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IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF CARTWRIGHT CREEK, LLC TO CHANGE AND INCREASE RATES AND CHARGES	)	**DOCKET NO. 09-00056**

POST-HEARING BRIEF OF THE CONSUMER ADVOCATE

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits this Post-Hearing Brief in Tennessee Regulatory Authority ("TRA," or "the Authority") Docket 09-00056, *Cartwright Creek, LLC Petition to Change and Increase Rates and Charges*.

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INTRODUCTION

Cartwright Creek, LLC ("Cartwright Creek" or "Company") filed a *Petition to Increase Rates and Charges* with the Authority on April 28, 2009, seeking a 75% increase in rates, or approximately $182,000 annually. During the regularly scheduled Authority Conference on May 18, 2009, the TRA voted to convene a contested case and the Consumer Advocate subsequently intervened on June 1, 2009.

On August 24, 2009, Waterbridge Development ("Waterbridge"), a development located within Cartwright Creek's service territory in Williamson County, also intervened in this matter in order to secure a contract for Cartwright Creek's wastewater services.[1] However, on October 19, 2009, Waterbridge effectively withdrew its *Petition to Intervene* as Waterbridge and Cartwright Creek were able to negotiate a contract and have that contract approved by the Authority before the scheduled Hearing on the Merits.[2] As a result, on October 22, 2009, the Hearing Officer in this matter modified the scope of this docket, ordering both the Consumer Advocate and Cartwright Creek to exclude any revenue or expense items associated with either Waterbridge or the Stillwater Development from the current rate case. The Hearing Officer's order required those issues to be analyzed separately, as the Company was required to file a new rate case upon the transfer of either development to Cartwright Creek.[3]

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[1] TRA Docket 09-00056, *Waterbridge Development Petition to Intervene* (August, 24, 2009), at 1.

[2] TRA Docket 09-00056, *Waterbridge Withdraws its Petition to Intervene* (November 11, 2009).

[3] TRA Docket 09-00056, *Order Resuspending Tariff and Proposed Rate Increase and Initial Order Modifying Scope of Rate Case* (October 22, 2009), at 3.

Once the scope of the rate case was clarified, the Consumer Advocate and Cartwright Creek were able to negotiate a *Proposed Settlement Agreement*, filed with the Authority on November 4, 2009 to be reviewed at the November 9, 2009 Hearing on the Merits. While the Consumer Advocate prefers that rates not increase for customers, especially in this tough economic climate, the statutory standards indicate a rate increase is appropriate to provide a fair rate of return to the Company. The *Proposed Settlement Agreement* requested the TRA to approve 40% increase in rates, or a $98,054 annual rate increase.[4] The Parties also filed a *Joint Stipulation Regarding Issues Not Resolved by Proposed Settlement Agreement* on November 23, 2009. At the November 30, 2009, hearing, the Authority unanimously voted to approve the *Proposed Settlement Agreement* and proceeded with the hearing on the outstanding issues as stipulated to by the parties. Because the Authority approved the *Proposed Settlement Agreement* and limited the hearing to the remaining outstanding issues, this Brief will address on only those remaining issues as stipulated to by the parties and any issues raised by the TRA at the Hearing on the Merits.

ISSUES WITH CARTWRIGHT CREEK'S PROPOSED TAP FEES

A. Proposed Tap Fee Increase

Cartwright Creek has proposed to increase tap fees from $2,750 to $9,000, an approximate 227% increase, and escrow these proceeds for the purpose of funding maintenance and plant improvements on their aging facility.[5] While the Consumer Advocate understands that

[4] TRA Docket 09-00056, *Proposed Settlement Agreement Between Cartwright Creek, LLC and the Consumer Advocate and Protection Division* (November 4, 2009), at 3.

[5] Direct Testimony of Robert I. Cochrane, 14:13-15 (April 28, 2009).

an aging facility requires upgrades and improvements in order to provide the best possible services to the customers, Cartwright Creek's "plan" to fund such improvements by increasing tap fees is unjustified under the circumstances.

At the Hearing on the Merits, the Company admitted that the requested $6,250 increase in tap fees is no way related to increased costs associated with connecting a customer to the system. Instead, the Company has improperly calculated the requested $9,000 tap fee amount by dividing the estimated cost of repairs ($1,350,000) by the estimated number of potential customers willing to tap onto the system (150). The Consumer Advocate takes issue with this methodology because both the estimated costs and the estimated potential customers are speculative, at best. The Company has not requested or provided any verifiable engineering estimates as to the cost of repairing and upgrading the facility. The only estimates submitted by the Company are contained in internal memorandums prepared by Cartwright Creek Staff, totaling a cost of $350,000, which would be utilized to fund several studies.[6] The Company then speculates that these studies will yield results which would indicate the appropriate use for the remaining $1,000,000.[7] Without a verifiable estimate on the cost to repair the system, the Company is essentially requesting the Authority to approve the collection of $1,000,000 in tap fee proceeds to fund an undetermined project. Cartwright Creek's "plan" has no contingency should their studies indicate that the $1,000,000 is unneeded.

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[6] Cartwright Creek's Responses to the Staff Data Request #2 (August 28, 2009), Attachment B.1.

[7] Direct Testimony of Bruce Meyer, Direct Testimony, 7:13-15 (April 28, 2009).

In addition to the absence of verifiable cost estimates, the Company has also failed to provide any reliable evidence as to the existence of potential customers willing to tap onto their system. Although there are several vacant tracts of land within the Company's service territory, no development has been planned or approved at this time.[8] The Company relies on reports published by Williamson County which identify several nearby homes with failing septic tanks.[9] However, the notion that a home's septic tank *may* fail, and the assumption that those homes will then request the services of Cartwright Creek, is inherently speculative and insufficient to support the increase in tap fees. Cartwright Creek's proposed tap fee of $9,000 is also substantially in excess of the average tap fee ($3,700) charged by similarly situated wastewater companies in the surrounding area.

Without reliable evidence as to the actual estimated costs of repairing and updating the system, and without a clear indication of the number of customers willing to tap on to the system, the Company has failed to justify the proposed increase. Put similarly, the Company has failed to indicate why the current tap fee of $2,750 is insufficient to meet its needs.

B. Treatment of Tap Fee Proceeds

In addition to the Company's proposed increase in tap fees, Cartwright Creek has also proposed that such proceeds be generally escrowed to fund any deferred maintenance and plant improvements.[10] The Consumer Advocate is of the opinion that tap fee proceeds should be

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[8] Cartwright Creek's Responses to the Staff Data Request #2 (August 28, 2998), at 7.

[9] *Id.*

[10] TRA Docket 09-00056, *Petition of Cartwright Creek, LLC to Change and Increase Rates and Charges* (April 28, 2009), at 5.

treated as revenue for rate making purposes, consistent with the position advanced by the Consumer Advocate and adopted by the Authority in the *Final Order* in TRA Docket No. 09-00034, which involved the neighboring wastewater utility Lynnwood Utility Corporation.[11] The Authority has consistently held that tap fee proceeds should be recorded as revenue as permitted by the Uniform System of Accounts.[12] The TRA has stated that the reasoning behind this decision is, "if the Service Connection Charges are booked as Revenue, the recurring revenue requirement would be greatly reduced."[13] Cartwright Creek has provided no legal authority, TRA Rule, or accounting principle which would permit tap fee proceeds to be escrowed or treated as anything other than revenue; therefore, Tap Fees must be treated as revenues in accordance with TRA precedent.

Finally, the Consumer Advocate believes that any funds brought in from increased tap fees should be carefully accounted for and reserved for improvements to the system.

Should the Authority feel that an escrow account is necessary to ensure the financial security of the Company, the Consumer Advocate is of the opinion that the creation of an escrow account should adhere to the requirements set forth in TRA Rule 1220-4-13-.07(8)-(9), the rule governing the financial security of wastewater utility companies. This rule states:

> reserve/escrow accounts established by the public wastewater utility to pay for non-routine operation and maintenance expenses shall meet the conditions as specified by the Authority. The public wastewater utility

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[11] TRA Docket 09-00034, *Final Order* (November 3, 2009), at 4.

[12] TRA Docket 06-00187, *Final Order Approving Rate Increase and Rate Design* (November 27, 2007), at 24, and TRA Docket 09-00034, *Final Order* (November 3, 2009), at 4.

[13] TRA Docket 06-00187, *Final Order Approving Rate Increase and Rate Design* (November 27, 2007), at 24.

> shall file bank statements and a report that details the expenses on all disbursements from the escrow account with its annual report or as the Authority may direct.[14]

In accordance with the above stated rule, the Authority should require Cartwright Creek to maintain that all escrowed funds be used solely for non-routine operation and maintenance expenses and should require Cartwright Creek to submit any studies or cost estimates to the TRA for approval before any expenditure.

ISSUES WITH CARTWRIGHT CREEK'S PROPOSED TARIFF

A. Sewer Access Fees

Cartwright Creek's Proposed Tariff includes a "Sewer Access Fee" which states that "each property owner provided one or more taps … but not making a Service Connection will be required to pay an annual "Sewer Access Fee" of $120 …, payable by December 31 of each year."[15] At the hearing on the merits, Cartwright Creek was asked whether such fee would be charged to those customers who have paid a tap fee, but have been denied for any reason a "service connection" by Cartwright Creek. Cartwright Creek affirmed that the "Sewer Access Fee" would only affect those customers who have willingly elected not to make a "service connection" within a reasonable amount of time. As such, the Consumer Advocate is of the opinion that the Proposed Tariff be amended to include a statement which would exclude from liability those customers who have been denied a "service connection" by Cartwright Creek or for whom Cartwright Creek does not have the current ability or capacity to provide a "service connection."

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[14] Tenn. Comp. R. & Regs. 1120-4-13-.07(8)-(9) (2006).

[15] TRA Docket 09-00056, *Petition of Cartwright Creek, LLC to Change and Increase Rates and Charges* (April 28, 2009), Exhibit A, p.8.

B. Disconnection and Reconnection Fees

The "Disconnection and Reconnection Fees" contained within Cartwright Creek's proposed tariff are unjustified under the circumstances because Cartwright Creek does not physically turn on or turn off a customer's service for nonpayment. Cartwright Creek has stated that turning off a customer's sewer service could result in adverse effects, specifically in relation to environmental and sanitation concerns. Therefore, when a customer fails to pay their monthly bill, Cartwright Creek's recourse is to place a lien on the property and recoup any legal costs, filing fees or amounts owed from past due bills through the legal process. Because Cartwright Creek has sufficient means to recoup all costs associated with a customer's non-payment of bills, it appears the proposed "Reconnection and Disconnection Fee" contained within the tariff is meant to serve as an additional deterrent for failure to pay. The Consumer Advocate understands that Cartwright Creek must allegedly go through a burdensome process in order to recoup costs because the Company cannot simply "turn off" a customer's service; however, Cartwright Creek has failed to justify why the "Disconnection and Reconnection Fee" in the existing tariff is inadequate to serve as a deterrent to consumers. In fact, Cartwright Creek has indicated that no customer has been disconnection for failure to pay. Because Cartwright Creek is able to recoup all costs associated with disconnection or reconnecting a customer through the legal process, the Authority should deny the Company's request to increase the "Disconnection and Reconnection Fee."

At the hearing on the merits, the TRA Staff raised concerns when Cartwright Creek stated that even the increased "Disconnection and Reconnection Fees" would still fall short of covering all costs associated with a disconnection or reconnection. If the current or proposed

fees are inadequate to cover the costs, the TRA Staff questioned whether the customers who pay their monthly bills on time would be penalized through rate increases seeking the un-recouped costs. The TRA Staff suggested that Cartwright Creek be required to file data concerning the number of customers who have been disconnected/reconnected and the costs associated with each.

The Consumer Advocate is in agreement with the TRA Staff in that no paying customer should be penalized for the actions of a non-paying customer. The Consumer Advocate concurs that Cartwright Creek should submit data as proposed by the TRA Staff and if such data indicates that the current process of charging a fee and recouping costs through the legal process is insufficient, Cartwright Creek should be required to conduct research as to alternative methods of handling nonpaying customers and file such research and data with the Authority for review.

C. Net Tap Fee Increase

The "Net Tap Fee Increase" as defined in Cartwright Creek's proposed tariff states that "any property owner who has paid a Tap Fee less than the new Tap Fee shall be required to pay the Company the difference between the new Tap Fee and the previously paid Tap Fee to remain eligible from service."[16] At the Hearing on the Merits, the Consumer Advocate maintained the position that the "Net Tap Fee Increase" as described above would be in violation of the prohibition against retroactive ratemaking, as such fee would be seeking to use current rates to recover past loses. Tennessee Code Annotated § 65-5-201 has been construed to prohibit retroactive ratemaking as it empowers the TRA to order rates which shall be followed

[16] TRA Docket 09-00056, *Petition of Cartwright Creek, LLC to Change and Increase Rates and Charges* (April 28, 2009), Exhibit A, p.8.

"thereafter", a position that has been upheld as far back as 1984 in *Security Alarms & Service, Inc. v. Public Service Commission*, 1984 Tenn. App. LEXIS 3426 (Tenn. Ct. App. 1984). During the hearing, Cartwright Creek withdrew its request to include the "Net Tap Fee Increase" in the proposed tariff and any final tariff should exclude this fee as requested by the Company.

D. Rate Design

As currently proposed, Cartwright Creek's flat fee rate design charges residential customers based on the number of bedrooms within their home.[17] Although Cartwright Creek maintains that this approach is an accepted industry practice, the Company has failed to provide any evidence to suggest that the number of bedrooms in a home is directly related to the number of residents residing within that home.[18] Unlike volumetric billing, which bases a customer's monthly bill on their actual usage, this approach unfairly burdens customers with small families living in larger homes, or those customers who utilize extra bedrooms for other purposes. Additionally, billing a customer based on the number of bedrooms in his or her home does not encourage or afford the customer the opportunity to lower their bill through conservation efforts.

While the Consumer Advocate generally believes that a volumetric rate design is of greater benefit to consumers for the above stated reasons, the Company has not provided any information as to the feasibility of implementing volumetric billing. It is the position of the Consumer Advocate that the Company should be required to perform additional research to determine the feasibility of volumetric billing and present such findings to the Authority for

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[17] TRA Docket 09-00056, *Petition of Cartwright Creek, LLC to Change and Increase Rates and Charges* (April 28, 2009), Exhibit A, p.10.

[18] Cartwright Creek's Responses to the Staff Data Request #2 (August 28, 2998), at 3.

consideration in future rate cases. Because this issue has been raised with Cartwright Creek as far back as 1993, a specific, reasonable time frame needs to be established for Cartwright Creek to perform this analysis. Specifically, the Company should be required to report back to the TRA by a date certain with either a detailed plan to implement volumetric billing in any future rate case or to provide a detailed explanation on why volumetric billing is not feasible, supported by verifiable evidence.

Until such time that Cartwright Creek can provide the necessary research study to the TRA as to the feasibility of volumetric billing, the Consumer Advocate also requests that the Authority consider requiring Cartwright Creek's new tariff to provide a mechanism for ratepayers to provide evidence to Cartwright Creek that the number of bedrooms does not reflect the actual occupants or water usage of their residence. If such evidence is provided, the Consumer Advocate is of the opinion that Cartwright Creek should consider changing the ratepayer's categorization as related to their rate class. If Cartwright Creek and the consumer are unable to come to agreement, the Consumer Advocate is of the opinion that the issue should be arbitrated before the Consumer Services Division of the TRA.

CUSTOMER COMPLAINTS

At the pre-hearing conference on November 4, 2009, TRA Staff indicated that they had received a "request" from a Cartwright Creek customer alleging that they paid a tap fee to the previous owner and have since been denied a "service connection" for lack of proof of such payment.[19] While the Consumer Advocate is not aware of any additional details regarding this "request" and although this customer has not filed a formal complaint, we greatly appreciate the

[19] Transcript of Proceedings, 27:19-28-4, (November 4, 2009).

TRA bringing this issue to the attention of the Consumer Advocate. In response to such concerns, it is the Consumer Advocate's opinion that Cartwright Creek should adopt and adhere to a reasonable policy for resolving customer complaints. That process should include, but not be limited to, establishing a means for customers to provide proof of previously paid tap fees and requiring Cartwright Creek to diligently research both the current records and those of the past owners to obtain any information relating to a customer's prior payments. The Authority should also require any unresolved issues or complaints to be arbitrated before a neutral third party, such as the Consumer Services Division of the TRA.

TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION ("TDEC") ACTIONS

At the Hearing on the Merits, the Company made references to TDEC permits and the effect of the permit requirements on the operation of the Cartwright Creek system. In order that the Consumer Advocate and the TRA may know of the potential impact of any TDEC actions, the Consumer Advocate requests that the TRA order the Company to notify the Consumer Advocate and the TRA of any TDEC actions or proposed permit changes within no more than three business days of receipt of any notice from TDEC.

CONCLUSION

For the foregoing reasons, the Authority should find that Cartwright Creek's proposed increase in tap fees is without merit. In light of the facts of this record, Cartwright Creek has not carried its burden of proving that an increase would be just and reasonable at this time, nor has it provided any authority for the escrow of tap fee proceeds. Additionally, the Consumer Advocate would recommend Cartwright Creek be required to research the feasibility of volumetric billing as stated above, amend the "Sewer Access Fee", "Disconnection and Reconnection Fee" and

"Net Tap Fee Increase" consistent with the Consumer Advocate's position, and establish a process for resolving customer complaints.

RESPECTFULLY SUBMITTED,

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Dated: Dec. 7th, 2009.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

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This the 7th day of December, 2009.

Mary L. White
MARY L. WHITE

No Rule 11 Filing – Mandate Date Not Available

LEXSEE

SECURITY ALARMS & SERVICES, INC., et al., Petitioners-Appellants, vs. TENNESSEE PUBLIC SERVICE COMMISSION, Respondent-Appellant, and SOUTH CENTRAL BELL TELEPHONE COMPANY, Respondent-Appellee, SOUTH CENTRAL BELL TELEPHONE COMPANY, Petitioner-Appellee, vs. TENNESSEE PUBLIC SERVICE COMMISSION, et al., Respondents-Appellants.

Court of Appeals of Tennessee, Western Section Sitting at Nashville

1984 Tenn. App. LEXIS 3426

September 13, 1984

PRIOR HISTORY: [*1] DAVIDSON EQUITY

From the Chancery Court of Davidson County, Tennessee

The Honorable C. Allen High, Chancellor

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, alarm service company and the Tennessee Public Service Commission, challenged a judgment of the Chancery Court of Davidson County (Tennessee), which ruled in favor of appellee telephone company in the telephone company's suit seeking to set aside the Commission's action in ordering a refund of certain rate charges which were implemented due to the Commission's miscalculation.

OVERVIEW: The alarm service company provided security services which required the use of telephone private lines. The Commissioner allowed the telephone company a rate increate for private line services. The alarm service petitioned the trial court for review of the Commission's order, citing a mathematical error by the Commission. The trial court remanded the matter to the Commission for reconsideration. The Commission ordered a reduction of rates and a refund of overcharges accruing from the mistaken methodology. The telephone company moved the trial court to set aside that part of the Commission's order which directed a refund. The trial court reversed the Commission's refund order, finding that it acted in excess of its statutory authority. On appeal, the court affirmed, holding that the Commission lacked authority to require the refund of rates. Such was beyond the Commission's enabling statutory grant. Tenn. Code. Ann. § 65-5-201 empowered the Commission to order rates which were to be followed "thereafter." The Commission had not been conferred the power of retroactive ratemaking.

OUTCOME: The judgment of the trial court was affirmed.

CORE TERMS: refund, rate increase, retroactive, ratemaking, private lines, subject to refund, own initiative, miscalculation, statutorily, reparations, telephone, deficit

LexisNexis(R) Headnotes

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review
Energy & Utilities Law > Utility Companies > Rates > General Overview
Governments > Legislation > Initiative & Referendum
[HN1]The power to establish rates is a legislative one, and the duty of the court is to correct errors after rates are fixed. If the Tennessee Public Service Commission is not statutorily authorized to order a refund on its own initiative, a reviewing court cannot bestow that power on it.

Administrative Law > Agency Adjudication > Review of Initial Decisions
Communications Law > Telephone Services > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN2]The Tennessee Public Service Commission may require the posting of a bond pending the outcome of

further study. Tenn. Code. Ann. § 65-5-203. An aggrieved party may petition the Commission for a stay within seven days of its initial order. Tenn. Code. Ann. §§ 34-5-316, 34-5-322.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Governments > Courts > Judicial Precedents
[HN3]Although a party may cite cases from other jurisdictions in support of its position, these are not controlling in the appellate court.

Administrative Law > Agency Adjudication > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Governments > State & Territorial Governments > Employees & Officials
[HN4]The Tennessee Public Service Commission operates pursuant to statutory powers, and these are to be strictly construed.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Governments > Legislation > Effect & Operation > Retrospective Operation
Governments > State & Territorial Governments > Employees & Officials
[HN5]There is no authority for the Tennessee Public Service Commission to make its rulings conditional or subject to refund. A bond may be required and a refund may be ordered under Tenn. Code. Ann. § 65-5-203, but this applies only before the Commission's order becomes final. The Commission has no authority other than that which is specifically granted by statute. Tenn. Code. Ann. § 65-5-201 empowers the Commission to order rates which shall be followed "thereafter." The Commission does not have the power of retroactive ratemaking. The Commission lacks authority to require a refund of rates, as such is beyond its enabling statutory grant.

COUNSEL: Daniel R. Loftus, Attorney for Security Alarms & Services, Inc.

Charles L. Lewis, Attorney for Tennessee Public Service Commission

Mark D. Hallenbeck, T. G. Pappas & Raymond Whiteaker, Jr., Attorneys for South Central Bell Telephone Company

JUDGES: Highers, J. wrote the opinion. NEARN, P.J., W.S. (Concurs), CRAWFORD, J. (Concurs)

OPINION BY: Highers

OPINION

HIGHERS, J.

The issue in this case is whether the Tennessee Public Service Commission may require a utility to refund certain rate charges which were implemented because of a miscalculation made by the Commission.

Security Alarms (hereinafter Security) and others provide security services, and all require the use of telephone "private lines." On May 21, 1979, the Tennessee Public Service Commission (hereinafter PSC or the Commission) issued a show cause order to South Central Bell (hereinafter Bell) to demonstrate the reasonableness of its rates for private line customers. On May 27, 1980, PSC allowed Bell a rate increase totalling $6,948,000.00 for private line services. A bond was [*2] required pending the outcome of a study.

The May 27 increase was made permanent by an order of the Commission dated November 20, 1980, subject to a study for the period of May through November of 1980. Not until after this order was entered did Security and others raise objections by petitioning for review to the Chancery Court on December 31, 1980. The $6,948,000.00 figure was based on an Embedded Direct Analysis (EDA) conducted by Bell for the purpose of telephone service. The EDA, according to the Chancellor's findings, showed a deficit for private line services of $4,888,000.00. The Chancellor stated:

The Commission took this figure and added $2,088,000.00 shown on the "current cost" for non-recurring rates and approved a rate increase of $6,968,000.00. [1]

The Commission either over-looked, or was not informed, that the $2,088,000.00 was already included in the $4,888,000.00 EDA deficit.

1 The actual rate increase was $6,948,000.00.

On January 6, 1982, the Chancellor remanded the matter to the PSC for a reconsideration of the rights of the parties.

On March 23, 1983, the PSC ordered a reduction of private line rates and ordered a refund of the overcharges [*3] accruing from the mistaken methodology. Bell moved in Chancery Court to set aside that part of the PSC action ordering a refund. By order dated June 21, 1983, the Chancellor reversed the Commission's refund

order, finding that it acted in excess of its statutory authority. Both PSC and Security *et al.* have appealed.

The Chancellor held that the Commission lacks statutory authority to order refunds because the PSC's authority is prospective whereas a refund amounts to retroactive ratemaking. *See* T.C.A. § 65-5-201 *et seq.*

Security and PSC rely upon *Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission*, 124 Ariz. 433, 604 P.2d 1144 (Ariz. App. 1979), which states:

When an agency approves a rate, and the rate becomes final, the agency may not later on its own initiative or as the result of collateral attack make a retroactive determination of a different rate and require reparations. [Citations omitted]. The refund in this case, however, was precipitated by this Court's decision in *Scates* and not by the Corporation Commission's own determination of the impropriety of the 1975 rate increase. The refund is the result of [*4] the direct, statutorily authorized, review of the Commission's order.

604 P.2d at 1147.

It is the contention of Security and PSC that the Commission did not undertake on its own to revise the affected rate, but that it acted pursuant to a judicial determination that the rate was in fact erroneous. It is argued that the *Mountain States* case supports the position that the Commission may not require reparations but that a reviewing court can.

In Tennessee, however, it is well settled that [HN1]the power to establish rates is a legislative one, and the duty of the court is to correct errors after rates are fixed. *McCollum v. Southern Bell Telephone & Telegraph Co.*, 163 Tenn. 277, 43 S.W.2d 390 (Tenn. 1931). If the Commission is not statutorily authorized to order a refund on its own initiative, a reviewing court cannot bestow that power on it.

We do not believe, however, that the *Mountain States* case stands for the proposition for which it is cited. That case pointed out that Arizona allows no stay of a rate increase pending judicial review. The Court stated:

Thus, unless the possibility of a refund exists, there is no effective remedy whatever for alleviating [*5] the effects of an invalid rate increase during the time that it takes the courts to reach a decision on review.

604 P.2d at 1146.

[HN2]In Tennessee, unlike Arizona, the Commission may require the posting of a bond pending the outcome of further study. *See* T.C.A. § 65-5-203. Moreover, unlike the situation in *Mountain States*, Security could have petitioned PSC for a stay within seven days of its initial order. *See* T.C.A. § 34-5-316; § 34-5-322.

The PSC argues that a refund in the case *sub judice* does not amount to retroactive ratemaking. Its position is that retroactive ratemaking would occur if the Commission had ordered a refund from a prior, valid rate increase. It is alleged that the prior rate increase was not valid because it was the result of an admitted miscalculation, and that "a rate fixed by a regulatory body must be reasonable not only as to the facts in existence on the effective date of the rate but also for a reasonable time in the future." *South Central Bell Telephone Company v. Tennessee Public Service Commission*, 579 S.W.2d 429, 440 (Tenn. App. 1979). PSC says, therefore, that this matter involves not retroactive ratemaking [*6] but restitution.

In support of its position, the Commission relies not only upon the *Mountain States* case, *supra*, but also upon two United States Supreme Court cases. In *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956), a refund order was allowed to stand, but the refund was authorized by a statute similar to T.C.A. § 65-5-203 providing for a bond and a refund pending an investigation. In *Atlantic Coast Line Railroad Company v. Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935), the refund at issue was struck down by the Court. [HN3]Although PSC cited cases from other jurisdictions in support of its position, these are not controlling in this Court. [HN4]PSC operates pursuant to statutory powers and these are to be strictly construed. *Tennessee- Carolina Transportation, Inc. v. Pentecost*, 206 Tenn. 551, 334 S.W.2d 950 (Tenn. 1960).

Both PSC and Security contend that the Commission's refund order is proper because the rates were put into effect subject to refund and pursuant to a bond. This contention is without merit. [HN5]We are unable to find any authority for the Commission to make its rulings [*7] conditional or subject to refund. A bond may be required and a refund may be ordered under T.C.A. § 65-5-203, but this applies only before the Commission's order becomes final. In this case, the rate increase becambe final and the bond was dissolved as of March 2, 1982, thus foreclosing relief under this section.

The Commission has no authority other than that which is specifically granted by statute. T.C.A. § 65-5-201 empowers the Commission to order rates which shall be followed "thereafter." The legislature has not conferred upon the PSC the power of retroactive ratemaking. We conclude, therefore, that the Commission lacked authority to require a refund of the rates as being beyond its enabling statutory grant.

The decision of the Chancellor is accordingly affirmed. Costs are adjudged against the appellants.

NEARN, P.J., W.S., CRAWFORD, J.