BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	**DOCKET NO. 07-00269**

RESPONSE OF THE CONSUMER ADVOCATE TO EMBARQ'S PETITION FOR RECONSIDERATION OF THE MARCH 5, 2008 ORDER

On March 14, 2008 United Telephone-Southeast, Inc. ("Embarq" or "company") filed the *Petition for Reconsideration of the March 5, 2008 Order*. The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") herein responds.

Embarq's *Petition for Reconsideration* should be denied and this matter should be allowed to proceed to a contested case. In summary, the Tennessee Regulatory Authority ("TRA" or "agency") has the statutory authority to convene a contested case in this matter and to suspend a tariff on its own motion in the public interest. Neither the convening of a contested case nor the suspension of the rate increase were actions that could be characterized as an abuse of discretion. Docket 06-00232 is not a precedent that would foreclose the possibility of a contested case in this matter. There is no uniform "State policy" for free directory assistance ("D.A.") allotment calls for incumbent telephone companies in this state, including those incumbents that are price cap regulated. In light of recent proposed tariff filings concerning free D.A. allotment calls and the corresponding regulatory actions of the agency, the TRA has acted consistently.

The parties have briefed the legal arguments at the heart of this docket on two separate

occasions. Since the initial status conference and throughout the course of this docket the company has made arguments questioning the legal merits of the initial decision of the hearing panel to suspend the D.A. portion of the tariff and the convening of a contested case. The Consumer Advocate has responded in kind with opposing arguments. Due to the recurring nature of these arguments and in recognition of Embarq's procedural rights, a decision on reconsideration by the hearing panel is warranted.

In support of the *Petition for Reconsideration*, Embarq has incorporated prior statements and briefs made on the company's behalf in this docket. Likewise, the Consumer Advocate incorporates into this *Response* in support of its position the *Brief of the Consumer Advocate in Response to the Request of the Hearing Officer* filed on January 31, 2008 and the *Response of the Consumer Advocate to Embarq's Petition for Appeal of the Hearing Officer's Initial Order* filed on March 10, 2008. These briefs explore and articulate the Consumer Advocate's position concerning the convening of a contested case and the suspension of the rate increase by the agency. For convenience, copies of both are attached in chronological order as Exhibit 1 and Exhibit 2 respectively.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint and Petition to Intervene was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 18 day of March 2008.

Edward Phillips, Esq.
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Ryan L. McGehee
Assistant Attorney General

Exhibit 1

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	DOCKET NO. 07-00269

BRIEF OF THE CONSUMER ADVOCATE IN RESPONSE TO THE REQUEST OF THE HEARING OFFICER

On January 3 of this year, at a status conference convened before the Tennessee Regulatory Authority ("TRA") after notice, the hearing officer requested briefs from the respective parties concerning the burden of proof and the "rate increase" issue. He further invited the Consumer Advocate to discuss any potential change in the number of free monthly directory assistance uses that it would suggest. Herein, the Consumer Advocate responds as requested. Additional comments are also included addressing issues of legal merit counsel for Embarq Corporation ("Embarq") brought forth at the status conference that should have been addressed formally in a motion for reconsideration.

BURDEN OF PROOF

As Embarq is well aware, published tariffs are binding on the company and its customers and have the effect of law upon the same. *GBM Communications, Inc. v. United Inter-Mountain Telephone Company*, 723 S.W. 2d 109, 112 (Tenn.Ct.App.1986) (cert.denied). Proposed tariffs do not have such binding or legal qualities. Only the TRA can empower a tariff. The company in

this matter has sought to change the tariff that governs it, specifically a tariff that is required of it by the TRA to serve the public interest. According to Tenn Code Ann. § 65-2-109(5), "[t]he burden of proof shall be on the party asserting the affirmative of an issue[.]" In the case at bar, the party asserting the affirmative of the issue is Embarq.

Clearly, the company is affirmatively asserting that the current free monthly directory assistance call allowance of three (3) should be reduced to one (1). In essence, it seeks to change the "law" it is governed by in regards to directory assistance ("D.A.") policy requirements. The proposed tariff filing at hand is not in effect. The tariff that currently and legally binds the company requires, by TRA authority, that three (3) free monthly D.A. uses be provided to consumers. The hearing officer should not consider a proposed tariff as bearing the same legal and binding authority as a tariff that has gone into effect. Otherwise, all proposed tariffs acquire a standing of infallibility and "law" until a complaining party shows otherwise. Embarq must prove that the proposed tariff will not harm the public interest.

By the same reasoning, the Consumer Advocate would bear the burden of proof if it asserts the current tariff that is in effect, requiring three (3) D.A. uses, is insufficient to serve the public interest.[1] Any party in this proceeding advocating a change in the status quo of three (3) free monthly D.A. calls is asserting the affirmative of the issue and bears the burden of proof pursuant to Tenn. Code Ann. § 65-2-109(5). Thus, both parties may shoulder the burden of proof for their respective positions in this matter, but only for those respective affirmative positions alone.

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[1] The Consumer Advocate's position on the number of free D.A. uses required to serve the public interest is addressed later in this brief.

THE RATE INCREASE ISSUE

Rates for Non-Basic Services Can Not Be Set By the TRA

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.

The Suspension of the Rate Increase by A Majority of Directors was Lawful

There is a relationship between the rate charged for DA calls and the number of free DA uses the agency mandates in the service of the public interest. The higher the charge, the more important the number of free DA calls become to consumers. The relevance of this relationship must not be lost sight of during the procedural maneuvers of this proceeding. In other words the TRA may need to determine the number of the free D.A. allotment in relation to the standard rate set by the company. Perhaps the agency recognized the relevance of this relationship when a majority of the TRA directors voted to suspend the rate increase portion of the DA tariff. The

legal validity of the suspension of the rate increase is not in doubt.

In 2004, the General Assembly provided statutory standards for the suspension of tariffs that establish rates filed by incumbent local exchange carriers. Tennessee Public Acts of 2004, Public Chapter 545. While setting a high standard for a complaining party to prove a tariff suspension is warranted, the amending law also specifically allowed the agency to retain the discretion to suspend a tariff on its own volition and independent judgment.

> The authority may suspend a tariff pending a hearing, on its own motion, upon finding that such suspension to be in the public interest. The standard established herein for suspension of tariffs shall apply at all times including the twenty one (21) or one (1) day period between filing and effectiveness; Tenn.Code Ann.§ 65-5-101 (c)(3)(C)(ii).

Comments made by directors clearly indicate a concern for the public interest in relation to directory assistance when this matter was first considered and the rate increase was suspended. *See* Transcript of Authority Conference, December 17, 2007, p. 13-20. In determining whether to suspend a tariff under Tenn.Code Ann.§ 65-5-101 (c)(3)(C)(ii), directors need not rely upon or defer to a prior agency decision if the suspension is undertaken in the public interest. It is apparent from the record that the agency exercised its discretion in the public interest as is clearly provided for within the law. While the hearing officer in this matter may be authorized to make rulings on matters of law, it must be noted that the suspension of the rate increase by a majority of the directors was made at their discretion on public interest grounds as specifically authorized under Tennessee law.[2]

[2] The Consumer Advocate did not request a suspension of the rate increase.

THE CONSUMER ADVOCATE'S POSITION AS TO THE NUMBER OF FREE D.A. USES REQUIRED TO SERVE THE PUBLIC INTEREST

The Consumer Advocate will not suggest the number of D.A. uses that should be required of Embarq until discovery has taken place. Various issues such as the "churn" rate in Embarq's service area, the availability of alternatives to D.A. service to Embarq consumers and other issues surrounding D.A. service for disabled consumers and those age 65 and older require discovery and consideration by expert witnesses prior to the Consumer Advocate making a proposal or taking a specific position of this nature. The direct testimony of the Consumer Advocate will address specific positions and proposals on these matters.

COMMENTS TO VARIOUS ISSUES RAISED BY EMBARQ AT THE INITIAL STATUS CONFERENCE

At the status conference, counsel for Embarq brought forth improperly several issues for consideration that should have been raised in a formal motion for reconsideration. The Consumer Advocate had no notice that substantive issues of law and argument would be presented that address the legal merits of the decision of the TRA in this docket to convene a contested case. To date, no formal motions have been made to reconsider the convening of this contested case. The hearing officer did not specifically request briefing on these issues and did not indicate he would rule on these matters. However, as the company's opinions on these issues occupied a great deal of time at the initial status conference, the Consumer Advocate would offer these comments while reserving the right to respond to any formal motion that may be made in the future.

The TRA Did Not Act Arbitrarily or Capriciously

The comments made at the status conference by Embarq and the Consumer Advocate would indicate that there is general agreement that the TRA has the authority to go back and re-

examine public policy. Thus, the authority of the agency to review D.A. policy does not appear to be at issue per se. However, the company appears aggrieved about the manner in which the agency has chosen to do so. Embarq insists that a generic proceeding is required to avoid error because the of the majority's decision in approving a D.A. tariff of AT&T in Docket 06-00232. The Consumer Advocate disagrees that Docket 06-00232 is somehow a controlling precedent which should dictate how the directors must proceed and that a generic proceeding is warranted. As matter of practice, D.A. policy has always been set and modified on an individual company basis as evidenced in a long chain of separate tariff filings and dockets.[3]

Furthermore, it must be noted that Embarq was not simply singled out by the Consumer Advocate or the agency for a contested case. The convening of a contested case in Docket 07-00188 in fall of last year concerning AT&T's attempt to terminate it's respective D.A. policy signaled a renewed interest in examining the specifics of such proposals and growing consensus that this policy must be reviewed. Naturally, when a policy that has served the public interest so well is threatened with extinction, the agency is well within its province to scrutinize and reconsider all proposals that pertain to that policy. Embarq can not maintain that it was unaware of Docket 07-00188 or that the agency did not have the authority within the AT&T docket to maintain or even raise the number of free D.A. allotment calls.

Public policy is not set in stone, but rather is subject to healthy debate. At times it must be reviewed in order to adapt to changing realities and to meet objectives. The decision to convene a contested case in this matter can not be considered the product of an arbitrary or capricious

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[3] Docket 96-01423, Docket 99-00391, Docket 04-00416,Tariff 050564, Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Tariff 080024.

decision but rather of evolving opinions and circumstances that currently surround concerns for the public interest. D.A. policy is far from a settled matter. Historically, it is obvious from the public record that the TRA directors have not shared total agreement on all details and specifics of D.A. policy. Indeed, TRA directors have indicated some differences of opinion in one form or fashion regarding D.A. policy issues and procedure for a decade. Director Kyle has dissented on directory assistance issues and decisions made by a majority of directors.[4] Director Jones has dissented from majority decisions in allowing reductions in the respective D.A. allotments of individual companies without a contested case.[5] These differences of opinion are merely a sign of the natural progression of how regulatory public policy is debated, implemented and reconsidered by directors. This is how the legislature intended the TRA to function in determining public policy rather than as evidence of arbitrary or capricious decisions.[6]

TRA directors have the discretion to change, modify or further develop their opinions on matters of public policy and form a consensus as evidenced by the decisions in Docket 07-00188 and the current proceeding at hand to convene a contested case, a procedure all three directors

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[4] Director Kyle dissented from the majority decision in Docket 96-01423 which concluded that D.A. was not a basic service. The director has repeatedly expressed interest and commented on D.A. policy and most recently dissented and concurred in Docket 07-00188. Her dissent in the AT&T docket was with regard to the majority's decision not suspend the rate increase. See Footnote 12 of the Order convening a contested case in Docket 07-00188.

[5] Director Jones dissented from approval of tariffs reducing the number of free D.A. service allotments in his Concurrence and Dissent in Docket 04-00416. Director Jones further referenced and incorporated this *Dissent* in the Final Orders of Docket 06-00232 and Docket 06-00288 respectively.

[6] In appointing TRA directors, the law instructs the governor and the respective speakers of both chambers of the legislature to ensure that people of diverse background, education, professional experience, ethnicity, residence, heritage and perspective serve in these important positions. Tenn.CodeAnn. § 65-1-101 (2004). This mandate promotes broader consideration, debate and thought to matters of public policy determined by TRA directors.

concluded was appropriate for reviewing directory assistance polices. In exercising this discretion, directors may reach their own independent and reasonably supportable conclusions in matters of public policy.

D.A. Policy Has Been Established & Modified On An Individual Company Basis for a Decade

The Consumer Advocate is unaware of a precedent requiring the TRA to convene a generic proceeding rather than a contested case when the agency seeks to review a tariff of a company or the public policy guiding that company's tariffs.[7] The D.A. tariffs of each company have been established and changed on multiple occasions in separate dockets and tariff filings.[8] Thus, the D.A. requirements of each price cap regulated company have seldom been in complete alignment since 2004. Rather, the policy guiding each company has been in flux.

When companies have sought to alter the free D.A. allotment required by the TRA, they have done so on an individual and separate basis by simply filing a tariff. The companies have never sought to petition the agency for a generic proceeding in regards to directory assistance. They simply filed tariffs without any attached analysis or formal request except when responding to *Petitions* filed by our office after the tariff had been filed. This trend first began in 2004 when AT&T filed a tariff reducing the D.A. allotment from six (6) to three (3) in Docket 04-00416. AT&T argued, in response to the Consumer Advocate's Petition to Intervene, that the decisions

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[7] Embarq has implied that the "Kingsport decision" from the Court of Appeals, cited at 01-A-01-9601-BC-00049, may require the agency to convene a generic case. *See* Transcript of Initial Status Conference, 1/3/08, p. 8, lines 20-25, next page. A reading of the opinion in that case does not support that conclusion.

[8] *See* Footnote 3 of this brief.

in Docket 96-01423 and 99-00391 did not establish a general rule or binding precedent.[9] Instead, AT&T asserted that the orders in those specific dockets reflected a balance of consumers' interests in the context of specific tariff filings.[10]

This trend of company tailored D.A. policy continues to this day. On January 16 of this year, Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications Solutions) ("Citizens Telecom-Tennessee") filed a tariff to modify the D.A. policy guiding its tariff, reducing the free D.A. allotment from three (3) to two (2).[11] This goes to illustrate that two of the three price cap companies have proposed tariffs that are unique and designed to meet the business demands of the respective companies.[12] There are also several significant differences between all three companies that must considered. As Embarq ably pointed out, AT&T is the largest carrier in Tennessee by far with "90% of the consumers" in the state.[13] Embarq, AT&T and Citizens Telecom-Tennessee are very different companies in terms of service area and numbers of consumers. In this regard, they are far from similarly situated. In setting D.A. public policy, the agency may take into consideration the vast differences between the companies in coming to a decision that serves the public interest.

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[9] Docket 04-00416, *Order Declining to Convene a Contested Case*, filed 9/2/05, p. 5.

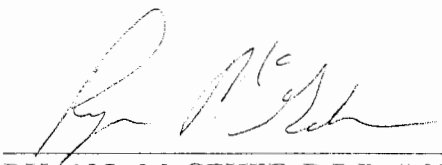
[10] *Id.*

[11] Tariff 20080024

[12] Embarq appears to suggest it is merely trying to mirror the tariffs of AT&T rather than design a tariff strictly related to the company's and consumers' needs. *See* Transcript of Initial Status Conference, 1/3/08, p. 11.

[13] *See* Docket 07-00269,Transcript of the Initial Status Conference, 1/3/08, p. 18, line 19.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint and Petition to Intervene was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 31st day of January 2008.

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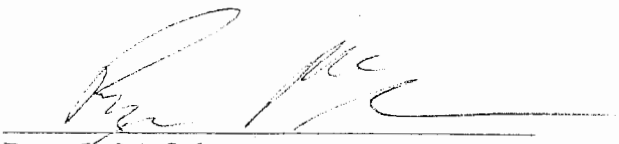

Ryan L. McGehee
Assistant Attorney General

Exhibit 2

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST INC. d/b/a EMBARQ CORPORATION TARIFF FILING TO INCREASE RATES IN CONJUNCTION WITH THE APPROVED 2007 ANNUAL PRICE CAP FILING	)	DOCKET NO. 07-00269

RESPONSE OF THE CONSUMER ADVOCATE TO EMBARQ'S PETITION FOR APPEAL OF THE HEARING OFFICER'S INITIAL ORDER

On February 29, 2008 United Telephone-Southeast, Inc. ("Embarq" or "company") filed a *Petition for Appeal of the Hearing Officer's Initial Order* ("*Petition for Appeal*"). Herein, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") responds as follows.

INTRODUCTION

This matter is before the hearing panel consisting of Chairman Eddie Roberson, Director Sara Kyle and Director Ron Jones of Tennessee Regulatory Authority ("TRA", "Authority" or "agency"). Briefly, the procedural history of this matter is as follows. On November 19, 2007 Embarq filed Tariff 2007456 which, among other things, reduced the directory assistance ("D.A.") call allowance of the company from three (3) to one (1) and raised the rate for D.A. calls made in excess of the allowance.[1] The Consumer Advocate filed a *Complaint & Petition to Intervene* on December 11, 2007.

On December 17, 2007 at a regularly scheduled conference, the hearing panel voted to

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[1] For clarification, D.A. service refers to local directory assistance service only.

convene a contested case and a majority of the directors suspended the D.A. rate increase portion of the tariff.[2] At the initial status conference on January 3, 2008 the hearing officer requested briefs on the issues of burden of proof and the rate suspension. Both parties filed briefs on January 31. The hearing officer issued an *Initial Order* on February 14, 2008. On February 29, 2008 Embarq timely filed the *Petition for Appeal.*

The hearing officer's decision in the *Initial Order* settled two issues; the validity of the rate suspension and the burden of proof. The Consumer Advocate would note that Embarq's *Petition for Appeal* extends well beyond the pale of appealing the *Initial Order*. In essence, the company's appeal serves as a motion to reconsider the decision of the directors to convene a contested case. In doing so, Embarq pleads that the tariff in its entirety must be allowed to go into effect without delay.

The company's arguments in the *Petition for Appeal* are briefed in two issues, but chiefly predicated upon several assumptions and conclusions:

(1) That Docket 06-00232, which approved a tariff filed by AT&T Communications, Inc. ("AT&T") allowing a reduction in free D.A. calls from three (3) to one (1), is a binding precedent setting the definitive State Policy for D.A. and that this decision controls this proceeding;

(2) That in light of this "controlling" precedent, the agency can not suspend the D.A. rate increase nor suspend the portion of the reduction in the D.A. allotment;

(3) That Embarq and AT&T are similarly situated, thus in this proceeding the company has allegedly been treated in an arbitrary, capricious and/or unwarranted manner;

(4) That the price cap statute determines when and what rate may be increased and thus,

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[2] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008); *Dissent of Director Ron Jones to the Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008). The other portions of the tariff not related to D.A. service were allowed to go into effect.

the rate cannot be suspended under Tenn.Code Ann.§65-5-101(c); and

(5) That in approving the company's annual price regulation plan in Docket 07-00220, the agency has already made a determination on the public interest and the validity of the rate increase.

The Consumer Advocate disagrees with each of these assertions and responds as follows.

I. THE CONVENING OF A CONTESTED CASE IN THIS MATTER IS NOT PRECLUDED BY THE DECISION IN DOCKET 06-00232

The company has submitted that Docket 06-00232 is a binding precedent controlling the outcome of this matter.[3] Embarq further argues that Docket 06-00232 created the definitive D.A. policy for the State of Tennessee and as such the company may reduce the free call allowance to one.[4] The Consumer Advocate disagrees such a uniform policy exists or that the outcome of Docket 06-00232 forecloses the possibility of a contested case in this matter. As a matter of practice, free D.A. allowance requirements have always been set and modified on an individual company basis as evidenced in a long chain of separate tariff filings and dockets.[5]

From a practical standpoint, it must also be considered there is a widespread disparity between the eighteen incumbent telephone companies in regards to D.A. service. For many Tennessee consumers there is no charge for D.A. service. Rather, just as it was for Embarq and AT&T's customers prior to 1997 and 1999 respectively, D.A. service remains a basic and free

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[3] *Id.*, 13-16 "Issue II."

[4] If Docket 06-00232 is a binding precedent that set the "State Policy" as requiring one free D.A. call allowance, the company failed to take advantage of the "State Policy" when it filed for D.A. call allowance reduction from six to three in Docket 06-00288 rather than the one call allowance approved earlier in Docket 06-00232.

[5] Docket 96-01423, Docket 99-00391, Docket 04-00416, Tariff 050564 (withdrawn 5/27/05), Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Docket 08-00021.

service for many consumers served by a number of rate of return regulated incumbents and Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications Solutions) ("Citizens Telecom-Tennessee").[6] On the other end of the spectrum, competing local exchange carriers have no regulatory D.A. requirements whatsoever. Thus, there is no uniform State policy for D.A. service.

Embarq has asserted the Consumer Advocate "understood" that the current D.A. policy in this State is "one call" in Docket 07-00188.[7] This is an incorrect characterization. The remedy sought by the Consumer Advocate in Docket 07-00188 was the preservation of "at least one call" in its *Complaint & Petition to Intervene*. The use of the words "at least" was intentional as there was and remains the certain possibility the Consumer Advocate, after discovery was concluded, would have presented evidence and testimony that supported that more than one call was needed to serve the public interest.[8] The TRA would have been well within its authority to increase AT&T's call allotment in that matter as well as the matter presently before it.

The TRA's authority to impose such requirements upon price cap regulated companies was clearly affirmed by the Court of Appeals. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *7 (Tenn.Ct.App.2002) (Attachment "A"). D.A. requirements were first imposed on Embarq in Docket 97-01423 and later upon AT&T in Docket 99-0391.

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[6] Citizens Telecommunications Company of Tennessee has filed a tariff to introduce charges for D.A. service. This price cap regulated company currently does not charge for D.A. use. See Docket 08-00021 and footnote 25 of this brief. In addition, some rate of return incumbents have been allowed to charge for D.A. service.

[7] Docket 07-00188 considered AT&T's proposal to eliminate the D.A. call allotment in Tariff 20070283.

[8] It is the intention of the Consumer Advocate to press upon the Authority the need for increased D.A. calls where evidence and expert testimony supports such measures. D.A. service is essential for Tennessee consumers.

Since 2004, the policy requirements of both Embarq and AT&T have been in a state of flux as the rates for D.A. have climbed while the number of free D.A. calls have been reduced. The public benefit of a D.A. service has been subject to a general decline from a consumer's perspective as rates have risen and the number of free calls has dwindled. Since 2004, these changes have been approved without the benefit of an evidentiary record. There has been no opportunity for an evidentiary hearing on these matters since 1999. The issue of D.A. service allotment is particularly ripe for review in light of recent tariff proposals.

On July 25 2007, AT&T filed a tariff which sought to eliminate the company's free D.A. call allowance altogether.[9] This proposed tariff was considered by the Authority in Docket 07-00188. After years of permitting the free D.A. call allowance to be reduced, the Authority faced the extinction of a company specific policy that has served to balance the interests of the price cap regulated carriers and those of consumers. In Docket 07-00188, the agency unanimously concluded to convene a contested case to examine the issue.[10] Naturally, when a policy that has served the public interest so well is threatened with extinction the agency is well within its province to scrutinize and reconsider all proposals pertaining to that policy. As a result, the decision in Docket 07-0188 served as a watershed moment signaling a renewed interest and consensus of the directors in examining free D.A. allowances in the service of the public interest.

Although AT&T withdrew the proposed D.A. allotment tariff proposal and the docket

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[9] As with Embarq's proposed tariff, the requirements of free D.A. calls for the disabled and those over age 65 would have remained in place.

[10] *Order Approving Tariff In Part And Suspending Tariff In Part For Ninety (90) Days, Convening A Contested Case Proceeding And Appointing A Hearing Officer*, Docket 07-00188.

was closed by the hearing officer in that matter, the issue remains a concern.[11] Beginning with Docket 07-00188, the agency has been consistent in convening contested cases to review the proposed D.A. call allowance tariffs of all three price cap regulated companies.[12] Embarq has not been singled out for a contested case in an arbitrary or capricious manner by the TRA. Rather, the agency has committed to making such a decision in the service of the public interest based upon an evidentiary record, as Director Kyle expressed during deliberations when this contested case was convened.

> "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." See *Transcript of Authority Conference*, (December 17, 2007) p.14.

Director Jones has expressed similar and consistent comments about the need for a contested case and an evaluation of various perspectives and relevant data in Docket 04-00416, Docket 06-00232, Docket 06-00288 and Docket 07-00188.[13] The Consumer Advocate readily agrees with these determinations. D.A. is an essential part of the telecommunications policy in this State. However, since D.A. service was determined to be a non-basic service under price cap regulation, the rates charged have risen sharply despite the General Assembly's intention to foster

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[11] AT&T withdrew the D.A. tariff on November 16, 2007. The hearing officer closed the docket the same day.

[12] Docket 07-00188 for D.A. tariff filed by AT&T, Docket 07-00269 for a D.A. tariff filed by Embarq and Docket 08-00021 for a D.A. tariff filed by Citizens Telecom-Tennessee.

[13] See *Transcript of Authority Conference*, (August 20, 2007) p.69.

competition, which would presumably control prices.[14]

The legislature has charged the Authority with safeguarding the public interest of consumers. Tenn. Code Ann. § 65-4-123. The term "public interest" is not defined by statute.[15] The General Assembly and Governor have appointed and delegated to TRA directors the role to determine what serves the "public interest" in matters of regulated public utilities. In that regard, public policy is not set in stone, but rather is subject to healthy debate. At times, it must be reviewed in order to adapt to changing realities and to meet objectives. The decision to convene a contested case in this matter can not be considered the product of an arbitrary or capricious decision but rather of evolving opinions and circumstances currently surrounding concerns for the public interest. D.A. policy is far from a settled matter. Historically, it is obvious from the public record the TRA directors have not shared total agreement on all details and specifics of D.A. policy.[16]

Indeed, TRA directors have indicated some differences of opinion in one form or fashion regarding D.A. policy issues and procedure for a decade. Director Kyle has dissented on D.A. issues and decisions made by a majority of directors.[17] Director Jones has dissented from majority

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[14] One would observe that the cost of service for providing most traditional telecommunication services has been generally lowered by advancing technology, although the Consumer Advocate realizes this is irrelevant in application to the rate increases of price cap regulated incumbents.

[15] Although Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B) employs the phrase "public interest" as grounds for the Authority to suspend a tariff, neither it nor other relevant statutes define its meaning. It is left to the TRA to determine such matters in carrying out Tennessee's Telecommunications Policy.

[16] Eight current and former TRA directors, with varied opinions on different D.A. tariffs, have served as TRA directors since 1997, the year the issue of D.A. call allowance was first determined for a company.

[17] Director Kyle dissented from the majority decision in Docket 96-01423 which concluded that D.A. was not a basic service. The director has repeatedly expressed interest and commented on D.A. policy and most recently dissented and concurred in Docket 07-00188. Her dissent in the AT&T docket was with regard to the majority's

decisions in allowing reductions in the respective D.A. allotments of individual companies without a contested case.[18] Disagreements or a lack of complete consensus among directors continues on matters of public interest to this day as evidenced by the differing opinions on the matter of the suspension of the rate increase in this docket.[19]

Reasonable minds will disagree on the policies serving the public interest. These differences of opinion are a sign of the natural progression of how regulatory public policy is debated, implemented and reconsidered by directors. This is how the legislature intended the TRA to function in determining public policy rather than as evidence of arbitrary or capricious decisions.[20] One must consider the structure of the TRA as tailored by legislation. There are four serving directors. Tenn.Code Ann.§ 65-1-101(a). Each matter before the agency is assigned in a random fashion to the extent practicable to hearing panels of three directors. Tenn.Code Ann.§ 65-1-104(d).

Under this structure, devised by the legislature, hypothetically similar dockets with different hearing panels could reach differing and opposing conclusions on determinations that

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decision not to suspend the rate increase. See Footnote 12 of the *Order* convening a contested case in Docket 07-00188.

[18] Director Jones dissented from approval of tariffs reducing the number of free D.A. service allotments in his Concurrence and Dissent in Docket 04-00416. Director Jones further referenced and incorporated this *Dissent* in the Final Orders of Docket 06-00232 and Docket 06-00288 respectively.

[19] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008); *Dissent of Director Ron Jones to the Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008).

[20] In appointing TRA directors, the law instructs the governor and the respective speakers of both chambers of the legislature to ensure that people of diverse background, education, professional experience, ethnicity, residence, heritage and perspective serve in these important positions. Tenn.CodeAnn. § 65-1-101 (2004). This mandate promotes broader consideration, debate and thought to matters of public policy determined by TRA directors.

serve the public interest on 2 to 1 (two to one) votes by directors.[21] This is not to suggest that the General Assembly sought to encourage differing outcomes on issues of the public interest. Neither would the Consumer Advocate suggest that the determinations of directors are not governed by statutory and constitutional boundaries. *Consumer Advocate v. TRA,* 2005 WL 3193684*9 (Tenn.Ct.App.2005) (Attachment "B"). Discretionary decisions must take the law and the facts into account. *Ballard v. Herzke*, 924 S.W. 2d 652, 661 (Tenn.1996). Yet, the public interest determination is a matter of discretion for the directors. In regards to the novel policy initiative of D.A. service call allotments and public interest requirements guiding such tariff offerings of price cap regulated companies, the discretion of the agency is clear and certain. *Consumer Advocate v. Tennessee Regulatory Authority*, 2002 WL 1579700, *7 (Tenn.Ct.App.2002) (Attachment "A").

TRA directors have the discretion to change, modify or further develop their opinions on matters of public policy and form a consensus. As evidenced by the decisions in Docket 07-00188, the current proceeding, and in Docket 08-00021, the convening of a contested case has unanimously been deemed an appropriate procedure for reviewing directory assistance polices. In exercising this discretion, directors may reach their own independent and reasonably supportable conclusions in matters of public policy.

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[21] This hypothetical is not present here. While not a voting member of the panel in the matter at hand, Director Hargett is a voting member of the hearing panel which has been assigned to handle the D.A. tariff filing of Citizens Telecom of Tennessee in Docket 08-00021. Director Hargett voted in favor of a contested case and for suspending the introductory rate for D.A. service in that matter. This indicates considerable consensus among all four serving directors.

II. D.A. SERVICE REQUIREMENTS AND PUBLIC POLICY HAVE BEEN IMPOSED AND ALTERED ON A COMPANY-BY-COMPANY BASIS FOR A DECADE

The D.A. tariffs of each company have been established and changed on multiple occasions in separate dockets and tariff filings.[22] Thus, the D.A. requirements of each price cap regulated company have seldom been in complete alignment since 2004. Rather, the policy guiding each company has been in flux.

When companies have sought to alter the free D.A. allotment required by the TRA, they have done so on an individual and separate basis by simply filing a tariff. The companies have never sought to petition the agency for a generic proceeding in regards to D.A. service. They simply filed tariffs without any attached analysis or formal request except when responding to *Petitions* filed by the Consumer Advocate after the tariff had been filed. This trend first began in 2004 when AT&T filed a tariff reducing the D.A. allotment from six (6) to three (3) in Docket 04-00416. During that matter AT&T argued, in response to the Consumer Advocate's *Complaint & Petition to Intervene*, that the decisions in Docket 96-01423 and 99-00391 did not establish a general rule or binding precedent.[23] Instead, AT&T asserted that the orders in those specific dockets reflected a balance of consumers' interests in the context of specific tariff filings.[24]

This trend of company tailored D.A. policy continues to this day. On January 16 of this year, Citizens Telecommunications Company of Tennessee (d/b/a Frontier Communications

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[22] Docket 96-01423, Docket 99-00391, Docket 04-00416, Tariff 050564 (withdrawn 5/27/05), Docket 06-00232, Docket 06-00288, Docket 07-00188, Docket 07-00269 and Docket 08-00021.

[23] Docket 04-00416, *Order Declining to Convene a Contested Case*, filed 9/2/05, p. 5.

[24] *Id.*

Solutions) ("Citizens Telecom-Tennessee") filed a tariff that would introduce charges for D.A. service but would allow for two (2) free calls.[25] This illustrates that two of the three price cap companies have proposed tariffs that are unique and designed to meet the business demands of the respective companies.[26] There are also several significant differences between all three companies that must considered. As Embarq ably pointed out, AT&T is the largest carrier in Tennessee by far with "90% of the consumers" in the state.[27] Embarq, AT&T and Citizens Telecom-Tennessee are very different companies in terms of service area and numbers of consumers. In this regard, they are clearly far from similarly situated.

In setting D.A. public policy, the agency may take into consideration the vast differences between the companies in coming to a decision that serves the public interest. The Consumer Advocate submits there are additional factors that may be examined in determining the free D.A. allowances of each company. The directors may wish to examine the "churn" rate of a company, the availability of alternatives available to a community or service area to accurately locate numbers and the over all impact of the D.A. rates in relation to the free call allowance upon communities and low-income households within that particular community.

III. THE TRA HAS THE STATUTORY AUTHORITY TO SUSPEND A RATE INCREASE IN THE SERVICE OF THE PUBLIC INTEREST

The record in this proceeding is quite clear that the parties and the hearing officer are in

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[25] Tariff 20080024; The Consumer Advocate erred in the *Brief in Response to the Request of the Hearing Officer* (January 31, 2008) when it cited Citizens's current D.A. policy as offering three (3) free calls. Tariff 2005654, which introduced D.A. service rate and three (3) call allotment, was withdrawn on 5/27/05 and was never effective. The Consumer Advocate regrets this error.

[26] Embarq appears to suggest it is merely trying to mirror the tariffs of AT&T rather than design a tariff strictly related to the company's and consumers' needs. *See* Transcript of Initial Status Conference, 1/3/08, p. 11.

[27] *See* Docket 07-00269,Transcript of the Initial Status Conference, 1/3/08, p. 18, line 19.

complete agreement that the agency can not set rates for a non-basic service, assuming all price cap regulations have been complied with.[28] D.A. 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). Thus, Embarq may set the rate for directory assistance as it deems appropriate subject to certain statutory limitations governing price cap regulation. Tenn.Code Ann.§ 65-5-109 (h). This issue is well settled.

The matter at bar is whether the agency may on its own motion suspend a rate increase proposed by a price cap regulated incumbent telephone company.[29] Notably, there is a distinction between the setting of rates, an act which carries with it a sense of permanence, and the temporary suspension of a rate increase in the public interest pending a hearing. At the conclusion of this proceeding or perhaps before, the agency will at some point in time allow the rate increase to go into effect. The agency is not setting rates, it has merely suspended a rate increase on its own motion by a majority of directors pending a hearing. The TRA is authorized by statute to do so. Tenn.Code Ann.§ 65-5-101 (c)(3)(iii)(B). The rate charged for D.A. service impacts the value and public benefit of the number of free D.A. calls determined for consumers. The existence of the TRA's authority to suspend a rate increase in the public interest can not plausibly be in doubt.

The company has opined that the price cap regulation statute strictly controls when

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[28] *Petition for Appeal* (February 29, 2008) p.9; *Initial Order*, (February 14, 2008) p. 4-5; *Brief of the Consumer Advocate at the Request of the Hearing Officer*, (January 31, 2008) p. 3; *Brief of UTSE* (Embarq) (January 31, 2008) p. 6.

[29] Embarq concedes on p. 12 of the *Petition for Appeal* (February 29, 2008) that the Hearing Officer correctly concluded that the TRA can suspend a tariff in the public interest. However, the company's assertions on pages 7-10 appear to imply that if headroom is present under the price cap, the agency would be precluded from suspending the rate increase on public interest grounds. Thus, the Consumer Advocate briefs the issue.

Embarq may increase its rates.[30] Further, the company submits that there "is no public interest standard that can be applied to Embarq's DA rate increase" because D.A. is classified as a non-basic service and the company can set rates as it deems appropriate when there is sufficient headroom.[31] By this reasoning, all rate increases for telephone communication services filed by an incumbent telephone company under price cap regulation cannot be suspended in the public interest by the agency. A stand alone reading of Tenn.Code Ann. § 65-5-109(h) supports the company's conclusion. However, statutory provisions are not construed on a stand alone basis. They must be construed in harmony with other relevant sections of the statute. The acceptance of Embarq's line of argument would result in a distorted and unnatural construction rendering meaningless the clear and unambiguous language provided in Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B).

Legislative intent is ascertained from the natural and ordinary meaning of the statutory language read "within the context of the entire statute, without any forced or subtle construction which would extend or limit its meanings." *State v. Butler*, 980 S.W. 2d 359, 363 (Tenn.1997). Strained interpretations must be avoided that would render portions of a statute inoperative or void. *Consumer Advocate v. Greer*, 967 S.W. 2d 759, 761 (Tenn.1998). Thus, if the language is clear and unambiguous, the particular language in dispute is read within the context of the entire statute in a manner that would not produce an unreasonable or unnatural interpretation while expressing the full intent of the General Assembly.

In 2004, the General Assembly provided statutory standards for the suspension of tariffs

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[30] *Id.* p. 8-9.

[31] *Id.* 8.

establishing rates filed by incumbent local exchange carriers. Tennessee Public Acts of 2004, Public Chapter 545. While setting a high standard for a complaining party to prove a tariff suspension is warranted, the amending law ("2004 Act") also specifically allowed the agency to retain the discretion to suspend a tariff on its own volition and independent judgment.

> The authority may suspend a tariff pending a hearing, on its own motion, upon finding such suspension to be in the public interest. The standard established herein for suspension of tariffs shall apply at all times including the twenty one (21) or one (1) day period between filing and effectiveness; Tenn.Code Ann.§ 65-5-101 (c)(3)(iii)(B).

The 2004 Act, enacted nearly a decade after price cap regulation came into effect, was geared specifically toward the tariffs of incumbent local exchange telephone companies that establish rates for telecommunication services. Tennessee Public Acts of 2004, Public Chapter 545; Tenn.Code Ann.§ 65-5-101(c). Without question, the aim of the 2004 Act was directed specifically in application toward price cap regulated companies such as Embarq.[32] It is a basic tenant of statutory construction that it is presumed that the General Assembly knows the existing state of the law when it enacts new legislation. *Blankenship v. Estate of Bain*, 5 S.W. 3d 647, 651 (Tenn.1999); *Still v. First Tennessee Bank*, 900 S.W. 2d 282, 285 (Tenn.1995). Further, it must be presumed the legislature chose its words carefully. *State v. Medicine Bird*, 63 S.W. 3d 734, 754 (Tenn.Ct.App.2001) (cert.denied).

If the General Assembly had intended for a distinction between basic and non-basic services to be made in the application of the suspension standards in Tenn.Code Ann.§ 65-5-101(c), it would have done so. However, no such distinction or exception was made by the

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[32] Incumbent telephone companies that are not price cap regulated can not simply file a tariff to raise the rate for most if not all services, but rather must file a rate case and be subject to a contested case as they are rate of return regulated.

General Assembly within the 2004 Act between that of a tariff that establishes rates for basic or non-basic services that would preclude a suspension on public interest grounds. In clear and unambiguous language Tenn.Code Ann § 65-5-101(c) applies to any tariff filed by an incumbent telephone company that files tariffs proposing rates and terms for service. Thus, the provisions of Tenn.Code Ann. § 65-5-109 should not be considered a controlling authority forbidding the suspension of the D.A. rate increase under the mandate inherent in Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B). To do so would render the directives of the 2004 Act meaningless and place unlawful constrainst on the agency's regulatory powers.

Embarq also submits that the TRA's approval of the company's 2007 annual price cap filing in Docket 07-00220 requires the agency to approve the rate increase without delay.[33] The company further submits in a footnote that the public interest determination for Embarq's D.A. rates was made during the same proceeding in which the annual price cap filing was approved.[34] The Consumer Advocate must disagree. When the TRA concludes that headroom exists and rates for basic and non-basic services *may* be increased, such a finding is not a blanket determination upon all future tariffs filed. Published tariffs are binding on the company and its customers and have the effect of law upon the same. *GBM Communications, Inc. v. United Inter-Mountain Telephone Company*, 723 S.W. 2d 109, 112 (Tenn.Ct.App.1986) (cert.denied). Thus, the wording and application of proposed and effective tariffs are still subject to approval and scrutiny before the Authority. The conclusion that headroom exists does not preclude the Authority from acting in the public interest in suspending a tariff that increases rates under

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[33] *Petition for Appeal* (February 29, 200). p.10.

[34] *Id.* p. 12, second paragraph of footnote 18.

Tenn.Code Ann.§ 65-5-101(c)(3)(iii)(B).

IV. THE SUSPENSION OF THE D.A. RELATED PORTIONS OF THE TARIFF WERE MADE IN THE PUBLIC INTEREST

The Consumer Advocate did not request a suspension for the D.A. rate increase portion of the proposed tariff. A majority of directors did so on its own motion.[35] During deliberations, Director Kyle noted that the rate increase and the corresponding reduction in the free D.A. allowance "may roll in together".[36] The Consumer Advocate would submit that there is a relationship between the rate charged for D.A. calls and the number of free D.A. uses the agency mandates in the service of the public interest. The higher the charge, the more important the number of free D.A. calls become to consumers. In other words, the TRA may need to determine the number of the free D.A. allotment in relation to the standard rate set by the company.

For example, assume a price cap regulated company filed a tariff that charges $0.10 per D.A. service use and no free calls are allowed. The TRA may determine the price is fairly low and no free calls are required to serve the public interest. In another example, the agency may determine that another price cap regulated company must provide a dozen free D.A. calls per month to serve the public interest if it proposes a $5.00 charge for each individual D.A. service call. The agency has no authority to set the rate. The rates are determined by the company, subject to price cap requirements. However, the TRA can set the D.A. call allowance in relation to the rate set by the company. As such, if the agency is setting the call allowance in relation to the rate deemed appropiate by the company, then the suspension of the rate increase for D.A.

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[35] *Order Granting Tariff in Part & Suspending Tariff in Part*, (March 5, 2008).

[36] Transcript of Authority Conference, (December 17, 2007) p.15.

service has a rational basis.

As pointed out by Embarq, in Docket 07-00188 concerning AT&T's D.A. elimination tariff, the hearing panel did allow the rate increase for D.A. service to go into effect while suspending the portion of the tariff that eliminated free D.A. calls. However, this was not a unanimous decision. Director Kyle dissented from the portion of the decision in that matter that allowed AT&T's rate increase to go into effect.[37] During the deliberations of the hearing panel in convening a contested case in this matter, Director Kyle repeated her objections of allowing a D.A. rate increase to go into effect pending a hearing on D.A. policy.[38] Chairman Roberson, whom in Docket 07-00188 had voted to allow the D.A. rate increase to go into effect immediately in that matter, took a brief recess to consult with General Counsel as reflected in the record.[39] Chairman Roberson then voted with Director Kyle to suspend the rate increase.[40] Again, as briefed earlier, TRA Directors may change or modify their opinions on what serves the public interest so long as their conclusions are reasonably and logically supportable.[41]

The company has raised issues of equal protection and unfair or arbitrary treatment. The Consumer Advocate would tend to agree with the proposition that the nature of discrimination is unequal treatment among like kinds. *Rivergate Wines v. City of Goodlettsville*, 647 S.W. 2d 631,

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[37] See Footnote 12 of the *Order Approving Tariff In Part And Suspending Tariff In Part For Ninety (90) Days, Convening A Contested Case Proceeding And Appointing A Hearing Officer* in Docket 07-00188.

[38] Transcript of Authority Conference, (December 17, 2007) p.14.

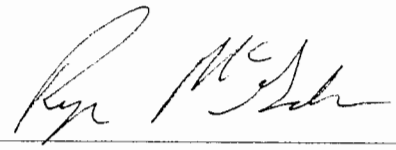
[39] Id., 15-16.

[40] Id., 17.

[41] See pages 6-9 of this brief.

636 (Tenn.1983). However, as briefed earlier, the price cap regulated incumbent telephone companies are far from similarly situated entities.[42] These companies serve different markets, possess incomparable and unique service territories, and have vastly different volumes of services and service lines. Presumably, they have varied earnings and price cap headroom.[43] The Consumer Advocate would point out that *Rivergate Wine* includes the proposition that in the exercise of police powers, the government may burden one or a few for the public good. *Id.* 635. Furthermore, the Court applied a rational basis test. *Id.* The Consumer Advocate would submit that if there is a rational basis for the rate suspension and that any suspension is temporary pending a hearing, such action is valid under the law.

Respectfully Submitted,



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[42] See pages 10-11 of this brief.

[43] The Consumer Advocate does not have ready access to the Annual Price Cap Filing of the companies. They are filed under seal and treated as confidential.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Complaint and Petition to Intervene was served on the party below via facsimile, U.S. Mail, hand delivery, commercial delivery, or e-mail, on the 10 day of March 2008.

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Assistant Attorney General

ATTACHMENT A

Westlaw
Not Reported in S.W.3d
Not Reported in S.W.3d, 2002 WL 1579700 (Tenn.Ct.App.)
(Cite as: Not Reported in S.W.3d)

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 transinission over voice grade facilities of residential customers or business customers within a local calling area, Life-

line, 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 re-

vised 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.)

END OF DOCUMENT

ATTACHMENT B

C
Office of the Atty. Gen. v. Tennessee Regulatory Authority
Tenn.Ct.App.,2005.
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
OFFICE OF THE ATTORNEY GENERAL, Consumer Advocate and Protection Division
v.
TENNESSEE REGULATORY AUTHORITY.
No. M2003-01363-COA-R12-CV.

July 9, 2004 Session.
Nov. 29, 2005.

Appeal from the Tennessee Regulatory Authority, No. 03-00060.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Joe Shirley, Assistant Attorney General, for the appellant, Office of the Attorney General, Consumer Advocate and Protection Division.
Henry Walker, Nashville, Tennessee; and Martha M. Ross-Bain, Atlanta, Georgia, for AT & T Communications of the South Central States, LLC and amicus curiae Competitive Carriers of the South, Inc.
J. Richard Collier, Jean A. Stone, and Randal Gilliam, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.
R. Dale Grimes, Brian Roark, Guy M. Hicks, and Joelle Phillips, Nashville, Tennessee, for the appellee, BellSouth Telecommunications, Inc.

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

OPINION

WILLIAM C. KOCH, JR., P.J., M.S.

*1 This appeal involves the Tennessee Regulatory Authority's consideration of a tariff filed by BellSouth Telecommunications, Inc. A group of competing telecommunications providers and the Consumer Advocate and Protection Division of the Office of the Attorney General filed petitions to suspend the proposed tariff and to open a contested case proceeding because the tariff was discriminatory and anti-competitive. The Authority considered the proposed tariff and the requests for a contested case proceeding at three conferences. After BellSouth amended the tariff to meet several of the objections of its competitors and the Consumer Advocate and Protection Division, the Authority, by divided vote, declined to suspend the tariff or to convene a contested case proceeding and permitted the revised tariff to take effect. On this appeal, the Consumer Advocate Division and the competing telecommunications providers assert that the Authority erred by refusing to open a contested case proceeding regarding their objections to the revised tariff. They also insist that the Authority's approval of the tariff is not supported by substantial and material evidence. We have determined that the Authority abused its discretion by refusing to open a contested case proceeding to resolve the contested issues regarding whether the revised tariff was discriminatory and anti-competitive.

I.

On January 3, 2003, BellSouth Telecommunications, Inc. (BellSouth) filed a tariff with the Tennessee Regulatory Authority (Authority) to introduce its "Welcoming Reward Program." The purpose of this program was to encourage certain businesses [FN1] who were not existing BellSouth customers to obtain their basic local business service from BellSouth. The tariff, as originally filed, offered qualifying businesses a $100 per line/per location bonus in return for the business's agreement to enter into a twelve-month service contract.

The tariff also authorized BellSouth to impose a charge on customers who terminated their contract before its expiration. BellSouth envisioned that this program would last from February 3, 2003 through May 2, 2003.

> FN1. To qualify for this program, a business must be located in the Chattanooga, Knoxville, Memphis, or Nashville metropolitan calling regions and must not have an aggregate annual billing exceeding $36,000 at the time of enrollment.

Approximately three weeks later, a coalition of four competing telecommunications providers [FN2] filed a petition requesting the Authority to suspend the "Welcoming Reward Program" tariff and to open a contested case proceeding. BellSouth's competitors objected to the "Welcoming Reward Program" because (1) it discriminated between BellSouth's new and existing business customers, (2) it required customers to enter into long-term service contracts, and (3) it did not clearly define the conditions on their ability to resell the program. On January 31, 2003, BellSouth filed a lengthy written response to the competitors' objections. On the same day, the Consumer Advocate and Protection Division of the Office of the Attorney General (CAPD) petitioned to intervene. In addition to the issues raised by BellSouth's competitors, the CAPD asserted that the tariff "could" (1) create a "price squeeze" [FN3] and (2) inappropriately inflate consumer acquisition costs.

> FN2. The coalition included Access Integrated Networks, Inc., Cinergy Communications Company, Xspedius Communications, and AT & T Communications of the South Central States, Inc. All these companies are members of Competitive Carriers of the South, Inc. (CompSouth), a coalition of competing local exchange companies.

> FN3. A traditional "price squeeze" involves a defendant who, as a monopolist, supplies the plaintiff at one level (e.g., wholesale), competes with the plaintiff at another level (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to their common customers. *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 418 (1st Cir.2000). In more common parlance, a "price squeeze" refers to a circumstance in which the combination of high wholesale prices and low retail prices makes it difficult for a wholesale customer to compete with its supplier at the retail level.

***2** The Authority first addressed the competitors' petitions to suspend BellSouth's "Welcoming Reward Program" tariff at its February 3, 2003 conference. Procedural ambiguity reigned. The Authority permitted all parties to make oral presentations explaining their respective positions. BellSouth insisted that the issues being raised by the CAPD and its competitors were "wrong as a matter of law" and that these "bare allegations shouldn't be enough to derail and delay this tariff."For their part, the CAPD and BellSouth's competitors insisted that the "Welcoming Reward Program" was discriminatory on its face, that it violated the Authority's resale requirements, and that it was not a promotional tariff because it required customers to enter into a long-term service agreement.

Following a lengthy colloquy between the directors and the parties, Director Ron Jones asked whether the Authority had sufficient facts to address the issues being raised or whether there was "some question of fact that would warrant going to a [contested case] proceeding at this point as opposed to taking all the comments under advisement...." The answers of both the CAPD and BellSouth's competitors were equivocal.[FN4]Thereafter, BellSouth, "[i]n the spirit of compromise and conciliation," recommended that the Authority allow its "Welcoming Reward Program" to go into effect while it took the issues raised by the CAPD and the

competitors under advisement. The Authority decided to move this issue to the end of its agenda after Director Jones and Chairman Sara Kyle split over whether to accept BellSouth's offer.

> FN4. The lawyer representing the CAPD had already observed: "I think that there could be, especially with regard to some of the issues, for example, with respect to whether there's a price squeeze or not.... There could be other areas, but that's one that leaps to my mind."The lawyer representing BellSouth's competitors admitted that the Directors could go back to their offices and make the calculations regarding the price squeeze claim and that the issue regarding differentiating between new and existing customers was a "question of law and policy." However, he added "I would think you would want a little more research on the legal and policy implications of what it would mean to start treating new customers different than existing customers and how that might affect other dockets."

When the Authority returned to the "Welcoming Reward Program," its staff and the parties stated that they had been discussing a compromise of sorts. The compromise involved the immediate approval of a temporarily modified version of the tariff [FN5] that would remain in effect while the Authority addressed the concerns about the original tariff. There was, however, significant ambiguity regarding the details of the revised tariff and the procedure that the Authority would use to address the issues regarding the original tariff.[FN6] The lawyers representing the CAPD and BellSouth's competitors also informed the Authority that they lacked the authority to accept the compromise at that time.

> FN5. To avoid the suspension of its original tariff, BellSouth had apparently offered to reduce the length of the service contract its customers would be required to sign from twelve to three months. Its competitors were skeptical about "the idea of giving away essentially three months [of] free service."
>
> FN6. The Authority's staff stated that the proposal envisioned that a contested case proceeding would be opened with regard to BellSouth's original "Welcoming Reward Program" tariff in which the Directors would be given an opportunity to address the issues raised by the CAPD and BellSouth's competitors.

The Authority and the parties then turned their attention to the procedural posture of the current proceeding. After a lengthy discussion among the directors, their staff, and the lawyers representing BellSouth's competitors and the CAPD, Chairman Kyle stated that the Authority was still trying to determine whether to open a contested case proceeding with regard to the complaints regarding BellSouth's original "Welcoming Reward Program." She also stated that she believed that the Authority "need[ed] time to analyze and decide if a contested case is warranted."Accordingly, she moved that the proposed compromise plan be permitted to go into effect and that "this matter be placed back on the docket for February 18th in order to decide whether a contested case is warranted."Director Deborah Taylor Tate concurred with Chairman Kyle; however, Director Jones did not. An order embodying the Authority's decision at its February 3, 2003 conference was entered on February 14, 2003.

*3 On February 4, 2003, the day following the hearing, BellSouth filed a revised "Welcoming Reward Program" tariff reflecting its understanding of the temporary modifications that the Authority had agreed to on February 3, 2003. Unfortunately, BellSouth's understanding of the agreed-upon modifications did not jibe with the Authority's.[FN7]On February 11, 2003, both the CAPD and BellSouth's competitors filed briefs discussing their objections to BellSouth's original "Welcoming Reward Program" and again requesting the Authority to open a

contested case proceeding to consider the "serious legal and regulatory issues" regarding BellSouth's original and revised tariff. In its February 14, 2003 response to these briefs, BellSouth asserted that the CAPD and its competitors had "demonstrated no basis to convene a contested case" and that the Authority should "exercise its discretion and decline to convene a contested case in this matter."

> FN7. BellSouth's modified tariff filed on February 4, 2003 required subscribers to sign a twelve-month contract but permitted them to cancel the contract within ninety days of its execution with no termination liability. However, the Authority's February 14, 2003 order reflected a far different understanding of the proposed modification discussed at the February 3, 2003 conference. It recited that the majority of the directors voted "[t]o accept a revision to the *Tariff* such that subscribing customers could terminate their agreement with BellSouth under the *Tariff* after ninety (90) days without termination liability...."

The Authority revisited BellSouth's "Welcoming Reward Program" at its February 18, 2003 conference. Neither the directors nor the parties spent much time discussing the need to convene a contested case hearing. Instead, they first addressed the discrepancy between BellSouth's revised tariff filed on February 4, 2003 and the Authority's February 14, 2003 order. Then the parties restated their positions regarding the original "Welcoming Reward Program" at some length. The discussions focused chiefly on the "resale" aspects of the original tariff and the requirement that customers sign a long-term contract. During this discussion, it was evident that both Chairman Kyle and Director Tate were urging BellSouth to make additional concessions to satisfy the objections of the CAPD and its competitors.[FN8]

> FN8. At one point, Director Tate pointedly told BellSouth, "if you aren't willing to modify the tariff, you know, then you maybe put me in a position for a motion for reconsideration and to vote a different direction, and that I think that we have precedent ... to stop the effective date of a tariff and/or to suspend the tariff and move for a contested case. You know, I don't know what other options there may be."

Eventually, BellSouth offered to file yet another revised tariff to address the issues regarding whether the "Welcoming Reward Program" was a short-term or long-term promotion and whether the promotional discount offered in the tariff would be available for resale. Director Tate insisted that the revisions be filed immediately. On February 20, 2003, Chairman Kyle directed BellSouth to submit its revised tariff by February 21, 2003 and directed CAPD and BellSouth's competitors to file their responses by February 25, 2003. Director Jones objected to permitting BellSouth's modified "Welcoming Reward Program" to go into effect without first deciding whether to open a contested case proceeding.

On February 21, 2003, BellSouth filed a revised "Welcoming Reward Program" tariff containing significant alterations intended to meet the objections raised by the CAPD and its competitors. BellSouth extended the duration of the program to make it a long-term promotion. It required customers to maintain the contract through the fourth subsequent billing period and provided that they would receive the $100 per line credit during the fourth or fifth subsequent billing period. Finally, the revised tariff provided that both the underlying service and the bill credit would be made available to resellers at the Authority's required wholesale discount.

***4** The response of the CAPD and BellSouth's competitors was tepid. The CAPD continued to argue that most of the issues it had raised in the earlier proceedings had not been resolved and requested the Commission to convene a contested case proceeding to evaluate these issues. BellSouth's competitors asserted that the revised tariff did not address BellSouth's discrimination between new and

existing customers and argued that "BellSouth is using its market and financial power in a concerted effort, not to make money, but to put its competitors out of business."The competitors also requested a contested case hearing.[FN9]In its February 28, 2003 response to these comments, BellSouth reiterated its opposition to convening a contested case hearing and insisted that the resale provisions in its revised tariff were precisely what its competitors had requested during the February 18, 2003 conference.

> FN9. The attorney representing the competitors noted that "[s]urely, the fifty-plus pages of filings that have already been made in this case and the hours of oral argument at the last two TRA conferences are sufficient to demonstrate, if nothing else, that these are serious matters which the agency is obliged to consider."

BellSouth's revised "Welcoming Reward Program" was back before the Authority on March 3, 2003. While BellSouth's competitors characterized the revised tariff as a "substantial improvement" over the original tariff, both the competitors and the CAPD insisted that the revised tariff did not address the issue of discriminating between new and existing customers [FN10] or the unreasonable limitations of the resale of the promotion and that it did not resolve the potential of a price squeeze. The CAPD also questioned the continuing requirement of long-term service contracts with termination penalties. Following a lengthy discussion, the dispute narrowed to (1) the CAPD's request that BellSouth revise the tariff to make it clear that resellers could sell the program to all new business customers, not just to new customers who had been BellSouth customers, and (2) the competitors' request that they be permitted to resell the program not only to their new customers but also to their existing customers. While BellSouth agreed to the revision suggested by the CAPD, it declined to agree to modify the tariff to permit resellers to offer the program to existing customers.

> FN10. While the original concern had been BellSouth's discrimination between its new and existing customers, its competitors now insisted that they should be permitted to resell the promotion to their own customers as well as to new customers.

Noting that the parties "had ample opportunity to present arguments for and against convening a contested case," Director Tate moved to deny BellSouth's competitors' petition to suspend the "Welcoming Reward Program" tariff and to open a contested case proceeding. She also moved to waive the application of Tenn. Comp. R. & Regs. 1220-4-1-.04 (2003)[FN11] and allow the revised tariff to go into effect immediately. Chairman Kyle concurred with Director Tate. Director Jones disagreed. In a written dissent filed on April 25, 2003, Director Jones observed that "the majority injudiciously prevented the attachment of ... [the rights and protections associated with contested cases] while simultaneously deciding the merits of the petitioners' claims...."

> FN11.Tenn. Comp. R. & Regs. 1220-4-1-.04 requires that tariffs containing changes in rates must be filed with the Authority thirty days before their effective date unless the Authority waives any portion of the time limit for good cause shown.

II.

The version of the "Welcoming Reward Program" ultimately approved by the Authority ended by its own terms on May 30, 2003. Because the tariff is no longer in effect, there is no relief this court can provide either to the CAPD or to BellSouth's competitors with regard to this particular program.FN12The fact that we can provide no judicial relief to the CAPD or BellSouth's competitors with regard to the "Welcoming Reward Program" raises a substantial question of mootness which must be addressed at the outset.

FN12. In fact, the "Welcoming Reward Program" tariff had expired approximately two months before the record on appeal was filed with this court and almost three months before the first appellate brief was filed.

***5** The requirements for litigation to continue are essentially the same as the requirements for litigation to begin. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n,* No. M1998-00985-COA-R3-CV, 2001 WL 72342, at *5 (Tenn.Ct.App. Jan. 30, 2001) (No Tenn. R.App. P. 11 application filed). A case must remain justiciable throughout the entire course of the litigation, including any appeal. *State v. Ely,* 48 S.W.3d 710, 716 n. 3 (Tenn.2001); *Cashion v. Robertson,* 955 S.W.2d 60, 62-63 (Tenn.Ct.App.1997). A case is not justiciable if it does not involve a genuine, existing controversy requiring the adjudication of presently existing rights. *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186, 193 (Tenn.2000); *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d 615, 616 (Tenn.Ct.App.1998).

A moot case is one that has lost its justiciability because it no longer involves a present, ongoing controversy. *McCanless v. Klein,* 182 Tenn. 631, 637, 188 S.W.2d 745, 747 (1945); *County of Shelby v. McWherter,* 936 S.W.2d 923, 931 (Tenn.Ct.App.1996). A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Knott v. Stewart County,* 185 Tenn. 623, 626, 207 S.W.2d 337, 338-39 (1948); *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d at 616. Determining whether a case is moot is a question of law. *Charter Lakeside Behavioral Health Sys. v. Tennessee Health Facilities Comm'n,* 2001 WL 72342, at *5;*Orlando Residence, Ltd. v. Nashville Lodging Co.,* No. M1999-00943-COA-R3-CV, 1999 WL 1040544, at *3 (Tenn.Ct.App. Nov. 17, 1999) (No Tenn. R.App. P. 11 application filed).

When a case is determined to be moot and when it does not fit into one of the exceptions to the mootness doctrine, an appellate court should ordinarily vacate the judgment below and remand the case to the trial court with directions that it be dismissed. *Ford Consumer Fin. Co. v. Clay,* 984 S.W.2d at 617;*McIntyre v.. Traughber,* 884 S.W.2d 134, 138 (Tenn.Ct.App.1994). However, if the case falls into one of the recognized exceptions to the mootness doctrine, the appellate court has the discretion to reach the merits of the appeal in spite of the fact that the case has become moot. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* No. M2002-02555-COA-R3-CV, 2005 WL 1111192, at *3 (Tenn.Ct.App. May 10, 2005)*perm. app. denied* (Tenn. Oct. 17, 2005).

The courts have recognized several exceptions to the mootness doctrine. The three most common exceptions include: issues of great public importance, [FN13] issues affecting the administration of justice,[FN14] and issues capable of repetition yet evading review.[FN15]The courts invoke the "capable of repetition yet evading review" exception only where (1) there is a reasonable expectation that the official act that provoked the litigation will occur again, (2) there is a risk that effective judicial remedies cannot be provided in the event that the official act reoccurs, and (3) the same complaining party will be prejudiced by the official act when it reoccurs. A mere theoretical possibility that an act might reoccur is not sufficient to invoke the exception. Rather, there must be a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely,* 2005 WL 1111192, at *4 (citing *Murphy v. Hunt,* 455 U.S. 478, 482, 102 S.Ct. 1181, 1184 (1982)).

FN13.*E.g., State ex rel. McCormick v. Burson,* 894 S.W.2d 739, 742 (Tenn.Ct.App.1994); *Dockery v. Dockery,* 559 S.W.2d 952, 955 (Tenn.Ct.App.1977).

FN14.*New Rivieria Arts Theatre v. State,* 219 Tenn. 652, 658, 412 S.W.2d 890, 893 (1967); *McIntyre v. Traughber,* 884

S.W.2d at 137.

FN15.*Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 903 (Tenn.1987); *State ex rel. Dean v. Nelson,* 169 S.W.3d 648, 652 n. 4 (Tenn.Ct.App.2004); *Mayhew v. Wilder,* 46 S.W.3d 760, 778 (Tenn.Ct.App.2001).

*6 We have determined that this case fits within the exception to the mootness doctrine for issues that are capable of repetition but which will effectively evade judicial review. First, the comments of two of the directors in this case reflect their, and we presume the Authority's, settled intention to follow this procedure in the future with regard to tariffs filed by telecommunications companies. Second, should the Authority follow this sort of procedure with regard to future objections to relatively short-term tariffs, it is essentially inevitable that this court will be unable to review the Authority's decision until after the tariff has gone into effect and has probably expired. Third, in these circumstances, the interests of the CAPD and the competitors of the telecommunications company filing the tariff could be prejudiced by the procedure the Authority uses to consider their petition to stay the tariff and to conduct a contested case hearing. Accordingly, we have determined that the issues raised by the CAPD and BellSouth's competitors qualify as a matter capable of repetition yet evading review.

III.

The central issue in this case involves the Authority's decision to allow BellSouth's revised "Welcoming Reward Program" tariff to go into effect without first opening a contested case proceeding to address the complaints that the tariff was discriminatory and anti-competitive. The CAPD and BellSouth's competitors argue that the Authority abused its discretion by denying their petitions to suspend the tariff and to open a contested case proceeding. BellSouth and the Authority respond that a contested case proceeding was unnecessary and would have only delayed eligible business customers from being able to benefit from the program's lower rates. We have determined that the petitions filed by the CAPD and BellSouth's competitors raised factual and policy issues that should not have been resolved without a contested case proceeding.

A.

The mid-1990s witnessed a fundamental change at both the federal and state level with regard to the regulation of the telecommunications industry. The impetus for these changes was a desire to promote increased competition, to reduce regulation, and to encourage the rapid development of new telecommunications technologies. Tenn.Code Ann. § 65-4-123 (2004); *BellSouth Telecomms., Inc. v. Greer,* 972 S.W.2d 663, 671 n. 21 (Tenn.Ct.App.1997). Accordingly, in addition to the traditional rate-making procedures, Tennessee's new Tennessee Regulatory Authority was empowered to utilize "alternative forms of regulation for telecommunications services and telecommunications services providers."Tenn.Code Ann. § 65-4-123. The most significant regulatory changes involved the procedures for setting or changing rates for existing or new telecommunications services.

Rate-making is essentially a legislative function that has been entrusted to the Authority. *Southern Bell Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm'n,* 202 Tenn. 465, 486, 304 S.W.2d 640, 649 (1957); *Consumer Advocate Div. v. Bissell,* No. 01A01-9601-BC-00049, 1996 WL 482970, at *4 (Tenn.Ct.App. Aug. 28, 1996) (No Tenn. R.App. P. 11 application filed); *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n,* 844 S.W.2d 151, 159 (Tenn.Ct.App.1992). Beginning in 1995, the process for setting and changing rates for new and existing telecommunications services was modified to provide greater flexibility, less oversight, and more self-determination to the competing telecommunications services providers. The new process envisions that telecommunications services providers

will be able to change or add services or change rates without first obtaining the Authority's approval.

*7 The new process permits telecommunications services providers to file tariffs with the Authority defining the new or changed service or charge.[FN16] These tariffs must be filed well in advance of their proposed effective date to give notice of the provider's intentions to the Authority, the public, and other telecommunications services providers.[FN17]Unless the Authority suspends the tariff, it becomes effective automatically, and once it becomes effective, the tariff has the force of law and is binding on the provider and its customers. *GBM Commc'ns, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn.Ct.App.1986).

FN16.Tenn.Code Ann. § 65-5-102(2004) empowers the Authority to require all public utilities to file these tariffs.

FN17. For example, a tariff that changes an existing tariff must be filed thirty (30) days before its effective date unless the Authority waives all or part of the time. Tenn. Comp. R. & Regs. 1220-4-1-.04.

Merely filing a proposed tariff does not trigger a contested case proceeding. However, any interested person may object to the proposed tariff by filing a timely written complaint stating with some specificity the nature of the person's interest, the grounds for objecting to the proposed tariff, and the relief sought. Tenn. Comp. R. & Regs. 1220-1-2-.02(4) (2000); *see also*Tenn. Comp. R. & Regs. 1220-4-8-.09(a) (2003). The provider that filed the proposed tariff has a right to respond to the complaint. Tenn. Comp. R. & Regs. 1220-1-2-.02(4). Thereafter, the Authority has the discretionary authority to decide whether the complaint raises legal or factual issues that require a contested case proceeding or whether the tariff should be permitted to go into effect. Tenn.Code Ann. § 65-5-103 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4); *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763-64 (Tenn.1998). The Authority may also suspend the proposed tariff pending its decision regarding the need for a contested case proceeding. Tenn.Code Ann. § 65-5-101(c)(3) (Supp.2005); Tenn. Comp. R. & Regs. 1220-4-1-.06(5) (2003).

No statute or regulation prescribes how the Authority should decide whether to open a contested case proceeding with regard to a proposed tariff. The Authority may "investigate" the complaint to determine whether it has merit.Tenn.Code Ann. § 65-4-117(a)(1) (2004); Tenn. Comp. R. & Regs. 1220-4-8-.09(2)(b) (2003). Thereafter, the Authority may either enter an order dismissing the complaint or petition, Tenn. Comp. R. & Regs. 1220-1-2-.02(5), or it may open a contested case proceeding regarding the proposed tariff. If the Authority decides to open a contested case proceeding, it may also permit the person or persons who filed the complaint or petition challenging the tariff or other interested persons to intervene. Tenn.Code Ann. § 4-5-310 (2005); Tenn.Code Ann. § 65-2-107 (2004); Tenn. Comp. R. & Regs. 1220-1-2-.02(4).

The process used by the Authority to decide whether to open a contested case proceeding to review a proposed tariff is not itself a contested case proceeding. Accordingly, at least at this particular point in the process, the Authority is not required to follow the procedures in either Tenn.Code Ann. §§ 65-2-107 to -119 or Tenn.Code Ann. §§ 4-5-301 to -321 (2005). However, some questions exist regarding the application of these statutes to the judicial review of the Authority's decisions.

***8** The first question involves the court where judicial relief should be sought. Petitions for review are ordinarily filed in the Chancery Court for Davidson County "unless another court is specified by statute."Tenn.Code Ann. § 4-5-322(b)(1)(A). The Uniform Administrative Procedures Act itself provides for judicial review by different courts with regard to the final decisions of five agencies. For four of these agencies, the statute explicitly states that the decisions must arise from contested case

proceedings .[FN18] However, the statute does not explicitly limit judicial review of the Authority's decisions to decisions arising from contested case proceedings. Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) provides that "[a] person who is aggrieved by *any final decision* of the Tennessee regulatory authority ... shall file any petition for review with the middle division of the court of appeals."(emphasis added).

> FN18. These include final decisions by the Department of Human Services, the Department of Children's Services, and the State Board of Equalization. Tenn.Code Ann. § 4-5-322(b)(1)(B)(i) & (iii). Also included are final decisions regarding the provision of special education services. Tenn.Code Ann. § 4-5-322(b)(1)(B)(ii). Proceedings involving special education services are deemed to be contested case proceedings.*Ogden v. Kelly,* 594 S.W.2d 702, 704 (Tenn.1980).

We must presume that the General Assembly intentionally omitted the "contested case" limitation with regard to appeals from the Authority's decisions.*Powell v. Blalock Plumbing & Elec. & HVAC, Inc.,* 78 S.W.3d 893, 897 (Tenn.2002); *State v. Godsey,* 60 S.W.3d 759, 778 (Tenn.2001). In the absence of the limitation, all appeals from the Authority's final decisions must be filed with this court whether or not they arise from a contested case proceeding. Accordingly, the Authority's decision to decline to stay or to open a contested case proceeding to review a proposed tariff is appealable directly to this court under Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii).

The second question involves the standard of review that should be used in cases of this sort. While the Tennessee Supreme Court determined in *Consumer Advocate Div. v. Greer* that the Authority had discretion to determine whether to convene a contested case proceeding to review a proposed tariff, it did not address how these discretionary decisions should be reviewed. It is not clear whether the court had in mind the common law "abuse of discretion" standard of review [FN19] or some other standard of review such as Tenn.Code Ann. § 4-5-322(h).

> FN19. Under the "abuse of discretion" standard of review, a decision-maker abuses its discretion "when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning and which causes an injustice to the complaining party."*Doe I ex rel. Doe I v. Roman Catholic Diocese of Nashville,* 154 S.W.3d 22, 42 (Tenn.2005). We have also pointed out that a decision-maker abuses its discretion when the decision is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence. *Overstreet v. Shoney's, Inc* ., 4 S.W.3d 694, 709 (Tenn.Ct.App.1999).

Tenn.Code Ann. § 4-5-322(h) is found in the statutes governing contested case proceedings. Accordingly, it might seem, at least on first reading, that Tenn.Code Ann. § 4-5-322(h) is not applicable in cases of this sort because the Authority did not conduct a contested case proceeding to determine whether it should open a contested case proceeding to review a tariff. However, Tenn.Code Ann. §§ 4-5-301 to -325, while directed primarily toward contested cases proceedings, contains procedural directions applicable to other types of proceedings.

We have already pointed out one example of Tenn.Code Ann. § 4-5-322's application to agency actions that are not contested case proceedings.Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) requires that appeals from "any final decision" by the Authority must be appealed to this court. The standard of review in Tenn.Code Ann. § 4-5-322(h) is another example. Like Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii), the statutory standard of review in Tenn.Code Ann. § 4-5-322(h) is not explicitly limited to the review of decisions in contested case proceedings. It simply refers to "the decision of the agency." Accordingly,

we have determined, that the proper standard of review for "petitions for review" filed in this court pursuant to Tenn.Code Ann. § 4-5-322(b)(1)(B)(iii) is the one found in Tenn.Code Ann. § 4-5-322(h). Therefore, we will review the Authority's decision to decline to stay or to open a contested case proceeding to review BellSouth's "Welcoming Reward Program" tariff using Tenn.Code Ann. § 4-5-322(h).[FN20]

> FN20. We also note that five specific review criteria in Tenn.Code Ann. § 4-5-322(h) are essentially specific manifestations of the sort of decision-making that would be considered an "abuse of discretion." Acting in violation of constitutional or statutory provisions [Tenn.Code Ann. § 4-5-322(h)(1)] would clearly constitute an "abuse of discretion," as would acting in excess of the decision-maker's statutory authority [Tenn.Code Ann. § 4-5-322(h)(2)], using an unlawful procedure [Tenn.Code Ann. § 4-5-322(h)(3)], or making a decision that is unsupported by the evidence [Tenn.Code Ann. § 4-5-322(h)(5)].

B.

*9 It is now well established that the Authority is not required to open a contested case proceeding whenever it receives a complaint or petition challenging a proposed tariff. The Tennessee Supreme Court has determined that the Authority may exercise its discretion to determine whether a contested case hearing is warranted. *Consumer Advocate Div. v. Greer,* 967 S.W.2d at 763. However, the court has yet to address the breadth of the Authority's discretion or the process the Authority may use to exercise its discretion. These questions are before us now.

Prior cases have recognized that the Tennessee General Assembly has given the Authority practically plenary power over the telecommunications services providers subject to its jurisdiction. *Consumer Advocate Div. v. Greer,* 967 S.W.2d at 762;*Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n,* 844 S.W.2d at 159. However, the Authority's discretion is not without limits. Any regulatory action the Authority takes must be the result of an express grant of authority by statute or must arise by necessary implication from an express grant of authority. *BellSouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth.,* 79 S.W.3d 506, 512 (Tenn.2002); *Tenn. Pub. Serv. Comm'n v. Southern Ry.,* 554 S.W.2d 612, 613 (Tenn.1977). Thus, while the Authority's enabling statutes should be construed in the Authority's favor,[FN21] they should not be construed so broadly that they permit the Authority to exercise its power in a manner contrary to law. *Pharr v. Nashville C. & St. L. Ry.,* 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948); *BellSouth Telecoms., Inc. v. Tenn. Regulatory Auth.,* 98 S.W.3d 666, 668 (Tenn.Ct.App.2002). The Authority must comply with the statutes and constitutional provisions governing its procedures. *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n,* 972 S.W .2d at 680.

> FN21.Tenn.Code Ann. §§ 65-2-121, 65-4-106 (2004).

No statute or regulation prescribes the factors for the Authority to consider when deciding whether to dismiss a complaint seeking a contested case proceeding regarding a proposed tariff. In two cases where the courts have reviewed the Authority's denial of a contested case proceeding, the grounds for the Authority's decision resembled grounds similar to those usually raised in a Tenn. R. Civ. P. 12.02 or Tenn. R. Civ. P. 12.03 motion. In one case, the Tennessee Supreme Court upheld the dismissal of a "vague and nonspecific complaint" that failed to state a claim in accordance with the Authority's pleading rules. *Consumer Advocate Div. v. Greer,* 967 S.W.2d at 763. In the second case, this court upheld the dismissal of a complaint raising issues that the Authority had already addressed. *Consumer Advocate Div. v. Tenn. Regulatory Auth.,* No. M1999-01170-COA-R12-CV, 2001 WL 575570, at

*6 (Tenn.Ct.App. May 30, 2001) (No Tenn. R.App. P. 11 application filed). In both of these cases, the Authority was not required to resolve any disputed factual issues regarding the nature or effect of the challenged tariff, nor was it required to resolve new legal or policy questions. The complaints were subject to dismissal as a matter of law.

*10 This case presents an entirely different circumstance. Here, both the CAPD and BellSouth's competitors filed complaints that satisfied the Authority's specificity requirements.[FN22]The issues raised in the complaints when they were first filed,FN23 particularly the issue regarding the discrimination between new and existing customers, had not been previously addressed by the Author- ity.

FN22. Neither the Authority nor BellSouth claimed that the petitions challenging the "Welcoming Reward Program" tariff were so vague and ambiguous that a more definite statement was required. Tenn. Comp. R. & Regs. 1220-1-2-.03(4). Similarly, they did not assert that the petitions did not allege with sufficient specificity the grounds for seeking relief, the nature of the relief sought, and the Authority's jurisdiction to grant the requested relief.

FN23. After BellSouth revised the "Welcoming Reward Program" tariff to make it a long-term promotion, the Authority determined that it had previously approved one-year service contracts for similar long-term promotions.

In this proceeding, the Authority went beyond simply determining whether the petitions filed by the CAPD and BellSouth's competitors raised meritorious issues regarding the proposed "Welcoming Reward Program" tariff. Two of the three directors considering the petitions, implicitly recognizing the validity of the petitioners' concerns, used the prospect of a contested case proceeding to induce BellSouth to revise the tariff to address the issues raised in the petitions. The ploy was partially successful. Three "negotiating" sessions with the Authority produced several revisions to the tariff that addressed three of the six issues raised by the CAPD and BellSouth's competitors. The three remaining issues involved: (1) the price discrimination between BellSouth's new and existing customers, (2) the restriction on the resellers' ability to offer the promotion to their existing customers, and (3) the requirement that customers enter into a one-year service contract. The CAPD and BellSouth's competitors continued to insist that these features of the proposed tariff were discriminatory and anti-competitive.

The two-director majority addressed these issues head on in their April 14, 2003 order by treating them as questions of law rather than as questions of fact. With no evidence in the record to support their conclusions, they concluded that the tariff's differentiation between new and existing customers was not discriminatory.[FN24]They based this conclusion on the representations of BellSouth's lawyers that new customers and existing customers were not similarly situated because of self-evident differences in "marketing costs" and "business opportunities." However, the record contained no evidence regarding the difference between the marketing costs incurred to attract new business customers and the marketing costs incurred to retain existing customers or the difference between the business opportunities with regard to new customers and the business opportunities with regard to retaining and expanding the services provided to existing customers. As far as the present record shows, the distinctions between new and existing customers relied upon by the Authority and BellSouth could very well be a distinction without a difference.

FN24. While utilities must offer the same rates to "all persons alike under the same conditions and circumstances" they need not offer the same rates to persons who are dissimilar, "and any fact that produces an

> inequality of condition and a change of circumstances justifies an inequality of charge."*Southern Ry. Co. v. Pentecost,* 205 Tenn. 716, 725, 330 S.W.2d 321, 325 (1959).

The two-director majority did not address the fact that new customers who sign a service contract as a result of the "Welcoming Reward Program" become existing customers. Thus, following enrollment, the new customer-existing customer distinction disappears because all customers are existing customers. Both the CAPD and BellSouth's competitors pointed out that these "new" existing customers would be paying less for their telephone service than customers who contracted for the same service either before or after the promotion. They also assert that if the *Southern Ry. v. Pentecost* standard is applied to customers after they have contracted for service, the proposed tariff results in price discrimination between customers who are receiving the same service.

***11** Likewise, the two-director majority failed to address the complaints that the final version of the proposed "Welcoming Reward Program" tariff is anti-competitive because it prevents resellers from offering the program to their existing customers. BellSouth's competitors argued that BellSouth was using its market power to undermine its competitors by offering discounted rates while preventing its competitors from purchasing the same discounted service and offering it to their existing customers.[FN25]BellSouth's response was simply that its tariff placed the same restrictions on its competitors when they resold the program that BellSouth was placing on itself. Notwithstanding BellSouth's concession that the cost of providing the program to a reseller's new and existing customers would be the same, the Authority neglected to make specific findings regarding whether the restriction was anti-competitive.

> FN25. The lawyer representing BellSouth's competitors asserted: "Well, I should be able to buy the offer myself and resell it to my own customer, and, ironically, that's the only situation in which BellSouth doesn't want that customer. They will want him if they can serve him directly, but they don't want him if they have to serve him through a reseller."

Discretionary decisions must take the law and the facts into account.*Ballard v. Herzke,* 924 S.W.2d 652, 661 (Tenn.1996); *DeLapp v. Pratt,* 152 S.W.3d 530, 538 (Tenn.Ct.App.2004). It was evident at the March 3, 2003 conference that the parties continued to disagree about whether the proposed "Welcoming Reward Program" tariff was discriminatory and anti-competitive and that the record contained no evidence upon which the Authority could resolve this dispute. Accordingly, we have determined that the Authority abused its discretion by dismissing the petitions to suspend the "Welcoming Reward Program" tariff and to convene a contested case proceeding without properly addressing factual issues raised by the complaints. The CAPD and BellSouth's competitors raised valid issues regarding the revised tariff's rate discrimination and potentially anti-competitive effects that warranted giving them an opportunity to make their case in the context of a contested case proceeding.FN26

> FN26. The Authority did not err by declining to open a contested case proceeding with regard to the claim that the tariff's requirement that customers enter a long-term service contract was unfair because the Authority had already approved this feature in other long-term promotions.

IV.

As a final matter, both the Authority and BellSouth argue that the CAPD and the competing telecommunications services providers waived their right to challenge the procedure the Authority used to determine whether to convene a contested case proceeding. They insist that both the CAPD and the competing telecommunications services providers

conceded during the March 3, 2003 conference that no further evidence was necessary to enable the Authority to act on the merits of their petitions challenging the "Welcoming Reward Program" tariff. We have determined that the Authority and BellSouth have misconstrued the remarks of the CAPD and BellSouth's competitors.

This proceeding amounted to a novel form of regulatory alternative dispute resolution. Two of the directors viewed it as a means to enable the parties to narrow or resolve their disagreements regarding BellSouth's "Welcoming Reward Program" tariff.[FN27]Such a proceeding is consistent with the broad and flexible grant of power to the Authority to regulate telecommunications services providers,FN28 and parties to proceedings before the Authority, like BellSouth, the CAPD, and BellSouth's competitors, may agree to participate in such proceedings in lieu of a contested case proceeding. *See Team Design v. Gottlieb,* 104 S.W.3d 512, 517 (Tenn.Ct.App.2002) (pointing out that parties are free to settle their disagreements using virtually any mutually satisfactory procedure that is neither illegal nor contrary to public policy).

> FN27. One director commented at the close of the March 3, 2003 hearing that "I am ... for us coming to consensus rather than a lengthy, costly, and almost always time-consuming contested case hearing. Most of these issues aren't going to be resolved in a single hearing. We're in a continuum here ... [and] I'm hopeful that we will continue toward consensus build- ing...."

> FN28.Tenn.Code Ann. § 65-4-123.

***12** Neither the CAPD nor BellSouth's competitors abandoned their request for a contested case hearing on their challenges to BellSouth's "Welcoming Reward Program" tariff. In every document they filed and in each of the three conferences during which the Authority considered the tariff, they requested an opportunity to discover and present evidence supporting their assertions that the tariff was discriminatory and anti-competitive. At the conclusion of the final conference on March 3, 2003, Director Jones asked the lawyers representing the CAPD and BellSouth's competitors, "[w]hat more is there to add to this dialogue?"Both responded that they had nothing further to add.[FN29]

> FN29. One lawyer responded, "[t]hree briefs is enough for me."The other lawyer stated: "I would not want to, I guess, compromise our ability to do discovery in this case if a case ... is eventually convened. With respect to the issue of whether or not a case should be ... convened ... we have probably gone beyond the pale on that particular issue."

The Authority and BellSouth would have us construe the lawyers' comments as signifying that the CAPD and BellSouth's competitors not only acquiesced in the decision-making process but also conceded that they had no further evidence to present with regard to their challenges to the "Welcoming Reward Program" tariff. However, when taken in context, the lawyers' answers to Director Jones's question signified only that they had nothing more to offer with regard to the question of whether the Authority should open a contested case proceeding. Waivers of procedural rights should be not presumed from equivocal conduct or ambiguous statements. In the context of this particular proceeding, it would be unfair and inappropriate to conclude that the CAPD and BellSouth's competitors abandoned their requests for the contested case proceeding that they had been pursuing for over two months. Accordingly, we decline to find that either the CAPD or BellSouth's competitors waived their right to challenge the legal propriety of the Authority's decision-making process or its decision to deny their petitions to suspend the proposed "Welcoming Reward Program" tariff and to open a contested case proceeding regarding their complaint that the tariff was discriminatory and anti-competitive.

V.

In summary, we have concluded that the Authority abused its discretion when it declined to grant a contested case hearing regarding the challenges that BellSouth's "Welcoming Reward Program" tariff was discriminatory and anti-competitive. Therefore, the Authority's April 14, 2003 order dismissing the petitions to suspend the tariff and to open a contested case proceeding must be vacated in accordance with Tenn.Code Ann. § 4-5-322(h)(4), and the case must be remanded to the Authority for further proceedings consistent with this opinion. We tax the costs of this appeal to the Tennessee Regulatory Authority.

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