TO INCREASE RATES IN CONJUNCTION	)	
WITH THE APPROVED 2007 ANNUAL PRICE	)	
REGULATION FILING	)	

INITIAL ORDER

This matter is before the Hearing Officer upon the January 31, 2008 filings of the *Brief of the Consumer Advocate in Response to the Request of the Hearing Officer* (the "CAD's Brief" or "Consumer Advocate") and the *Brief of United Telephone-Southeast, Inc.* ("UTSE's Brief" or "Embarq"). These filings were made pursuant to a request by this Hearing Officer at the January 3, 2008 Status Conference that was convened "for the purposes of determining the issues, establishing a procedural schedule and discussing pre-hearing matters, including any discovery issues."[1]

BACKGROUND

At a regularly scheduled Authority Conference held on December 17, 2007, the voting panel of the Tennessee Regulatory Authority ("Authority" or "TRA") assigned to consider the tariff filing in this docket, suspended the portion of the tariff concerning directory assistance while approving the balance of the tariff. The directory assistance ("DA") portion of the tariff consists of two elements, which raise two distinct issues: (1) the number of free DA allowances,

[1] See *Notice of Status Conference*, December 21, 2007.

and (2) the rate for each call in excess of the DA allowance. The panel voted unanimously to suspend, in the public interest[2] and pending a hearing, the issue concerning the number of DA allowances. A majority of the panel voted to suspend the proposed rate increase on calls that exceed the appropriate DA allowance.[3] A contested case was convened to consider the directory assistance portion of the tariff, a hearing officer appointed, the intervention of the CAD into such contested case was granted, and Embarq was directed to refile its tariff as approved.[4]

THE ISSUES

In addition to the two DA issues (which for sake of brevity will be referred to as (1) "number of allowances" and (2) "rate per call"), this case also presents the issue as to which party has the burden of proof. At the January 3, 2008 Status Conference, the parties were queried about these three issues, and after presenting their respective arguments, both parties agreed with the following: the number of allowances (Issue 1) is a question of policy;[5] the rate per call (Issue 2) is a question of law;[6] and the burden of proof[7] (Issue 3) is also a question of law.

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[2] *See* Tenn. Code Ann. § 65-5-101(c)(3)(iii)(B); as part of her motion, Director Kyle stated "I think I owe it to Tennessee consumers to pause right now and take the time to research, to review evidence, and to build a record about how they will be impacted by reducing the call allowance from three to one. Also I would like to hear from the Consumer Advocate on this issue. So I would be in favor of suspending the portion of the tariff concerning directory assistance so we could have a hearing." Transcript of Authority Conference, p. 14 (December 17, 2007).

[3] Director Jones stated that absent a change to the number of DA allowances, if the tariff simply proposed a rate increase on excess DA calls, he would vote to approve it, given that DA is a non-basic service and it is well settled that the company has the ability to make an adjustment in its rates under the price regulation regime.

[4] The remaining sections of the tariff, the contested case, appointment of a hearing officer and the CAD's intervention were all unanimously approved by the panel. See Transcript of Authority Conference, pp. 13-20 (December 17, 2007).

[5] *Policy*: "The general principles by which a government is guided in its management of public affairs." Black's Law Dictionary, 7th Ed., p. 1178. In this case, a question of policy is an issue over which an agency has been given discretion, either by statute or case law. The Court of Appeals has previously ruled that the TRA has the discretion to determine the number of DA allowances that will best serve the public interest. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700 (Tenn.Ct.App.2002) (copy attached).

[6] *Question of law*: "A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion." Black's Law Dictionary, 7th Ed., p. 1260.

[7] *Burden of Proof*: "A party's duty to prove a disputed assertion or charge. The burden of proof includes both the *burden of persuasion* and the *burden of production*." (Emphasis in original). Black's Law Dictionary, 7th Ed., p. 190. *Burden of Production* (a/k/a *Burden of going forward with evidence*): "A party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict." *Id. Burden of Persuasion*: "A party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.*

With this framework in mind, the Hearing Officer cited TRA Rule 1220-1-2-.12(4), which states:

> Upon reasonable notice to all parties, the Hearing Officer may convene a hearing or convert a pre-hearing conference to a hearing, to be conducted by the Hearing Officer, to consider arguments and any relevant evidence on any question of law. The Hearing Officer may enter an initial order, as provided in the Uniform Administrative Procedures Act, on any such question of law.

TRA Rule 1220-1-2-.12(4). Pursuant to this rule, the Hearing Officer notified the parties that he intended to determine the two questions of law and issue an Initial Order which would be subject to review by the Authority. The Hearing Officer then requested briefs on the questions of law (issues 2 and 3), and queried the parties if additional oral argument was warranted or requested. Both parties agreed that after the arguments put forward at the Status Conference, and with sufficient time to review the appropriate transcripts prior to submitting briefs, further oral argument would be unnecessary.

As there are no genuine issues as to any material facts concerning Issue 2 and 3, under the Authority's general procedural powers[8], the Hearing Officer has the discretion to hear and determine all or any part of a case, without hearing oral testimony. Therefore, based on the pleadings, the arguments of the parties and their briefs, this Hearing Officer makes the following findings and conclusions of law.

FINDINGS AND CONCLUSIONS

Issue 1

At the Status Conference, both parties agreed that the number of free DA allowances is clearly a policy decision and a question to be answered at the sole discretion of the Authority. In both their briefs, in the CAD's *Complaint* and in Embarq's *Response*, each cited and/or referred to *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700 (Tenn.Ct.App.2002) as controlling authority for this proposition. (A copy of the Opinion is

[8] *See* TRA Rule 1220-1-2-.22(1).

attached to this Initial Order). In its Opinion, the Court of Appeals cited Tenn. Code Ann. §§ 65-4-117 and 65-4-106 as the legislative justification for such power and discretion. Therefore, Issue 1 is properly within this contested case, is subject to complete discovery, and after a full evidentiary hearing, will be determined by the designated panel of Directors.

Issue 2

The rate for each call in excess of the DA allowance is a question of law, because the controlling statute[9] is clear on its face, the Court of Appeals (in the above referenced Opinion) has previously determined that DA is a non-basic service, and therefore, a price regulated company has the ability to set rates for the DA allowance within its maximum headroom. Furthermore, any legislative delegation of discretion to the TRA in the area of rate setting has been limited under the price regulation regime. UTSE's Brief argues that the "Authority is required under state law to permit Embarq's DA rate increase to go into effect" provided that there is "sufficient headroom under its annual price regulation filing."[10] The CAD's Brief states:

> It is the preference of the Consumer Advocate that consumers not be burdened with increased rates for D.A. service. However, there is no legal basis for the Consumer Advocate to challenge the rates charged for D.A. provided by price cap regulated companies in this specific matter. The Court of Appeals has determined that directory assistance is not a basic service as the term is applied in the price cap statute. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *3-4 (Tenn.Ct.App.2002). **As a matter of law, the TRA can not set the rate for a non-basic service, assuming the company has complied with all price cap regulations.** Thus, Embarq may set the rate for directory assistance as it deems appropriate subject to certain statutory limitations that govern price cap regulation. Tenn. Code Ann. § 65-5-109(h). The Consumer Advocate has not requested the agency to set the rate for a non-basic service. Nor does the agency appear poised to do so. (Emphasis added).[11]

It is clear from the statute and court decisions interpreting the statute that the Authority can not, as a matter of law, set the rates charged by a price regulated company for each call in excess of its DA allowance.

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[9] *See* Tenn. Code Ann. § 65-5-109(h).
[10] UTSE's Brief, p. 6 (January 31, 2008).
[11] CAD's Brief, p. 3 (January 31, 2008).

In this case, the Authority has acted within the law, for it did not deny, set, or otherwise alter Embarq's proposed rate increase, but rather, the Authority suspended the rate increase in the public interest while it examines the directory assistance issues. Pursuant to Tenn. Code Ann. § 65-5-101(c)(3)(iii)(B), the Authority "may suspend a tariff pending a hearing, on its own motion, upon finding such suspension to be in the public interest." (*See* footnote # 2, *infra*). The Authority clearly has the power to suspend a tariff in the public interest notwithstanding the Consumer Advocate not requesting such a suspension. On page 3 of the CAD's Brief, the Consumer Advocate points out that there is a direct relationship between the number of DA allowances and the rate per call, and the Authority should consider the amount of the company's standard rate when determining the number of allowances. Simply put, the "higher the charge, the more important the number of free DA calls becomes to consumers."[12] That doesn't imply that the TRA can modify the rate, but it does suggest that the amount of the rate is a factor in determining the number of allowances.

Therefore, as a matter of law, while the Authority can not modify the rates charged for each call in excess of the DA allowance, it may suspend the rate in the public interest, pending a hearing to determine the proper policy concerning the number of free DA allowances in relation to the rate being charged customers for DA calls made in excess of such DA allowance.

Issue 3

The Burden of Proof, as pointed out in the definition cited in footnote # 7, *infra*, includes both the *burden of persuasion* and the *burden of production*. The burden of production is the requirement of producing evidence, sufficient to satisfy the judge, of a particular fact in issue. It is the party's obligation to come forward with evidence to support its claim. The burden of persuasion imposes upon a party the responsibility of persuading a trier of fact that the alleged

[12] *Id.*

fact is true or should be resolved in favor of that party;[13] if the evidence is evenly balanced, the party that bears the burden of persuasion can not prevail. Although the burden of proving the fact (burden of persuasion) remains where it started, once the party with this burden establishes a prima facie case,[14] the burden to "produce evidence" (burden of production) shifts.

In *Winford v. Hawisse Apartment Complex*, 812 S.W.2d 293, 296 (Tenn.App. 1991) (*perm. app. denied*), the Tennessee Court of Appeals explains the difference between the two "burdens" and how they apply in the presentation of evidence or proof.

> The term "burden of proof" is used in two senses in the authorities. In one sense the meaning of the term involves that burden which the party who has the affirmative of an issue must always bear until the conclusion of the case, a burden which never shifts no matter what the changing aspects of the controversy may show as the case develops on the evidence. The other meaning is expressed in the duty which devolves upon the respective parties to meet with evidence the inferences adverse to them that may develop at any point in the trial from the beginning to the end of the case. Some authorities indicate this aspect of the matter by the term "burden of evidence," and in this sense it is said that the "burden of the evidence" shifts from time to time from one party to the other.[15]

In summary, the "burden of proof," as it is now recognized and accepted in law, is synonymous with the obligation of a particular party, asserting the affirmative of an issue in dispute, to persuade the trier of fact that his or her position is correct or should be ruled upon favorably. The burden of persuasion component of the "burden of proof" does not shift. The burden of production, as a related but distinct concept of burden of proof, properly shifts upon the showing of a prima facie case, and may shift back upon sufficient rebuttal.

As a matter of law, in proceedings before the Authority, the burden of proof rests upon the proponent or party seeking the affirmative relief. While the UAPA does not specifically

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[13] Richard J. Pierce, *Administrative Law Treatise* §10.7, p. 759-760 (4th Ed. 2002).

[14] *Prima facie case*: "1. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary, 7th Ed., p.1209.

[15] *Winford v. Hawisse Apartment Complex*, 812 S.W.2d 293, 296 (Tenn.App. 1991) (*perm. app. denied*), citing 11 Tenn.Jur., *Evidence*, § 49 at 280 (1984).

address this subject, procedure before the TRA, specifically Tenn. Code Ann. § 65-2-109(5), dictates that:

> The burden of proof shall be on the party or parties asserting the affirmative of an issue; provided, that when the authority has issued a show cause order pursuant to the provisions of this chapter, the burden of proof shall be on the parties thus directed to show cause.

Furthermore, TRA Rule 1220-1-2-.16(2) reiterates that:

> The burden of proof shall be on the party asserting the affirmative of an issue, provided that when the Authority has issued a show cause order pursuant to T.C.A. § 65-2-106, the burden of proof shall be on the party thus directed to show cause.

Embarq initiated this docket when it filed its tariff on November 16, 2007. The tariff proposes increased rates and other changes to its status quo, and as Embarq is "asserting the affirmative" of this issue (in seeking approval of this tariff), it has the burden of persuasion relative to the tariff. While the burden of persuasion never shifts from the party presenting the affirmative of an issue, the burden of production would necessarily shift upon the making of a prima facie case by the proponent of an issue. In this case, Embarq points to the Authority's Order of April 17, 2007 in Docket No. 06-00232, and cites that Order as precedent[16] for the number of call allowances before DA charges are assessed to a customer. Once a prima facie case is established by Embarq, the burden of producing evidence would rightly shift to the Consumer Advocate.

On December 11, 2007, the Consumer Advocate filed its *Complaint and Petition to Intervene ("CAD's Complaint").* In this pleading, the Consumer Advocate requests to participate and intervene in a contested case proceeding, and

> seeks the preservation of the status quo for all companies required to provide free directory assistance allotments until the TRA can complete a thorough review of directory assistance policy with the confines of a contested case. Such a policy

[16] As precedent, the Order in Docket No. 06-00232 is persuasive authority, but it is not binding on the current panel: the current panel consists of different Directors from the panel in Docket No. 06-00232.

> review should take into account advances in technology and means of locating phone numbers, but also take into consideration the quality and availability of such alternatives to the consumers of Tennessee.[17]

Earlier in the *CAD's Complaint*, it bemoans that Embarq "would reduce the free monthly directory assistance calls that consumers currently enjoy from three allowances to one. **Such a reduction is not in the interest of the consumers of Tennessee.**"[18] (Emphasis added). Clearly, this position asserts the affirmative of the issue. Furthermore, the CAD's Brief then states that the "Consumer Advocate will not suggest the number of D.A. uses that should be required of Embarq until discovery has taken place" but goes on to say that the "direct testimony of the Consumer Advocate will address specific positions and proposals on these matters."[19] On this issue, after sufficient discovery occurs, the CAD has assumed the burden of going forward with the evidence to propose and prove the appropriate number of call allowances that is in the public interest. While the ultimate decision lies within the Authority's discretion, the Consumer Advocate has the burden of persuading the Authority that its decision in Docket No. 06-00232 is not applicable to Embarq.

IT IS THEREFORE ORDERED THAT:

1. Issue 1 is properly within this contested case, is subject to complete discovery, and after a full evidentiary hearing, will be determined by the designated panel of Directors.

2. As a matter of law, while the Authority can not modify the rates charged for each call in excess of the DA allowance, it may suspend the rate in the public interest, pending a hearing to determine the proper policy concerning the number of free DA allowances in relation to the standard rate charged for DA calls made in excess of such DA allowance.

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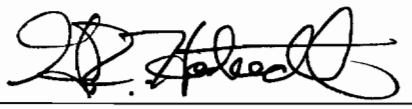
[17] *CAD's Complaint*, p.3 (December 11, 2007).
[18] *Id.* at 2.
[19] CAD's Brief, p. 5 (January 31, 2008).

3. As a matter of law, Embarq has the burden of persuasion relative to the tariff; the Consumer Advocate has the burden of going forward with the evidence to propose and prove the appropriate number of call allowances that is in the public interest; and the Consumer Advocate has the burden of persuading the Authority that its decision in Docket No. 06-00232 is not applicable to Embarq.

4. In accordance with the decision of the panel at the December 17, 2007 Authority Conference, the directory assistance portion of the tariff is suspended pending further action by the panel.

5. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Initial Order.

6. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Initial Order.



Gary Hotvedt, Hearing Officer

Consumer Advocate Div. v. Tennessee Regulatory Authority
Tenn.Ct.App.,2002.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

CONSUMER ADVOCATE DIVISION,
v.
TENNESSEE REGULATORY AUTHORITY.

No. M1997-00238-COA-R3-CV.

July 18, 2002.

Appeal from the Tennessee Regulatory Authority, No. TRA 96-01423; Melvin Malone, Director.

John Knox Walkup, Attorney General & Reporter; Michael E. Moore, Solicitor General; L. Vincent Williams, Consumer Advocate; Vance L. Broemel, Assistant Attorney General, for appellant, Consumer Advocate Division.

Guy M. Hicks, Nashville, Tennessee and Patrick William Turner, Atlanta, Georgia, for appellee, BellSouth Telecommunications.

Citizens Telecommunication Company, Pro Se.

Dennis McNamee, J. Richard Collier and William Valerius Sanford, Nashville, Tennessee, and H. Edward Phillips, Wake Forest, North Carolina, for appellee, Tennessee Regulatory Authority.
Joseph F. Welborn, Robert Dale Grimes and Theodore G. Pappas, Nashville, Tennessee for appellee, United Telephone Southeast, Inc.

OPINION

PER CURIAM.

***1** The principal issue in this case is whether telephone directory assistance service is basic or non-basic under the statutory scheme. Secondary issues involve the practice of grandfathering existing customers when a new tariff is approved, the exemptions to directory assistance charges, and whether the Tennessee Regulatory Authority was authorized to transfer a contested case to another docket. We affirm.

This is a direct appeal by the Consumer Advocate Division [CAD] of the office of the Attorney General.

The genesis of this litigation dates from the filing of a tariff by United Telephone [United] with the Tennessee Regulatory Authority [TRA] for an increase in rates, particularly for directory assistance, which was provided without charge to a telephone customer.

The filing was made pursuant to Tennessee Code Annotated § 65-5-209(e) which allows regulated telephone companies that have qualified under a price regulation plan to adjust prices for non-basic services so long as the annual adjustments do not exceed lawfully imposed limitations.

Intervening petitions were filed by CAD, by Citizens Telecommunications Company of Tennessee [Citizens], by BellSouth Telecommunications, Inc. [BellSouth] and AT & T Communications of the South Central States, Inc. [AT & T], all of which were granted.

The telephone services described as basic services are subject to a four-year price freeze under Tennessee Code Annotated § 65-5-209(f), that is, if a service is basic, its rates cannot be raised for four years.

United insisted that directory service was not a basic service and hence not subject to the price freeze. As the case progressed, CAD raised other issues of (1) whether United was entitled to have its 911 Emergency Service and educational discounts classified as non-basic and therefore subject to a price increase; (2) whether a company could continue to offer a service to certain classes of customers while refusing the service to newer customers; (3) whether a previously approved tariff filed by United limiting to five the number of lines at a single location could be considered residential service.

By order entered September 4, 1997, the TRA ruled that (1) directory service is non-basic and approved the tariff as filed subject "to free-call allowance up to six inquiries with an allowance of two telephone numbers per inquiry for residents and business access lines per billing period," an exemption for customers over sixty-five and those with a confirmable visual or physical disability; (2) a previous tariff filed by United which limited the number of access lines that could be charged a residential rate to five per location was not proper to be considered in this proceeding; and (3) a previous tariff approving a business service to existing customers but denying it to newer customers was not proper to be considered in this proceeding.

CAD appeals and presents for review the issues of (1) whether directory service is a basic or non-basic service; (2) whether the TRA erred in holding that the five-line tariff would be adjudicated in another proceeding; and (3) whether the TRA erred in holding that United could obsolete a business service, change its characteristics, and offer it to new customers for an increased price.

***2** BellSouth presents an additional issue for review: Whether the TRA erred in requiring United to provide free directory assistance in certain instances.

United presents for review issues similar to those presented by CAD and BellSouth.

Appellate review is governed by Tennessee Code Annotated § 4-5-322(h) which provides:

The [reviewing] court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision ft the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material ...

Directory Assistance

Tennessee Code Annotated § 65-5-209, a1995 enactment, allows a telecommunications company to utilize a price regulation plan in the calculation of rates. This plan establishes, inter alia, a cap on the amounts a company can raise its rates for basic and non-basic telephone service as defined in Tennessee Code Annotated § 65-5-208(a)(1), with the maximum rate increase indexed to the rate of inflation, and the rates for basic service are frozen for four years from the date the company elects to be bound by the price regulation plan. United elected to be bound by the plan and its application was approved October 15, 1995. Tariff 96-201, the predicate of the case at Bar, sought a rate increase for non-basic services for an amount less than the rate of inflation. United proposed a charge for directory assistance because it was a non-basic service and therefore not subject to the price freeze. The TRA agreed, and approved the proposed rate increase subject to Tennessee Code Annotated § 65-5-208 as follows:

Classification of Services-Exempt services-Price floor-Maximum rates for non-basic services.-(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:

(1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.

(2) "Non basic services" are telecommunications services which are not defined as basic local exchange telephone services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

***3** CAD insists that the TRA erred in its interpretation of the statute because directory assistance was a part of the "usage" enjoyed by customers who subscribed to telephone service, in contrast to United's insistence that since the statutory definition of basic services does not refer to "directory assistance," it is a non-basic service.

The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts."*Collins v. McCanless,* 169 S .W.2d 850 (Tenn.1943); *Riggs v. Burson,* 941 S.W.2d 44 (Tenn.1997).

The TRA seemingly was cognizant of the long-standing principle that the legislative intent should be ascertained from the natural and ordinary meaning of the language used without a forced or subtle construction that would limit or extend the meaning of the language, *Hamblen County Ed. Asso.v. Bd. of Education,* 892 S.W.2d 428 (Tenn.Ct.App.1994); *Worrall v. Kroger Co.,* 545 S.W.2d 736 (Tenn.1977), since each party argued that the plain language of the statute supported its position, the TRA concluded that the language was susceptible of more than one meaning and hence was unclear, which justified recourse to its legislative history.

What we held in *BellSouth Tele. v. Greer,* 972 S.W.2d 663 (Tenn. Ct App.1997) is apropos in the case at Bar:

The legislative process does not always produce precisely drawn laws. When the words of a statute are ambiguous or when it is just not clear what the legislature had in mind, courts may look beyond a statute's text for reliable guides to the statute's meaning. We consider the statute's historical background, the conditions giving rise to the statute, and the circumstances contemporaneous with the statute's enactment. (Citations omitted).

Courts consult legislative history not to delve into the personal, subjective motives of individual legislators, but rather to ascertain the meaning of the words in the statute. The subjective beliefs of legislators can never substitute for what was, in fact, enacted. There is a distinction between what the legislature intended to say is the law and what various legislators, as individuals, expected or hoped the consequences of the law would be. The answer to the former question is what courts pursue when they consult legislative history; the latter question is not within the courts' domain.

Relying on legislative history is a step to be taken cautiously. (Citations omitted). Legislative records are not always distinguished for their candor and accuracy, and the more that courts have come to rely on legislative history, the less reliable it has become. (Citation omitted). Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts' interpretation of the statute. (Citations omitted).

***4** Even the statements of sponsors during legislative debate should be evaluated cautiously. (Citation omitted). These comments cannot alter the plain meaning of a statute (citations omitted), because to do so would be to open the door to the inadvertent, or perhaps planned, undermining of statutory language. (Citation omitted). Courts have no authority to adopt interpretations of statutes gleaned solely from legislative history that have no statutory reference points. (Citation omitted). Accordingly, when a statute's text and legislative history disagree, the text controls. (Citation omitted).

The Legislature considered and debated at length the issue of whether directory service was a basic or non-basic service. A transcript of the debate is included in the record and we have carefully studied it; suffice to say that the Legislature, by a substantial majority, approved the bill as now codified, reflecting its intent to exclude directory service as a basic service.

The interpretation of a statute is strictly one of law, *Roseman v. Roseman,* 890 S.W.2d 27, (Tenn.1994), and courts must construe statutes as they are written, *Jackson v. Jackson,* 210 S.W.2d 332 (Tenn.1948). While the logicality of the argument of CAD is obvious, the counter-arguments of the TRA and BellSouth are equally logical: That basic services are those specifically enumerated in the statute, and that if every "use" of a telephone were a basic service, Unified could not increase its rates for any service during the first four years of the price regulation plan and the price freeze admittedly applies only to basic services. Upon a consideration of all the recognized principles of statutory construction, we conclude that the meaning attributed to the statute by the TRA is the correct one.

The Five-Line Tariff

In the process of reviewing United's proposed rate filing, CAD discovered that United had raised the rates for residential customers with more than five access lines, and insisted that these lines were a basic service and subject to the statutory price freeze. Tenn.Code Ann. § 65-5-209(f). After hearing testimony concerning this issue, the TRA ruled that it should be heard in another docket. CAD challenges the action of the TRA, insisting that it had no authority to transfer the case to another docket after hearing proof on the issue in the case at Bar.

The tariff at issue was permitted to take effect by the Public Service Commission in October 1995. CAD argues that the tariff was never approved, but did not intervene in the proceeding.[FN1]TRA argues that it had the discretion to reopen the issue of the tariff in the case at Bar within a proceeding of its choosing. We agree that the TRA acted within its discretion in considering that the issue raised by CAD was more appropriately joined in another pending case. *See, South Central Bell Tele. Co. v. TPSC,* 675 S.W.2d 718 (Tenn.Ct.App.1984). We are referred to no rule or statute which forbids the TRA from ordering that this issue should be heard in another docket, and thus cannot fault the TRA for doing so.

FN1. New tariffs automatically became effective unless suspended. *See, Consumer Ad. Div. v. Bissell,* No. 01-A-01-9601-B-00049 (Tenn.Ct.App.1996).

The Grandfathering Issue

***5** During the progress of the directory assistance docket, CAD raised the issue that United impermissibly raised rates for its ABC Service, described as a kind of advanced business service. A witness for CAD testified that United made some changes in its ABC Service, renamed it "Centrex Services," and increased its rates above those charged to ABC customers. CAD specifically alleges that Centrex Services is not a new service, but merely a new name with a new way of combining and pricing the service provided under the ABC Service tariff.

TRA argues that CAD has impermissibly sought appellate review by collaterally attacking an agency decision that was rendered in another contested case hearing initiated upon a complaint filed by a customer of United. Docker Number 96-00462 was assigned, a hearing on the merits was held, and a final judgment was rendered on October 3, 1996, which was modified to approve a stipulation between regarding ABC Service on January 22, 1997. These judgments required

United, inter alia, to revise the terms of its central office-based service; to comply, United filed a tariff which included the grandfathering of ABC Service and a revised service called Centrex Services, which was approved by the TRA by Order entered January 22, 1997.

TRA further argues that since it found that Centrex Services was a unique bundling of products and pricing arrangements, it was not a service offered on June 6, 1995,[FN2] and that as a new service the Centrex tariff was "specifically considered and approved by the TRA in a prior docket and not found to be contrary to law."

FN2. Referring to the language of the tariff then in effect.

It was further found by TRA that the proposed tariffs to obsolete ABC Service and that introduced Centrex Services were filed in September 1996 with a revision filed in December 1996. The initial filing was served on CAD which did not intervene or otherwise participate in the hearing.

The TRA thereupon determined that there was no legal basis for the position urged by CAD, which should not be permitted to attack collaterally a TRA decision for which appellate review is time barred.[FN3]

FN3. Judicial review must be sought within sixty days from entry of judgment. Tenn.Code Ann. § 4-5-322; Rule 12(a) T.R.A.P.

CAD contends that grandfathering is not permitted under Tennessee law because a telephone company must "treat all alike and it cannot discriminate in favor of one of its patrons against another," citing *Breeden v. Southern Bell Telephone & Telegraph Co.,* 285 S .W.2d 346 (Tenn.1955). If, as CAD argues, United provides services to one group of customers while refusing to provide the same service to another group-new customers-we agree that the practice is contrary to Tennessee law. Tenn.Code Ann. § 65-4-122; § 65-5-204.

TRA ordered United to obsolete the ABC Service tariff following a docket hearing involving a complaining customer. TRA found that the ABC Service tariff as it applied to the complaining customer, ZETA Images, Inc., was insufficient, discriminatory, unreasonable and excessive.

The Centrex tariff was approved January 22, 1997. CAD insists that it is no different from the ABC tariff; that the ABC Service and Centrex Services are the same.

***6** There are differences between the tariffs. ABC Service is distant-restrictive but Centrex Services is not. ABC Service charges only for outgoing traffic over Network Access Registers, while Centrex Services charges for outgoing and incoming traffic. ABC Service requires a customer to purchase basic features separately, while Centrex Services included the basic features in the price of the line. Minimum service for ABC Service requires the use of two access lines and one NAR while Centrex Services requires two access lines and two NARs.

Grandfathering [FN4] is not, per se, illegal. But if it results in discrimination between old and new customers, and is unjust or unduly preferential and thus violative of the statutes, it cannot be

permitted. The thrust of CAD's argument is that ABC and Centrex Services are essentially the same, and to require one class of customer to pay more for the same service is unjust discrimination and unlawful.

> FN4. A provision in a new law or regulation exempting those already in or a part of an existing system which is being regulated. An exception to a restriction that allows those already doing something to continue doing it even if they would be stopped by the new restriction. *Black's Law Dictionary,* 699 (6th ed.1990).

The record reflects that if the ABC Service had been obsoleted without grandfathering the existing customers, they would have been required to pay the rate under the Centrex Services tariff, an increase in their cost of service. United has the right to price a non-basic service as it chooses, but any rate increase must be accompanied by off setting rate reductions which result in the rate increase being revenue neutral. Otherwise, United would be in violation of Tennessee Code Annotated § 65-5-209(e). The TRA argues that without a showing of a revenue neutral rate increase, United cannot obey its order to obsolete ABC Service without grandfathering the existing service. This argument has merit. If United is required to offer ABC Service to existing and new customers, it could not obsolete that service unless the service was withdrawn. But under the revenue neutral requirements, United could only obsolete a service where existing customers did not experience a rate increase or where a rate increase was neutralized by other rate deceases.

The CAD argues that grandfathering constitutes unjust discrimination and an undue preference as a matter of law and, is illegal in this case because the company has the technical ability to offer the service but chooses to offer it only to a certain group of customers. As we have seen, the statutes only prohibit discrimination that is unjust or unreasonable or preferences that are undue or unreasonable. The TRA is permitted to establish separate classifications of customers for the purposes of assessing different rates and has done so many times over the years.

Tennessee Code Annotated § 65-4-122 provides as pertinent here:

(a) If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any reference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.

***7** (b) Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful.

(c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage.

The operative language "for any service of a like kind under substantially like circumstances and conditions" is significant in this case because there is material proof that the Centrex Services was a new service, and one that was not offered on June 6, 1995. We cannot say that the action of the TRA was not supported by substantial and material evidence.

Exemptions from Directory Assistance Charges

United argues that while the TRA properly determined that directory assistance is a non-basic service, thus allowing United to set rates as it deems appropriate subject to certain safeguards, the TRA impermissibly ordered it to amend its tariff (1) to increase the directory assistance free call allowance to six inquiries with an allowance of two telephone numbers per inquiry per billing period; (2) to exempt from directory assistance charges those customers who are unable to use the directory owing to visual or physical disability, and (3) to exempt from directory assistance charges residential customers who are older than sixty-five years. United argues that these requirements are in excess of the authority of TRA. We disagree. Tennessee Code Annotated § 65-4-117 provides:

The Authority has the power to:

* * * * *

(3) after hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices and services to be furnished, imposed, observed and followed thereafter by any public utility.

This statute is required to be liberally construed, Tennessee Code Annotated § 65-4-106, and thus any reasonable doubt as to whether the language is sufficiently broad to include the right of TRA to impose conditions should be resolved in favor of the existence of that right. We therefore conclude that the action United complains of is authorized by the statutes.

The judgment is affirmed. Costs are assessed to CAD and United Telephone equally.

Tenn.Ct.App.,2002.
Consumer Advocate Div. v. Tennessee Regulatory Authority
Not Reported in S.W.3d, 2002 WL 1579700 (Tenn.Ct.App.)

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