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Hon. David Jones, Chairman
c/o Ectory Lawless, Docket Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
TPUC.DocketRoom@tn.gov

RE: ***Petition of Tennessee-American Water Company to Adopt Annual Review Mechanism and ARM Tariff Pursuant to Tenn. Code Ann. § 65-5-103(d)(6),*** **Docket No. 25-00089**

Dear Chairman Jones:

In submitting the Pre-Filed Rebuttal Testimony of TAWC Witness Robert C. Lane on February 19, 2026, we inadvertently failed to attach the enclosed cases. In Mr. Lane's Rebuttal Testimony, these cases were noted to be attached.

As required, copies will be mailed to your office. Should you have any questions concerning this filing or require additional information, please do not hesitate to contact me.

Very truly yours,

BUTLER SNOW LLP

Melvin J. Malone

clw
Attachments
cc: Bob Lane, TAWC
Shilina Brown, Consumer Advocate Division
Phillip Noblett, City of Chattanooga
Frederick Hitchcock, City of Chattanooga

1998 WL 684536

SEE COURT OF APPEALS RULES 11 AND 12
Court of Appeals of Tennessee.

CONSUMER ADVOCATE DIVISION, Petitioner/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY;
Nashville Gas Company, Respondents/Appellees.

No. 01A01-9708-BC-00391.
|
July 1, 1998.

Appeal No. 01-A-01-9708-BC-00391 Tennessee Regulatory Commission.

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OPINION

CANTRELL, J.

***1** This petition under Rule 12, Tenn. R.App. Proc., to review a rate making order of the Tennessee Regulatory Authority presents a host of procedural and substantive issues. We affirm the agency order.

I.

On May 31, 1996 Nashville Gas Company (NGC) filed a petition before the Tennessee Public Service Commission requesting a general increase in its rates for natural gas service. The proposed rates would produce an increase of $9,257,633 in the company's revenue. The Consumer Advocate Division (CAD) of the State Attorney General's office filed a notice of appearance on June 6, 1996 and Associated Valley Industries (AVI), a coalition of industrial users of natural gas, entered the fray on August 20, 1996.

The Public Service Commission was replaced on July 1, 1996 by the Tennessee Regulatory Authority (TRA), a new agency created by the legislature. By an administrative order, TRA laid down the procedure by which it would accept jurisdiction of matters previously filed before the Public Service Commission, and the parties successfully navigated the uncharted waters of the TRA to get the case ready for a final hearing on November 13, 1996.

At a scheduled conference on December 17, 1996, the TRA orally approved a general rate increase for NGC, effective January 1, 1997, that would produce approximately $4,400,000 in new revenue. When a final order had not been filed by December 31, 1996, NGC began charging the rates orally approved at the conference on December 17. On February 19, 1997 TRA filed its written order adopting the oral findings of December 17, 1996. The order allowed the increased rates "for service rendered on and after January 1, 1997."

II. The Procedural Issues

a.

Was the TRA required to appoint an administrative law judge or hearing officer to conduct the hearing?

The Tennessee Administrative Procedures Act provides that a contested case hearing shall be conducted (1) in the presence of the agency members and an administrative judge or hearing officer or (2) by an administrative judge or hearing officer alone. Tenn.Code Ann. § 4-5-301(a). The CAD asserts that the TRA's order in this case is void because the agency did not follow the mandate of this statute.

The TRA, however, is also governed by an elaborate set of procedural statutes. *See* Tenn.Code Ann. § 65-2-101, et seq. Tenn.Code Ann. § 65-2-111 provides that the TRA *may* direct that contested case proceedings be heard by a hearing examiner, and we held in *Jackson Mobilphone Co. v. Tennessee Public Service Comm.,* 876 S.W.2d 106 (Tenn.App.1994), that the TRA's predecessor, the Public Service Commission, could conduct a contested case hearing itself *or* appoint a hearing officer. We think that decision is still good law and that it applies to the TRA.

b.

Did the TRA staff conduct its own investigation and improperly convey ex parte information to the TRA?

The CAD argues that the TRA violated two sections of the UAPA in the proceeding below: (1) the section prohibiting a person who has served as an investigator, prosecutor, or advocate in a contested case from serving as an administrative judge or hearing officer in the same proceeding, Tenn.Code Ann. § 4-5-303; and (2) the section prohibiting ex parte communications during a contested case proceeding, Tenn.Code Ann. § 4-5-304.

***2** As to the first contention, there is nothing in the record that supports it. The Regulatory Authority members sat as a unit to hear the proof in the hearing below. We have held that they were entitled to do so. There is no proof that any of them had served as an investigator, prosecutor, or advocate in the same proceeding.

As to the second contention, it is based on the CAD's suspicion that members of the TRA staff had taken part in an investigation of NGC, had prepared a report for the Authority, and had, in fact, continued to communicate with NGC and relay that information to the Authority members.

At the beginning of the hearing the Consumer Advocate moved to discover what he described as a report from the staff that augmented or boosted the position of one party or the other. He admitted that he did not know that such a report existed but that he believed it did, because of the past practice before the Public Service Commission.

The Authority chairman moved to deny the motion with the following explanation:

> I believe that as a director I have a right to have privileged communication with a member of my staff for the purpose of understanding issues and analyzing the evidence in the many complicated proceedings that this Agency has to hear. I reject your allegation that I have abdicated my responsibility as a decision maker. I rely on my staff expertise as the law permits me to do so. Therefore, I move that your motion be denied.

The Agency members unanimously denied the CAD's motion.

On this part of the controversy we are persuaded that the TRA was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA. *See* Tenn.Code Ann. § 4-5-304(b). Otherwise, all support staff-law clerks, court clerks, and other specialists-would be of little service to the person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it.

The other part of the CAD's contention is more troubling. It contains an assertion that members of the TRA staff were passing along to the TRA evidence received from NGC. We would all agree that such ex parte communications are prohibited. *See* Tenn.Code Ann. § 4-5-304(a) and (c).

In support of his contention Consumer Advocate called the manager of the utility rate division who testified that he did an investigation of NGC under an audit. At that point the parties engaged in a general discussion about the Authority's prior ruling that the staff members' advice could not be discovered. A question about whether his advice was based on anything other than the facts in the record was excluded after an off-the-record discussion, and the witness was asked only one other question. He answered “yes” when asked if he had talked with the company or company officials since the time of the audit. There were no questions bearing on the nature of the conversations, or whether the witness received or disseminated any information pertinent to the NGC proceeding.

***3** We cannot find on the basis of the evidence in this record that the Agency received any ex parte communications that were prejudicial to the CAD's position. We would add only one further point: that administrative agencies should ensure compliance with the Administrative Procedures Act.

c.

Did NGC unlawfully put its new rates into effect on January 1, 1997?

The CAD argues that since no written order had been entered allowing the rate increase, NGC had no authority to start charging the increased rates, and the TRA's February order amounted to retroactive ratemaking.

The TRA has the power to fix just and reasonable rates "which shall be imposed, observed, and followed thereafter" by any public utility. Tenn.Code Ann. § 65-5-201. But the statutory scheme-which is the same as it was during the existence of the Public Service Commission-recognizes that a public utility may set its own rates, subject to the power given to the TRA to determine if they are just and reasonable. Tenn.Code Ann. § 65-5-203(a). *See Consumer Advocate Division v. Bissell,* No. 01-A-01-9601-BC-00049 (Tenn.App., Nashville, Aug. 26, 1996). The increased rates may be suspended for an outside limit of nine months while the TRA conducts its investigation, *id.,* but after six months the utility may, upon notice to TRA, place the increased rates into effect. Tenn.Code Ann. § 65-5-203(b)(1). The authority *may* require a bond in the amount of the proposed annual increase. *Id.*

In this case, NGC filed its petition on May 31, 1996. Because the Public Service Commission was replaced by the TRA on July 1, 1996, NGC refiled the petition on July 29, 1996. The CAD argues that the petition, therefore, had not been pending for the six months period that would allow NGC to put the rates into effect.

Under the circumstances of this case, however, we think that argument exalts form over substance. The TRA had heard the proof, and in an open meeting had announced its decision to allow part of the rate increase to go into effect on January 1, 1997. While a written order had not been entered, NGC notified the TRA that it would put the approved rates into effect on the date specified in the TRA's oral decision.

In our view, the increased rates had been pending since May. The hiatus between May and July was caused by a massive overhaul of the state regulatory machinery, and that fact cannot be attributed to NGC. So, under the statutory scheme, NGC had the power to put the approved rates into effect on January 1, 1997.

In addition, Tenn.Code Ann. § 65-2-112 says "Every final decision or order rendered by the authority in a contested case shall be in writing, or stated in the record...." NGC could have used the TRA's oral decision as the basis for its action of putting the rates into effect. The decision had been "stated in the record" on December 17, 1996. We add this caveat, however. The statute goes on to say that either a written or oral decision "shall contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based." We do not express an opinion on whether the December 17 oral decision complies with that mandate. But we do agree that findings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. *See Levy v. State Bd. of Examiners for Speech Pathology & Audiology,* 553 S.W.2d 909 (Tenn.1977).

III. The Substantive Issues

a. Hearsay

***4** The CAD argues that some of the evidence offered by NGC's expert on the projected increase in company expenses was based on rank hearsay. We notice, however, that Tenn.Code Ann. § 65-2-109 allows TRA to admit and give probative effect to any evidence that would be accepted by reasonably prudent persons in the conduct of their affairs. The same statute relieves the TRA from the rules of evidence that would apply in a court proceeding.

The CAD does not address the question of whether the evidence it calls hearsay is, nevertheless, of the kind that would be relied on by reasonably prudent persons in the conduct of their affairs. NGC argues that the evidence was not hearsay because it was based on the company records that are kept in the ordinary course of business. *See* Tenn.

R. Evid. 801, 803(6). We need not decide whether the proffered evidence was hearsay because we are satisfied that the evidence was reliable and could be considered by the TRA. The TRA heard the objections to the evidence and the CAD's argument that its evidence on the same subject should have been received. The TRA chose NGC's evidence as more reliable. We find no fault with the TRA's decision on this issue.

b. Advertising

This is an issue on which the briefs of the principal parties seem to be speaking different languages. The following explanation is the best we can glean from the record. In 1984 the Public Service Commission adopted a rule that disallowed as a recoverable expense by a utility any "promotional or political advertising." The prohibition covered advertising for the purpose of encouraging any person to select or use gas service or additional gas service. It did not cover (among other things) advertising informing customers how to conserve energy or to reduce peak demand for gas, or advertising promoting the use of energy efficient appliances. *See* former Rule 1220-4-5-.45, Tenn. Regis.

In a 1985 proceeding involving a rate increase application by NGC, the Commission deviated from the rule and allowed advertising expenses up to .5% of revenues. In March of 1996 the Commission repealed 1220-4-5-.45 and proposed a new rule that would allow a utility to recover "all prudently incurred expenditures for advertising." Apparently the rule had not made it completely through the adoption procedure when the TRA heard this case below.

Nevertheless, based on proof of $1,486,000 in external advertising expenses, $800,000 in marketing personnel payroll and $300,000 in miscellaneous sales expenses, the TRA allowed the recovery of all but approximately half of the external advertising expenses. The CAD urged disallowance of all the related expenses except approximately $647,000 and NGC claims that the TRA erred in reducing the external operating expenses because there was no proof that they were imprudently incurred.

We think the TRA was justified in its conclusion on this issue. Based on the testimony in the record that the advertising expenses were incurred to meet competition, to add new customers on existing mains, and to get existing customers to use more gas, the TRA concluded that the rate payers benefited from at least part of the external advertising.

c. The Long Term Incentive Plan

***5** The TRA allowed NGC to recover approximately one-half of the cost of its Long Term Incentive Plan. The CAD opposes the allowance of any of this expense on the basis that the plan encourages executives to seek growth through rate increases instead of through performance gains. According to the CAD, the plan does not promote improved service.

NGC offered evidence, however, that the plan had increased employee efficiency and had reduced the number of company employees per customer in Tennessee. The savings amounted to $7 million annually in wages and salaries. The same witness rebutted the CAD witness who testified that the plan encourages employees to seek rate increases rather than improved efficiency.

None of the parties to the appeal cited any authority governing the allowance of incentive payments in utility rate cases. The proof included some references to cases in other jurisdictions where that state's utility commission had allowed either 100% of the incentive payments or some fraction thereof. The consensus seems to be to look at each plan on a case by case basis and view each plan in the context of the utility's total compensation package.

We do not think the TRA erred in the treatment of the long term incentive plan in this case.

d. Rate of Return

NGC requested a rate of return on equity in the range of 13% to 13.25%. The CAD requested an 11% rate of return and offered expert testimony showing that monthly compounding of the company's income would raise the rate of return to 11.60%. The TRA set a rate of return of 11.5%.

We fail to see how either side could make much of a case on appeal. The TRA's findings and conclusions are supported by evidence in the record that is both substantial and material. *See* Tenn.Code Ann. § 4-5-322(h). A proper rate of return is not a point on a scale, *Tennessee Cable Television Ass'n v. PSC,* 844 S.W.2d 151 (Tenn.App.1992), it covers a fairly broad range, as indicated by the testimony of the competing experts in this case. We affirm the TRA's decision on this point.

We take no position on the issue of the compounding effect of the company's receipts. It is a concept that is new to us in utility regulation, and its merits need to be explored more thoroughly than they have been in this record.

IV. The Rate Design

The intervenor, AVI, challenges the part of the TRA's order that raised the "tailblock" rate for gas supplied to NGC's largest interruptible customers. The tailblock rate is the lowest rate charged per unit and it applies to usage of over 9,000 decatherms per month.[1] NGC's petition did not seek any increase in the rates falling in this category. The CAD's proof proposed that any changes be spread to all customer classes, but the intervenor sought an overall rate decrease. AVI's witness testified that industrial rates were set well above costs and should not be increased The TRA's order increased the tailblock rate from $0.21 per decatherm to $0.228 per decatherm. The TRA said in its order:

***6** After careful consideration of the testimony and exhibits of the parties, the Authority finds that the rate increase approved herein should be spread equally to all customers. It is the intent of the Authority to spread this increase to all ratepayers, including interruptible Sales customers, Transportation customers, and Special Contract customers, in order to minimize the overall impact of this rate change. In addition, the Authority concludes that the residential customer charge should be increased from $6.00 per month to $7.00 per month.

We think the question of whether to spread the rate increase to all classes of users was within the discretion of the TRA. In *CF Industries v. Tenn. Pub. Serv. Comm.,* 599 S.W.2d 536 (1980), our Supreme Court said:

> Specifically, there is no requirement in any rate case that the Commission receive and consider cost of service data, or what such data, if in the record, are to be accorded exclusivity. It is self-evident that cost of service is of great significance in the establishment of rates but is of lesser value in arriving at rate design. A fair rate of return to the regulated utility is one thing; the establishment of rates among various customer classes is quite another.

599 S.W. at 542.

* * *

Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test-nothing more, nothing less.

599 S.W. at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design-on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

CONCUR: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, WILLIAM C. KOCH, JR., JUDGE.

All Citations

Not Reported in S.W.2d, 1998 WL 684536, Util. L. Rep. P 26,665

Footnotes

1 There are three other blocks in the interruptible industrial category of users. Block one applies to usage of 1-1,500 decatherms per month; block two covers the 1,501-4,000 category; and block three applies to the 4,001-9,000 category.

2000 WL 13794
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

CONSUMER ADVOCATE DIVISION, on Behalf of TENNESSEE CONSUMERS and the Attorney General of Tennessee, Petitioner/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY, Respondent/Appellee.

No. M199902151COAR12CV.
|
Jan. 10, 2000.

Appealed from the Tennessee Regulatory Authority at Nashville, Tennessee.

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J. Richard Collier, H. Edward Phillips, Tennessee Regulatory Authority, Nashville, TN, for appellee Tennessee Regulatory Authority.

Guy M. Hicks, Patrick W. Turner, Nashville, TN, Bennett L. Ross, Atlanta, GA, for the appellee BellSouth Telecommunications, Inc.

OPINION

CANTRELL.

***1** After this court remanded a prior appeal saying that "the Tennessee Public Service Commission ... should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995", the Tennessee Regulatory Authority entered an order approving a price regulation plan based on the data used in the 1995 application. The State Attorney General's Consumer Advocate Division levels a broad attack on the order, asserting that this court's prior order did not mandate the result below, and that the order violates state and federal law. We hold that the Authority was not required by our prior order to take the action it took but that the order was within the Authority's discretion. Therefore, we affirm.

I.

We refer to our prior opinion in *BellSouth Telecommunications v. Greer,* 972 S.W.2d 663 (Tenn.Ct.App.1997) for the facts leading up to the approval of price regulation plans for local telephone companies. As that opinion recites, BellSouth applied for a price regulation plan on June 20, 1995 and an audit of BellSouth's Form PSC-3.01 report of March 31, 1995 showed a rate of return within the range set by the Public Service Commission's order in 1993. Nevertheless, the Commission's staff recommended some adjustments to the 3.01 report, and the Commission ordered BellSouth to reduce its rates by $56.285 million.

On appeal this court held that the Commission did not have the power to adjust the figures in the 3.01 report, and we remanded the case "to the Tennessee Regulatory Authority with directions to approve BellSouth's application for a price regulation plan." 972 S.W.2d at 682. BellSouth filed a petition to rehear seeking an order from this court that the price regulation plan became effective on March 1, 1995. We declined the invitation and left it up to the agency "to carry out its task in a manner consistent with its statutory authority." 972 S.W.2d at 683.

On remand BellSouth contended that this court's opinion required an immediate order approving a price regulation plan and moved for a plan effective as of October 1, 1995. BellSouth conceded that the freeze on basic rates and call waiting services should be extended to August 1, 2002 and that the indexing for annual adjustments for basic and non-basic rates should begin on August 1, 1998. The Consumer Advocate Division moved to start over. The Regulatory Authority approved BellSouth's motion with one exception. The annual adjustments for basic and non-basic services will be calculated from December 1, 1998.

II.

The Scope of the Remand

The Consumer Advocate Division asserts that the Regulatory Authority erred in concluding that this court's opinion required it to take the action it took. A remand may take one of several forms. It may dictate the course of further proceedings, *Hoover v. Metropolitan Board of Zoning Appeals,* 955 S.W.2d 52 (Tenn.Ct.App.1997), it may be made for a specific purpose. *Mathis v. Campbell,* 22 Tenn.App. 40, 117 S.W.2d 764 (Tenn.Ct.App.1938), or it may be open and general. Here, however, we agree that this court's remand did not require the Authority to approve, without qualification or further inquiry, BellSouth's 1995 application. On the petition to rehear in *Greer,* we made the following observations with respect to BellSouth's request for a holding that its price regulation plan became effective on March 1, 1996:

***2** Our October 1, 1997 opinion focused on the procedure employed by the Tennessee Public Service Commission to consider and act on BellSouth's application for a price regulation plan. Rather than focusing on the substance or merits of the Commission's decision, we held that the procedure the Commission followed did not comply with Tenn.Code Ann. § 65-5-209. Accordingly, we vacated the Commission's orders and remanded the case to its successor for further proceedings consistent with the requirements of Tenn.Code Ann. § 65-5-209.

The doctrine of separation of powers counsels the courts to avoid requiring an administrative agency to take a particular action except in the most extraordinary circumstances. We should decline, for constitutional and practical reasons, to shoulder an agency's responsibilities. Thus, the goal of a remand in cases of this sort should generally be to require the agency to carry out its task in a manner consistent with its statutory authority. *See Hoover, Inc. v. Metropolitan Bd. Of Zoning Appeals,* 955 S.W.2d 52, 55 (Tenn.Ct.App.1997).

Throughout these proceedings, BellSouth consistently asserted that the procedure followed by the Commission was not authorized by Tenn.Code Ann. § 65-5-209 and requested the courts to require the regulators to make their decisions in accordance with Tenn.Code Ann. § 65-5-209. Our October 1, 1997 opinion settles the dispute concerning what Tenn.Code Ann. § 65-5-209 requires. Now it falls upon the Tennessee Regulatory Authority to consider BellSouth's application for a price regulation plan in accordance with Tenn.Code Ann. § 65-5-209.

The key to the scope of the remand is contained in the last quoted paragraph. We resolved one question about price regulation. We left it to the Authority to consider BellSouth's application in accordance with Tenn.Code Ann. § 65-5-209 and to "carry out its task in a manner consistent with its statutory authority." Therefore, the Authority was not under a mandate to take any particular action. It could not, however, adjust the actual results on BellSouth's 3.01 report.

III.

The Regulatory Authority's Decision

Our conclusion that the Authority was not compelled to take the action it took opens up the question of whether it was compelled to take some other action. The Consumer Advocate Division attacks the Agency's action on several fronts.

A. The 3.01 Audit

The Consumer Advocate Division asserts that the Authority did not have the assurance that BellSouth's March 1995 3.01 report was in compliance with generally accepted accounting principles. *See* Tenn.Code Ann. § 65-5-209(j). The Agency staff gave a "negative" assurance, meaning that it did not make that determination itself but relied on the company's internal controls and independent auditors for the assurance.

After initially making the same arguments in the prior proceeding, the Consumer Advocate Division dropped its objection and did not pursue it on appeal-despite a finding by the PSC that the 3.01 report accurately reflected BellSouth's earned rate of return according to generally accepted accounting principles. By failing to challenge that finding on appeal, the Consumer Advocate Division waived any objection to it, *Lewter v. O'Connor Management, Inc.,* 886 S.W.2d 253 (Tenn.Ct.App.1994), and it is now the law of the case. *See Ladd v. Honda Motor Co.,* 939 S.W.2d 83 (Tenn.Ct.App.1996).

***3** In addition, in the prior appeal the Consumer Advocate Division actually defended the PSC's action, because it resulted in a sizeable reduction in rates. Having taken that position, the Division must confront the rule that a litigant is required to act consistently throughout the litigation. *Fidelity-Phenix Fire Ins. Co. v. Jackson,* 181 Tenn. 453, 181 S.W.2d

625 (Tenn.1944). Other courts have talked in terms of judicial estoppel. *See Bubis v. Blackman,* 58 Tenn.App. 619, 435 S.W.2d 492 (Tenn.Ct.App.1968); *Stamper v. Venable,* 117 Tenn. 557, 97 S.W. 812 (Tenn.1906). Thus, we conclude that the objections to the 3.01 audit cannot be pursued on this appeal.

B. Federal Preemption

The Consumer Advocate Division devotes a lengthy part of its appellate brief to an argument that the preemptive effect of the Federal Telecommunications Act of 1966 (which took pay phones out of regulated operations) was a compelling reason to reopen the case below. In the prior appeal AT & T argued that federal preemption was a reason to deny price regulation and remand the case to the Regulatory Authority for consideration of that issue. We rejected AT & T's argument then, in part because some of the issues were already before the Authority in separate proceedings involving AT & T and BellSouth. We said, "This type of proceeding, and others like it, provide the parties with an appropriate forum to air out and resolve more clearly defined issues concerning the possible preemptive effect of the specific provisions of the Telecommunications Act of 1966...."

In this appeal BellSouth points out that the changes in payphone regulation are already the subject of a separate proceeding pending before the Authority. We think our decision in *Greer* applies with equal force to this issue. We are not convinced that a federal law prohibiting pay phones from being subsidized by the company's rate-payers affects BellSouth's price regulation plan, but the pending proceeding can determine if BellSouth's rates should be adjusted to reflect the changes in the law.

C. Retroactive Ratemaking

The Consumer Advocate Division asserts that the Authority engaged in retroactive ratemaking by approving BellSouth's price regulation plan effective October 1, 1995. *See South Central Bell v. Tennessee Public Service Commission,* 675 S.W.2d 718 (Tenn.Ct.App.1984). We disagree.

The Regulatory Authority's order did not attempt to change rates retroactively. The rates had been in effect for some time before the June 6, 1995 application for price regulation. The whole thrust of the Consumer Advocate Division's four year effort has been to convene a contested case hearing for the purpose of setting new rates. The only rate changes under the Authority's December 1998 order will be prospective. Annual rate adjustments for nonbasic services are to be calculated from December 1, 1998, and there can be no increase in the rates for basic services or call waiting until December 1, 2002. By making the order prospective only, the Authority avoided the charge that future ratepayers would "pay for past use," which is the essence of retroactive ratemaking. *Porter v. South Carolina Public Service Comm'n,* 328 S.C. 222, 493 S.E.2d 92 (S.C.1997). The order also eliminated BellSouth's right to seek an increase in nonbasic services in 1996, 1997, and 1998, which it would have had if the Public Service Commission had acted lawfully in 1995. As we view it, the Authority's order places BellSouth as nearly as possible in the position they would have been in except for the Commission's error. That was the goal of the Authority on remand. *See Hoover, Inc. v. Metropolitan Board of Zoning Appeals,* 955 S.W.2d 52 (Tenn.App.1997).

IV.

***4** "The sole concern of the courts, at each stage of appellate review, it to determine whether the [Regulatory Authority's] action on the matters raised by the application meet the requirements of the law." *CF Industries v. Tenn. Public Service Commission,* 599 S.W.2d 536 at 544 (Tenn.1980). We are satisfied that the Authority acted within the scope of its powers.

We affirm the Authority's order and remand the cause to the Authority for any further proceedings that are necessary. Tax the costs on appeal to the Consumer Advocate Division.

KOCH and CAIN, JJ., concur.

All Citations

Not Reported in S.W.3d, 2000 WL 13794

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 20th day of February 2026.

Melvin Malone