IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
CONSUMER ADVOCATE'S PETITION FOR A DECLARATORY ORDER THAT BERRY'S CHAPEL UTILITY, INC., IS A PUBLIC UTILITY UNDER TENNESSEE LAW AND SHOULD BE REGULATED BY THE TRA	)	**DOCKET NO. 11-00005**

CONSUMER ADVOCATE'S REPLY BRIEF THAT BERRY'S CHAPEL UTILITY, INC., IS A PUBLIC UTILITY UNDER TENNESSEE LAW AND SHOULD BE REGULATED BY THE TRA

The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to the Hearing Officer's Notice of February 11, 2011, hereby submits its Reply Brief on the issue of whether Berry's Chapel Utility, Inc., is a public utility under Tennessee law and should be regulated by the Tennessee Regulatory Authority ("TRA"). The Hearing Officer's Notice directed the parties to address three issues:

1. Whether the TRA has the authority under Tennessee law to make a determination with respect to whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a nonprofit corporation or a public utility as defined in Tenn. Code Ann. § 65-4-101(6).

2. Whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a public utility under Tennessee law and subject to regulation by the TRA.

3. Whether customers of Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company are entitled to a refund of any increase in rates that was put into place through the Rate Change Notice, which called for a $20 per month increase effective November 1, 2010.

The Consumer Advocate will reply to the position of Berry's Chapel Utility, Inc. ("Berry's Chapel"), on each of these three issues as set forth in the Initial Brief of Berry's Chapel.

1. <u>The TRA Has Authority to Determine that Berry's Chapel Is a Nonprofit Corporation or a Public Utility (Berry's Chapel's Initial Brief at 2)</u>

In its Initial Brief, Berry's Chapel Utility, Inc. ("Berry's Chapel"), asserts it is not subject to the jurisdiction of the TRA on the ground that the TRA has no expertise in construing its own statutes and, therefore, the construction of these statutes should be left to the courts under the doctrine of "primary jurisdiction." The Consumer Advocate strongly disagrees with both parts of this assertion and would maintain that: (1) the TRA does have expertise to interpret its own statutes, especially those defining what entities should be regulated by the TRA; and (2) the doctrine of "primary jurisdiction" in no way bars the TRA from hearing this matter.

First, the Consumer Advocate would maintain that the construction of the statute in question, Tenn. Code Ann. § 65-4-101(6), is, in fact, particularly within the TRA's expertise. As set forth in the Consumer Advocate's Initial Brief, defining what entities should be regulated by an agency goes to the existential core of the agency. Just as the Tennessee Department of Commerce and Insurance has the jurisdiction and authority to decide what products are insurance, so the TRA has the jurisdiction and authority to decide what entities are public utilities under its statutes. *H&R Block Eastern Tax Services, Inc. v. State of Tennessee, Department of Commerce and Insurance*, 267 S.W.3d 848 (Tenn. Ct. App. 2008). Parties may, of course, disagree with an agency's determination that they or their product are subject to regulation. What Berry's Chapel is arguing, however, is to deny the agency the right to even hear the case under the guise of "primary jurisdiction". Such a position makes a mockery of

regulatory statutes and would leave the public unprotected in the face of a mere denial by a company that it is subject to regulation.

Furthermore, while the construction of the TRA's statutes defining what entities are public utilities and, therefore, subject to regulation, may ultimately be a matter of law, it also involves facts particular to the case. Thus, the interpretation of the statute in question involves such matters as the TRA's knowledge of how cooperative entities have or have not been regulated by the TRA in the past; how many entities, if any, have applied for exemption from TRA regulation on the ground they were merely incorporated under the non-profit corporation statute; and, what is the regulatory scheme currently in place and does it make sense to assume that the Legislature intended to pass a statute that would allow a utility to operate in a monopolistic environment without any meaningful oversight from either a governmental agency or the members of the utility itself. In short, in order to properly determine this case, we must know the facts surrounding the operation of this regulatory law which are solely within the knowledge of the TRA. The need for clearly establishing the facts to which the law is to be applied was articulated in *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 512 (Tenn. 2002):

> In addition, this Court has held that the issue of whether an administrative agency's action is explicitly or implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995).

BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority, 79 S.W.3d 506, 512 (Tenn. 2002).

To further demonstrate the need for the TRA's expertise in construing its own statutes, the Consumer Advocate would also point out that a court would be unlikely to initially recognize

as incorrect, facts that the TRA, with the Directors' and Staff's knowledge of utility regulation, would see very quickly. In Part 2 of its Initial Brief where Berry's Chapel is arguing that the Consumer Advocate's statutory construction is supposedly misinformed, a key part of Berry's Chapel's argument is that the TRA has never asserted jurisdiction over any "local governmental agencies":

> The Consumer Advocate argues that the language in the preamble [to the Public Act of 1935 that first referred to the exclusion of non-profit cooperatives from the definition of public utility] which exempts "certain non-profit organizations" means the legislature intended to exempt some, but not all, non-profit organizations from regulation by the TRA. The Consumer Advocate ignores that similar language is used in the preamble as it relates to governmental entities. The preamble also provides that the exemption is for "certain Federal and State Corporations, Agencies, Instrumentalities, and other public bodies." Does the Consumer Advocate believe there are federal, state or local governmental agencies which provide public utility service which are or could be subject to regulation by the TRA? The use of the word "certain" in the preamble does not have the meaning the Consumer Advocate ascribes to it.

Initial Brief at 8 (emphasis added).

The Consumer Advocate knows of at least two local governmental agencies that are subject to TRA regulation: the Electric Power Board of Chattanooga ("EPB") and Memphis Light, Gas & Water ("MLG&W").

As was stated in a Complaint at the TRA involving EPB:

> . . . EPB is a municipal electric service provider and a board of the City of Chattanooga, Tennessee. EPB provides retail electric power to business and residential customers in the City of Chattanooga, most of Hamilton County, and parts of eight other counties located in Tennessee and Georgia.
>
> . . . Pursuant to T.C.A. § 7-52-401 et seq. and 65-4-201 et seq., EPB has been certified by the TRA to offer intrastate telecommunications services in Tennessee. See "Order Approving Application for Certificate Convenience and Necessity" ("the

> Order"), issued May 10, 1999, docket no. 97-07488. Pursuant to the Order, EPB offers telecommunications services in the City of Chattanooga in competition with US LEC and other local exchange carriers.

US LEC Complaint at pp. 1-2, TRA Docket No. 02-00562 (May 15, 2002).

As for MLG&W, it is a Division of the City of Memphis. In TRA Docket 99-00909, MLG&W filed a Joint Petition with A&L Networks-Tennessee, LLC ("A&L") for approval of an agreement regarding joint ownership of Memphis Networx, LLC, a telecommunications company. *See Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity*, TRA Docket No. 99-00909 (August 9, 2001). In TRA Docket No. 99-00909, MLG&W, which is certainly a local governmental agency, sought regulatory approval for a telecommunications utility service.

More recently, MLG&W appeared before the TRA in Docket No. 08-00124 seeking a waiver for the use of plastic pipe that had been in storage for more than two years.

Thus, the actions of both EPB and MLG&W establish that certain local governmental agencies are in fact subject to regulation by the TRA for their utility operations. The Consumer Advocate is confident that even if it had not recalled this fact, the TRA Directors and Staff would have known this and would have discounted Berry's Chapel's argument accordingly. A court, however, hearing this matter for the first time would likely have no knowledge of the history of the Electric Power Board and Memphis Light, Gas & Water, or any other existing examples for that matter before the TRA.

Berry's Chapel's second argument as to why the TRA lacks authority or jurisdiction is similarly flawed. Berry's Chapel's second argument is that the doctrine of "primary jurisdiction" bars the TRA from hearing this matter. However, the case cited by Berry's Chapel on this point, *Freels v. Northrup*, 678 S.W.2d 55, 57 (Tenn. 1984), clearly states that the law "generally

requires that parties resort to an administrative agency **before** they seek judicial action involving a question within the competence of the agency." Thus, the presumption under the doctrine of primary jurisdiction is that agencies such as the TRA have first or primary jurisdiction, not the court. This is exactly the procedure that was followed by the Consumer Advocate when it petitioned the TRA for a declaratory order that Berry's Chapel is a public utility and should be regulated by the TRA.

Berry's Chapel, however, seizes on another statement in *Freels* that says a court need not defer to an administrative agency unless such deferral will be conducive toward uniformity of a decision between courts and that the agency will utilize pertinent agency expertise. Initial Brief at 3. As shown above, the present case clearly calls for such agency competence and expertise. This part of the *Freels* test, therefore, is not met.

Berry's Chapel, therefore, has misapplied the primary jurisdiction doctrine as set forth in *Freels*. Under primary jurisdiction, the issue is whether the courts should defer to agencies, not whether agencies should defer to courts. Thus, the Tennessee Court of Appeals actually cited *Freels* for the proposition that courts defer to agencies, not the other way around:

> Additionally, courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, at 279; *citing Southern Ry .v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984); *Freels v. Northrup*, 678 S.W.2d 55, 57-58 (Tenn. 1984).

BellSouth Telecommunications v. Bissell, 1996 WL 482975 (Tenn. Ct. App.) (1996), **Exhibit A.**

As such, the Consumer Advocate will address the issue of whether the Chancery Court of Davidson County should defer to the TRA before the Chancery Court, not at the TRA.

For the reasons stated herein, the TRA, therefore, should find that it has the authority under Tennessee law to make a determination that Berry's Chapel is a nonprofit corporation or public utility as defined in Tenn. Code Ann. § 65-4-101(6).

2. Berry's Chapel Is a Public Utility Under Tennessee Law and Subject to Regulation by the TRA

A. Contrary to the Assertion of Berry's Chapel's, the Plain and Ordinary Meaning of the Language Used in Tenn. Code Ann. § 65-4-101(6)(E) Establishes that Berry's Chapel Is a Public Utility (Initial Brief at 4)

The statute under which Berry's Chapel claims to be exempted from regulation by the TRA is inapplicable to a corporation such as Berry's Chapel. Berry's Chapel claims that it is a nonutility under Tenn. Code Ann. § 65-4-101(6)(E) because it is a "nonprofit corporation." Tenn. Code Ann. § 65-4-101(6)(E) provides as follows:

> . . . . (6) "Public utility" as defined in this section shall not be construed to include the following nonutilities:
>
> (E) Any cooperative organization, association or corporation not organized or doing business for profit.

Berry's Chapel, however, is not a "cooperative" corporation not organized or doing business for profit as required by this statute. As set forth in the Consumer Advocate's Initial Brief, a plain reading of Tenn. Code Ann. § 65-4-101(6)(E) shows that the only kind of "nonprofit" that can be excluded from the definition of a "public utility" is one that is "cooperative" in nature because the word "cooperative" must be read to modify each of the terms "organization," "association," and "corporation" for the statute to make sense and to effectively protect Tennessee consumers from utilities operating in a monopolistic environment. Otherwise, under Berry's Chapel's reading of the statute, any utility simply calling itself an "association," for example, would be free from TRA regulation. Such interpretation, however, cannot have been the intent of the Legislature.

B. Berry's Chapel Failed to Show that the Legislature Intended to Exclude Berry's Chapel from the Definition of Public Utilities (Initial Brief at 6)

In its Initial Brief Berry's Chapel asserts that the Legislature intended to exclude nonprofits from the definition of public utilities. No proof of this assertion is produced, but instead Berry's Chapel proposes a question to the Consumer Advocate in an apparent attempt to prove the point:

> The Consumer Advocate argues that the language in the preamble [to the Public Act of 1935 that first referred to the exclusion of non-profit cooperatives from the definition of public utility] which exempts "certain non-profit organizations" means the legislature intended to exempt some, but not all, non-profit organizations from regulation by the TRA. The Consumer Advocate ignores that similar language is used in the preamble as it relates to governmental entities. The preamble also provides that the exemption is for "*certain* Federal and State Corporations, Agencies, Instrumentalities, and other public bodies." Does the Consumer Advocate believe there are federal, state or local governmental agencies which provide public utility service which are or could be subject to regulation by the TRA? The use of the word "certain" in the preamble does not have the meaning the Consumer Advocate ascribes to it.

Berry's Chapel's Initial Brief at 8 (emphasis added).

In answer to this question, the Consumer Advocate would respond that yes, it does believe there are "local governmental agencies" that are subject to TRA regulation. Namely, the Electric Power Board of Chattanooga and Memphis Light Gas & Water. Both of these local agencies have entities in the telecommunications business and both have appeared before the TRA in regard to these utility services. *See* TRA Docket Nos. 97-07488 and No. 99-00909.

Accordingly, Berry's Chapel's argument that the Legislature intended to exclude all nonprofits from TRA regulation is without merit.

C. Contrary to the Assertion of Berry's Chapel, the TRA Has the Authority to Disregard the Corporate Form of Berry's Chapel (Initial Brief at 9)

As set forth in its Initial Brief, the Consumer Advocate does not believe that mere nonprofit corporate status is sufficient to exclude a utility from the definition of public utility. However, even assuming, arguendo, that nonprofit corporate status were sufficient, Berry's Chapel has failed to show that it is, in fact, a nonprofit corporation for regulatory purposes.

As was held by the Tennessee Supreme Court, "a regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations." *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Commission*, 79 S.W.3d 506, 516 (Tenn.2002), citing *Tennessee Public Service Commission v. Nashville Gas Co.*, 551 S.W.2d 315, 319-20 (Tenn.1977).

In the present case, Berry's Chapel has done nothing more than file a paper showing that it is incorporated under the Nonprofit Corporation Act. Even though given every opportunity, Berry's Chapel has produced no other indicia of its alleged nonprofit status.

Berry's Chapel was created by the merger of Lynwood Utility Corporation ("Lynwood") into Berry's Chapel. Lynwood was authorized to earn a certain rate of return when the TRA set its rates in the last rate case. What has happened to that profit? At a minimum, Berry's Chapel should be required to establish that it is no longer earning a profit before the TRA should even begin to consider its application for exclusion from regulation as public utility.

D. Contrary to the Assertion of Berry's Chapel, the Legislature Already Has Determined that Nonprofit Corporations with or without Members Should be Regulated by the TRA (Initial Brief at 11)

As already set forth, the Consumer Advocate maintains that mere incorporation under the Nonprofit Corporation Act is not sufficient for a utility to be excluded from regulation by the

TRA. The issue of whether a nonprofit corporation which is not a cooperative has members or not is, therefore, irrelevant on the issue of statutory construction of Tenn. Code Ann. § 65-4-101(6).

The issue of whether a utility seeking exemption from TRA regulation has members, however, is important in showing how exposed to harm utility consumers are if they have no representation. As set out in the Consumer Advocate's Initial Brief, if a utility is a true cooperative composed of the members it serves, then there is a built-in mechanism to ensure that the persons served by the utility are not completely at its mercy. If, however, Berry's Chapel's position is accepted there is nothing to stop those persons who control and benefit from the utility's operations from charging its captive customers as much as those persons want.

In its Initial Brief, Berry's Chapel attempts to soothe the TRA's fears that consumers are at risk from an unregulated nonprofit such as Berry's Chapel. Berry's Chapel states that it can only make distributions in a certain manner under corporate law. That is scant assurance, however, if salaries and expenses of the "nonprofit" become exorbitant or otherwise out-of-line. If such a thing happens, what recourse do consumers have? The answer, of course, is none.

Obviously, assurances that distributions and salaries shall be made in a certain manner are hollow if these assurances are neglected. Or it could be that the consumers and the persons who control the nonprofit simply disagree as to how much rates, salaries, and expenses should be. These, in fact, are issues contained within virtually every rate case that is filed at the TRA. In the case of regulated utilities, the TRA is the place to resolve such disagreements. If Berry's Chapel's position is accepted, however, there will be no control over rates, expenses or salaries -- they will be whatever those who control the "nonprofit" say they are.

Rules governing the distributions of nonprofits, therefore, do not provide the kind of protection consumers of utility services require.

3. Customers of Berry's Chapel Are Entitled to a Refund of any Increase in Rates

Finally, since Berry's Chapel is a public utility under Tennessee law and subject to TRA regulation, any rate increases it imposes are subject to approval of the TRA. Berry's Chapel, however, did not obtain such approval before imposing a $20 per month rate increase on its customers. Accordingly, the rate increase was improper and the money obtained from the improper increase should be returned to the customers.

CONCLUSION

For the foregoing reasons, the TRA should find that Berry's Chapel is a public utility under Tennessee law and is, therefore, subject to regulation by the TRA.

RESPECTFULLY SUBMITTED,

VANCE L. BROEMEL (BPR #11421)
MARY LEIGH WHITE (BPR #26659)
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-8733

Dated: March 11, 2011.

CERTIFICATE OF SERVICE

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

Donald L. Scholes
Branstetter, Stranch & Jennings, PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201-1631

Vojin Janjic (vojin.janjic@tn.gov)
Department of Environment and Conservation
401 Church Street
L&C Annex 6th Floor
Nashville, Tennessee 37243

Gary Davis (gary.davis@tn.gov)
Wade Murphy (wade.murphy@tn.gov)
Department of Environment and Conservation
401 Church Street
L&C Annex 6th Floor
Nashville, Tennessee 37243

This the 11th day of March, 2011.

Vance L. Broemel

VANCE L. BROEMEL

EXHIBIT A

Not Reported in S.W.2d, 1996 WL 482975 (Tenn.Ct.App.)
(Cite as: 1996 WL 482975 (Tenn.Ct.App.))

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Bellsouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company, Petitioner/Appellant,
v.
Keith Bissell, Chairman; Steve Hewlett, Commissioner; Sara Kyle, Commissioner; Constituting the Tennessee Public Service Commission, Respondents/Appellees.

No. 01A01-9504-BC-00165.
Aug. 28, 1996.

MIDDLE SECTION AT NASHVILLE APPEAL FROM THE TENNESSEE PUBLIC SERVICE COMMISSION AT NASHVILLE, TENNESSEE
Sandra L. Randleman, Charles L. Howorth, Jr., BellSouth Telecommunications, Inc., Nashville, Tennessee, for petitioner/appellant.

Val Sanford, John Knox Walkup, Gullett, Sanford, Robinson & Martin, Nashville, Tennessee, for AT&T Communications of the South Central States, Inc. and MCI Telecommunications Corporation; Roger A. Briney, AT&T Communications of the South Central States, Atlanta, Georgia, for AT&T Communications of the South Central States, Inc.; Martha P. McMillin, MCI Telecommunications Corporation, Atlanta, Georgia, for MCI Telecommunications Corporation.

D. Billye Sanders, Waller Lansden Dortch & Davis, Nashville, Tennessee, Dianne F. Neal, General Counsel, Tennessee Public Service Commission, Nashville, Tennessee, Benjamin W. Fincher, Sprint Communications Company L.P., Atlanta, Georgia, for Sprint Communications Company L.P.

AFFIRMED AND REMANDED

LEWIS

OPINION

Introduction

***1** This appeal involves the judicial review of five Tennessee Public Service Commission orders. The orders approved tariffs filed by AT & T Communications of the South Central States, Inc., Sprint Communications Company, L.P., and MCI Telecommunications Corporation. BellSouth Telecommunications Inc., d/b/a South Central Bell, has appealed directly to this Court pursuant to Tenn.R.App.P. 12. They assert that the Tennessee Public Service Commission (Commission or PSC) should have denied the tariffs, as they violated the Commission's prior orders and policies. Additionally, BellSouth contends that the tariffs at issue in this proceeding violate the Tennessee Telecommunications Reform Act of 1995.

We have decided that the PSC did not act arbitrarily or abuse its discretion in approving the tariffs. Also, we decline to decide whether the tariffs violate the Tennessee Telecommunications Reform Act of 1995. The Commission did not render a decision with respect to its interpretation of the Tennessee Act. Accordingly, we affirm the Commission's decision.

Procedural History

This case began on September 8, 1994, the date AT & T filed Tariff No. 94-200 [FN1] in the offices of the Tennessee Public Service Commission. From that date to June 8, 1995, AT & T filed thirteen additional tariffs [FN2], MCI filed three tariffs [FN3], and Sprint filed two tariffs.[FN4] After each of these companies filed their respective tariffs, petitioner/appellant, BellSouth Telecommunications, Inc. (“BellSouth”), filed petitions for leave to intervene, to suspend the tariffs, and to set hearings.

FN1. A tariff is the schedule of prices and regulations for a particular service which is filed with the Commission and serves as the official published list of charges, terms and conditions governing the provision of the service or facility. Tariffs functions in lieu of a contract between an end user and a service provider.

FN2. The numbers of the AT & T tariffs are 94-200, 94-277, 94-289, 94-292, 94-293, 94-280, 94-284, 95-014, 95-016, 95-103, 95-094, 95-127, 95-139, and 95-140.

FN3. The numbers of the MCI tariffs are 94-247, 95-003, and 95-009.

FN4. The numbers of the Sprint tariffs are 94-269 and 95-008.

As to the first six tariffs filed, including five AT & T tariffs and one MCI tariff, the Commission granted BellSouth's petitions to intervene, suspended the tariffs, and consolidated the petitions into docket number 94-02610. On February 22, 1995, the Commission heard oral arguments concerning the six petitions. In its final order, dated March 24, 1994, the Commission held "that the promotions and tariffs involved here are consistent with previous orders and rulings of this Commission and should be approved. "

On April 24, 1995, BellSouth filed a petition to review pursuant to Rule 12 of the Tennessee Rules of Appellate Procedure. The petition asked that this court review the March 24, 1995 order as it applied to all six of the tariffs ("Appeal One"). Later, AT & T and MCI filed a joint notice of appearance pursuant to Rule 12(e) of the Tennessee Rules of Appellate Procedure. Sprint, pursuant to Rule 21(b) of the Tennessee Rules of Appellate Procedure, filed a Notice of Appearance, and requested that this Court allow it to adopt the briefs of intervenors AT & T and MCI. We granted the motion.

The next set of tariffs at issue includes two AT & T tariffs and one Sprint tariff. Again, BellSouth responded to the filings of the tariffs with petitions to intervene, to set hearings, and to suspend. Although the Commission failed to consolidate these petitions, it did treat them similarly. It granted BellSouth's petitions to intervene, but denied BellSouth's requests to suspend the tariffs. On May 12, 1995, the Commission filed its final order as to all three tariffs and stated as follows: "[T]hese tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." BellSouth appealed this decision on July 7, 1995, by filing a petition to review pursuant to Rule 12 ("Appeal Two").

***2** The third group of tariffs includes two AT & T tariffs, two MCI tariffs, and one Sprint tariff. For all practical purposes, the history of this group is the same as that of the second group. BellSouth filed petitions as to each tariff. The Commission then granted the petitions to intervene, but denied BellSouth's requests that the Commission suspend the tariffs. The Commission held a hearing and entered a final order on May 12, 1995. The Commission concluded "that these tariffs were not in violation of any prior Commission Order and should be allowed to remain in effect." In response to the Commission's order, BellSouth filed a petition to review pursuant to Rule 12 ("Appeal Three").

The fourth group of tariffs includes two tariffs filed by AT & T. After the filings, BellSouth filed two petitions to "suspend the tariff filing, convene a contested case, and allow leave to intervene." In separate orders, the Commission allowed BellSouth to intervene in both proceedings and denied both of BellSouth's requests to suspend the tariffs. Later, the Commission considered the tariffs at its conference and concluded "that the[ ] tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." Following the decision in these cases, BellSouth filed a petition to review pursuant to Rule 12 on September 8, 1995 ("Appeal Four").

The final group of tariffs also involves only AT & T. On May 22, 1995, AT & T filed one tariff, and on June 8, 1995, AT & T filed two additional tariffs. In June 1995, BellSouth filed three petitions to "suspend [the] tariff filing, convene a contested case, and allow leave to intervene." Unlike the other cases, here the Commission denied BellSouth's petitions to intervene and its requests to suspend the tariffs. The Commission found: "Bell's filings fail to allege any new issues or evidence raised by these tariffs other than those previously reviewed and decided by the Commission." Once again, BellSouth filed a petition to review pursuant to Rule 12 on September 25, 1995("Appeal Five").

Thus, as of September 25, 1995, BellSouth had five appeals pending in this court. As a result, on September 26, 1995, the Commission, AT & T, and MCI filed a joint motion to consolidate the appeals and a memorandum in support of the motion. This court reserved judgment on the motion until October 25, 1995, when it ordered the appeals consolidated.

As these facts developed, another set of facts relevant to the outcome of this case began to unfold. On

June 6, 1995, Governor Don Sundquist signed the Telecommunications Reform Act of 1995("the Act") into law. 1995 Tenn. Pub. Acts Ch. 408 § 7. Section seven of the Act amended Tennessee Code Annotated section 65-4-201 by adding subsection (b). This subsection provides as follows:

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the commission a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

***3** *Tenn.Code Ann. §* 65-4-201(b) (Supp.1995).

On July 24, 1995, AT & T filed a petition asking the Commission to amend its existing certificate of convenience and necessity. AT & T wanted the commission to authorize it to "provide interexchange telecommunication services throughout Tennessee regardless of LATA boundaries." An administrative judge held a hearing and issued an initial order on September 22, 1995. In the initial order, the judge denied AT & T's petition to amend its certificate of convenience and necessity, but issued AT & T a new certificate as a "Competing Telecommunications Service Provider." On October 13, 1995, the Commission entered an order ratifying the initial order of the administrative judge. None of the parties in the present action filed an appeal as to this order before time expired.

At the beginning of oral argument, BellSouth stated that it was voluntarily dismissing the appeal as to the AT & T tariffs. As a result, Appeal Four and Appeal Five are voluntarily dismissed because both contained only AT & T tariffs. Further, AT & T had filed seven of the tariffs in the remaining appeals. Thus, this court is left with three appeals, which we consolidated into one appeal, and a total of five tariffs, three filed by MCI and two filed by Sprint. BellSouth has presented this court with two issues as to each of the tariffs. The issues are as follows:

[I] Whether the tariffs at issue in this proceeding violate the Tennessee Public Service Commission's Orders and its policy on intraLATA competition? [II] Whether the tariffs at issue in this proceeding violate the Telecommunication reform Act of 1995?

Standard of Review

Tenn.Code Ann. § 4-5-322 provides the appropriate standard of review for Tennessee appellate courts reviewing state agency decisions. Subsection (h) of that statute states:

(h) the court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because of administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

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

(3) Made upon unlawful procedure

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

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

BellSouth contends that subsections (1), (4), and (5) provide grounds for reversal.

This Court examines the Commission's adjudicatory decisions using the same standards of review applicable to the decisions of other administrative agencies. *Jackson Mobilephone Co., Inc., v. Tennessee Public Service Com'n,* 876 S.W.2d 106,110 (Tenn.Ct.App.1993). Thus, we observe the narrow,

statutorily defined standard contained in *Tenn.Code Ann. § 4-5-322(h)(4)*, and *Tenn.Code Ann. § 4-5-322(h)(5)*, rather than the broad standard used in other civil appeals. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn.Ct.App.1988); *citing CF Indus. v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn.1980).

***4** Additionally, courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, at 279; *citing Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn.1984); *Freels v. Northrup*, 678 S.W.2d 55, 57-58 (Tenn.1984). We do not review the factual issues de novo, and therefore, do not substitute our judgment for the agency's as to the weight of the evidence. *Id. citing Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 667 (Tenn.1977). However, we may construe statutes, and apply the law to the facts. *Sanifill of Tennessee v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 811 (Tenn.1995).

As to *Tenn.Code Ann. § 4-5-322(h)(4)*'s "arbitrary and capricious" standard, this court should determine "whether the administrative agency has made a clear error in judgment." *Jackson Mobilephone Co., Inc., v. Tennessee Public Service Com'n*, at 110-11. An arbitrary decision is one not based on any course of reasoning or exercise of judgment, or one which disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. *Id.*

Tenn.Code Ann. § 4-5-322(h)(5) does not define what amounts to "substantial and material evidence." However, in reviewing an administrative decision with regard to *Tenn.Code Ann. § 4-5-322(h)(5)*, this court should examine the record carefully to determine whether the administrative agency's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." *Jackson Mobilephone Co., Inc., v. Tennessee Public Service Com'n* at 111, *quoting Clay County Manor v. State Dep't of Health & Environment*, 849 S.W.2d 755, 759 (Tenn.1993). In general terms this amounts to something less than a preponderance of the evidence, but more than a scintilla or glimmer. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, at 280.

The Development of Long Distance Telephone Regulation in the United States

Early this century the American Telephone and Telegraph Company (AT & T) developed a long distance telephone network superior to its competitors. Later, AT & T's long distance dominance extended to local calling when it limited connection of its long distance network to its local service network. Eventually, AT & T monopolized all telephone traffic in the United States. *See GTE Sprint Communications Corp. v. Public Util. Comm'n*, 753 P.2d 212, 213 (Colo.1988). In 1974 the U.S. Department of Justice, responded to AT & T's hegemony by filing an antitrust claim. This claim, settled in 1982, resulted in the largest judicially supervised divestiture in American history. [FN5]

FN5. At the time of the settlement, or "Modified Final Judgment," AT & T was the largest corporation in the world. In 1980 the Bell System's total operating revenues exceeded $50 billion which constituted almost two percent of the gross national product of the U.S. that year. *United States v. American Tel. & Tel. Co.*,552 F.Supp. 131, 152 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The 1982 court-approved order, also known as the Modified Final Judgment (MFJ), accomplished two things significant to this appeal:

***5** (1) it divested AT & T of its twenty-two subsidiaries, which now operate independently as regulated local monopolies. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131,226 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983);

(2) it created a new framework of ownership and rate structure by establishing "Regional Bell Operating Companies" (RBOCs), like BellSouth, which were to divide their territories into new geographical classifications known as "local access and transport areas" (LATAs). *GTE Sprint Communications Corp. v. Public Communications Corp. v. Public. Util. Comm'n*, at 214.

The MFJ allowed the RBOCs to retain a monopoly over local telephone services, but precluded the RBOC's from providing any long distance services. *United States v. American Tel. & Tel. Co.*, at 227-8. Thus, the RBOCs can carry intraLATA traffic (local), but not interLATA traffic (long distance). The MFJ divided the original AT & T territory into 163 LATA's nationally, 5 of which are in Tennessee.

A state's power to regulate extends to all LATAs within its boundaries. *GTE Sprint Communications Corp. v. Public Util. Comm'n*, 753 P.2d at 214. The Tennessee Public Service Commission has regulatory authority over the telephone companies of this state. *Tennessee Cable Television Ass'n v. Tennessee Public Service Com'n*, 844 S.W.2d 151,155 (Tenn.App.1992). The Commission exercises co-mingled legislative, executive, and judicial functions. *Id.* at 158; *citing Blue Ridge Transp. Co. v. Pentecost*, 343 S.W.2d 903, 904 (Tenn.1961). Like other administrative agencies, the PSC must base the exercise of its rulemaking or adjudicatory authority on state law. *Id.* at 161.

At divestiture some state public utility commissions, including Tennessee's, initially barred interexchange carriers,[FN6] (IXCs)from providing intraLATA services. Nevertheless, technological advances in the 1980's brought new service capabilities to the IXCs. The knowledge of these capabilities prompted the IXCs to approach the PSC and request permission to provide some intraLATA services. On July 27, 1991, the PSC responded to the IXC's request and denied them intraLATA certificates which would have permitted them to compete freely in the intraLATA market. However, in an unprecedented step, the Commission agreed to allow the IXCs to provide some intraLATA communications services in 4 specific instances. These instances were exceptions to the PSC rule prohibiting intraLATA competition. Each exception involved access arrangements for the termination and/or origination of calls in local telephone exchanges. The four exceptions to the Commission's policy prohibiting intraLATA communication include:

> FN6. Interexchange carriers are facilities based providers of intrastate, interLATA telecommunications services. In Tennessee these providers include AT & T, MCInn and Sprint.

(1) intraLATA calls made by customers subscribing to interLATA special access (Megacom-like) services;

(2) calls made over private lines that complete the intraLATA portion of an interLATA private line service;

***6** (3) intraLATA “800” calls which are part of an interLATA offering; and

(4) calls prefixed by 10-XXX, 950-XXXX, or some other type of access code which users dial to reach the subscriber's interLATA carrier.

In its Order the Commission stated:

Tennesseans may enjoy the benefits of “one-stop shopping” using a single carrier to handle both intra- and interLATA toll calls-without opening the LATA's to competition and without [the] threatening value of service pricing....

[T]he Commission approves the parties' proposal in this proceeding to “unblock” certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services available on a statewide basis.

In a footnote on page 5 of the June 27, 1991 Order the PSC stated:

Since the IXC's applications for intraLATA authority are denied, the carriers' tariff shall continue to describe only interLATA services. The applicants may, however, advertise that the carriers are able to provide statewide service to certain types of customers.

Later in the Order the Commission added:

[T]he Commission approves the parties proposal in this proceeding to “unblock” certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services available on a statewide basis.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between

the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

The Commission added a footnote which provides in part:

The Commission has consistently followed a policy of protecting local exchange carriers from IXC competition in the intraLATA toll market.

On appeal, BellSouth seeks review of the Commission's orders of March 24, 1995, and May 12, 1995, approving MCI and Sprint tariffs. BellSouth argues that the tariffs violate the Tennessee Public Service Commission's orders and its policy on intraLATA competition. Specifically BellSouth claims that the tariffs "promote," "describe," and "solicit" the use of interexchange services for calls which are not incidental to interLATA service. Stated differently, BellSouth argues the tariffs approved in 1995 permits the interexchange carriers to impermissibly compete in the intraLATA services market.

Analysis

I. Whether the tariffs at issue in this proceeding violate the Commission's prior orders and policy on intraLATA competition.

BellSouth asserts the 1995 PSC ruling contradicts the Commission's 1991 Order and earlier rulings. However, this Court believes that the June 27, 1991 Order is dispositive as to the issues in this appeal. The PSC historically has made its intent to prevent intraLATA competition clear. However, the June 1991 Order created four exceptions which permit interexchange carriers to carry intraLATA calls. As the Commission stated:

***7** [T]he Commission approves the parties proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

MCI and Sprint argue that the tariffs they filed simply represent an application of the permissible intraLATA exceptions created in 1991. They submit that the tariffs subject to this appeal do not wrongfully promote intraLATA services, but involve interexchange activity consistent with the Commission's current policy.

To properly determine the controversy between the parties we consider each tariff separately.

MCI 94-247

MCI filed Tariff 94-247 on October 28, 1994. The tariff allegedly offers credits to customers of "MCI Metered Use Service Option J" (MCI Vision) if their "incremental intraLATA usage" exceeds $100.00. For those customers accessing the service via a "PBX," the tariff offers a credit of up to $250.00 if their intraLATA usage exceeds certain amounts.

The text of the tariff states in part:

MCI Vision IntraLATA Usage Promotion

Beginning on November 27, 1994, and ending April 14, 1995, MCI will provide the following promotion to new and existing customers of Metered Use Service Option J (MCI Vision) who enroll in the promotion.

An MCI tariff filed with the PSC describes "MCI Vision" as:

[A]n outbound customized telecommunications service which may include an inbound 800 service option using Business Line, WATS Access Line, or Dedicated Access Line Termination. It provides a unified service for single or multi-location companies using switched, dedicated, and card origination, and switched and dedicated termination.

MCI claims the tariff only contemplates the completion of intraLATA calls in exception category one (special access), exception category three (800 calls part of an interLATA offering), or exception category four (10-XXX prefixed or other dialing code calling). This Court cannot verify with certainty that a category one or category four exception applies. However, it does appear that MCI tariff 94-247 involves intraLATA "800" calls which are a part of an

interLATA offering (category three). Thus, this Court cannot assert that "the administrative agency has made a clear error in judgment." *Jackson Mobilephone Co., Inc., v. Tennessee Public Service Com'n,* at 110-11. We agree with the Commission that the tariff is "consistent with previous orders and rulings of this Commission and should be approved. "

SPRINT 94-269

The Commission's Final Order on this tariff contains the following statement:

The Commission considered these tariffs at its regularly scheduled April 18, 1995 Commission Conference. It was concluded after careful consideration of the entire docket constituting the record in this matter, the Commission's prior decisions in Docket Nos. 89-11065 and 94-02610, the provisions of all applicable rules and statutes, particularly the provisions of TCA 65-5-203; that these tariffs were not in violation of the Commission's policy on IntraLATA competition as established in prior Commission Orders and should be allowed to remain in effect.

***8** We have reviewed the text of Sprint Tariff 94-269, the PSC's order, and the briefs filed by the parties. Although neither BellSouth nor Sprint has adequately described the rationale for their positions as to this tariff, we cannot affirmatively say that the Commission's "findings, inferences, conclusions or decisions" are so arbitrary as to require reversal. This Court will defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274 (Tenn.Ct.App.1988). As the Circuit Court of Appeals for the District of Columbia recently stated:

Where, as here the issue is the Commission's interpretation of a tariff, we defer to its reading if it is "reasonable [and] based upon factors within the Commission's expertise. "

American Message Centers v. F.C.C., 50 F.3rd 35, 39 (D.C.Cir.1995); *quoting Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 492 (D.C.Cir.1980).

MCI 95-003

This tariff involves a reduction to MCI's per-minute usage rates for its basic long distance service, Dial One/Direct Dial. It also revises the Time of Day chart to reflect accurate times. The tariff for Dial One/Direct Dial, also known as "Option A" describes the service as:

[A] one-way, dial in-dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers served by end offices that have been converted to equal access may originate call by dialing 10222.

Thus, it seems the tariff comports with the limitations imposed by the June 27, 1991 Order. The tariff only describes interLATA services, and users complete intraLATA calls via exception category four (10XXX prefixed or other dialing code calling).

The Commission's May 12, 1995 Order declared that MCI 95-003 "allowed consumers one-stop shopping" for telecommunications services and found no violation of any prior Commission Order.

This Court affirms the Commission's decision to uphold MCI Tariff 95-003, since the services contemplated fall squarely within an exception category. Thus, we do not consider the Commission to have been "arbitrary and capricious" in arriving at their conclusions as to this tariff.

MCI 95-009

MCI 95-009 involves the introduction of a service plan known as "Friends & Family Option B" and the introduction of a new Personal 800 option, "Personal 800 Plan R." Personal 800 Plan R describes the service as:

Personal 800 Plan R provides a telephone number at which calls may be received from any location within the state of Tennessee for a monthly subscription fee and one-time installation fee as identified in MCI's F.C.C. Tariff No.1. MCI will provide to the customer and 800 telephone number, a 4-digit Security Code, and a 6 digit Rerouting Code which will allow the customer to use the "Follow-Me" Routing feature. The customer will be charged the per minute usage rates as described in MCI's F.C.C. Tariff No. 1.

***9** This service plan comports with the 1991 Commission Order as it involves the use of "800" calls as a part of an interLATA offering (Category 3). The tariff for Friends and Family Option B is a variant of Option A or "Dial One/Direct Dial." The tariff for Option A describes the service as:

[A] one-way, dial in-dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers who prescribe to MCI may originate calls by dialing 1. All customers served by end offices that have been converted to equal access may originate calls by dialing 10222.

This plan uses exception category four of the 1991 PSC order (10XXX prefixed or other dialing code calling). Thus, MCI Tariff 95-009 complies with current Commission orders. We find that the approval of this tariff by the Commission was not "arbitrary and capricious" pursuant to *Tenn.Code Ann. §* 4-5-322(h)(4).

SPRINT 95-008

The Commission considered this tariff in a docket with MCI 95-003 and MCI 95-009. The Commission, as it had done in every tariff except MCI 94-247, refused to suspend the tariff as BellSouth had requested, finding "no basis on which to suspend the tariff." After reviewing Sprint Tariff 95-008 we too find no provision which violates the Commission's 1991 Order governing intraLATA competition. Thus, we affirm the Commission's conclusion as to this tariff.

We believe that BellSouth has not demonstrated that the MCI and Sprint tariffs were so inconsistent as to warrant this Court's finding the 1995 Commission Orders arbitrary and capricious. Additionally, we agree with MCI's position that the determinative issue in these cases was whether or not the tariff filings were consistent with the 1991 Commission Order. As this determination involves a review of the Commission's orders, the issues in this case were legal in nature. Thus, we need not decide whether "substantial and material evidence" supports the Commission's decision as required by *Tenn.Code Ann. §* 4-5-322(h)(5).

II. Whether the Tariffs violate the 1995 Tennessee Telecommunications Act?

As previously discussed, the Telecommunications Reform Act of 1995 ("the Act") amended Tennessee Code Annotated section 65-4-201 by adding the following subsection:

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the commission a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

***10** Relying on this amendment, BellSouth argued that MCI and Sprint lacked the authority to offer the services proposed in their tariffs because they failed to obtain the necessary certificates of public convenience. Despite its arguments, BellSouth must fail as to this issue because it is not properly before this court.

Tennessee Code Annotated section § 4-5-322 defines this court's scope of review. Pursuant to that section, "[a] person who is aggrieved by a final *decision* in a contested case is entitled to judicial review...." Tenn.Code Ann. § 4-5-322(a)(1) (1991) (emphasis added). Upon review, this court "may affirm the *decision* of the agency or remand the case for further proceedings." *Id.* § 4-5-322(h) (emphasis added). When appealing a decision of the Public Service Commission, an aggrieved person shall file their petition for review in this court. *Id.* § 4-5-322(b)(1). Thereafter, this court must confine its review to the record and decide the issues without a jury. *Id.* § 4-5-322(g). This limited standard of review prohibits this court from reviewing an issue which the Commission did not decide.

In this case, the Commission did not decide if the tariffs violated the Act. BellSouth never raised the issue before the Commission. The Commission never addressed the issue in any of its orders relating to the

five tariffs, and the record does not contain any evidence as to the issue. The only issue *decided* by the Commission was whether their approval of the tariffs was consistent with their Order from 1991. It is only on appeal to this court, that BellSouth raises the issue of a violation of the Act. Because there was neither a *decision* nor a record for this court to review, this court lacks the authority to address the issue on appeal. Moreover, it is not the role of this court to delve into the complicated issues facing administrative agencies unless called on to do so. This court is to give deference to the decisions of an administrative agency which has acted within its area of specialized knowledge. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279 (Tenn.App.1988). We are not to substitute our judgment for that of the agency on highly technical matters. *Id.* at 280.

The Federal Telecommunications Act of 1996

On February 16, 1996, the U.S. Congress passed the Telecommunications Act of 1996. This Act does not provide for the wholesale preemption of state regulation of telecommunications services. Instead, the Act permits states to retain authority if the state regulation is consistent with it. In examining the provisions of the Federal Telecommunications Act of 1996, we find nothing which would alter our decision in this appeal. We believe the Commission's Orders governing the services of MCI and Sprint to be consistent with the 1996 Federal Act.[FN7]

FN7. The Court considered the following provisions of the 1996 Federal Telecommunications Act:

The caption of the Act:

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Section 253:

(a) IN GENERAL-No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect or prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY-Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY-Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION-If, after notice and an opportunity for public comment, the Commission determines that a State or local government permitted or imposed any statute, regulation, or legal requirement that violate subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Section 261 (b):

EXISTING STATE REGULATIONS-Nothing in this part shall be construed to prohibit any State Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provision of this part.

Section 261(c):

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

For the foregoing reasons we affirm the judgment of the Tennessee Public Service Commission. We tax costs on appeal to the Appellants, BellSouth.

Tenn.App.,1996.
Bellsouth Telecommunications, Inc. v. Bissell
Not Reported in S.W.2d, 1996 WL 482975 (Tenn.Ct.App.)

END OF DOCUMENT