

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

December 9, 1998

**IN RE**

**APPLICATION OF BELL SOUTH  
TELECOMMUNICATIONS, INC  
FOR A PRICE-REGULATION  
PLAN**

**DOCKET NO 95-02614**

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**ORDER APPROVING BELL SOUTH TELECOMMUNICATIONS, INC 'S  
APPLICATION FOR PRICE REGULATION PLAN**

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This matter came before the Tennessee Regulatory Authority ("Authority") during a special Authority Conference held on October 27, 1998, for consideration of BellSouth Telecommunications, Inc 's ("BellSouth") application for a price regulation plan. In *BellSouth Telecommunications, Inc v Greer*, 972 S W 2d 663 (Tenn Ct App 1997), appeal denied, Case No 01A01-9601-BC-00008 (June 15, 1998), the Tennessee Court of Appeals remanded this case to the Authority "with directions to approve BellSouth's application for a price regulation plan" and to conduct "further proceedings consistent with the requirements of Tenn Code Ann § 65-5-209 "

On January 23, 1996, the Tennessee Public Service Commission entered an order, pursuant to Tenn Code Ann § 65-5-209, implementing BellSouth's price regulation plan and requiring that BellSouth reduce its rates by approximately 56.3 million dollars. On October 1, 1997, in a lengthy opinion, the Court of Appeals for the Middle Section of Tennessee vacated the order of the Public Service Commission and remanded the matter to the Tennessee Regulatory Authority to approve

BellSouth's price regulation application The Court of Appeals issued another opinion on November 19, 1997, denying motions for rehearing On January 20, 1998, the Authority and the Consumer Advocate Division Office of the Attorney General ("Consumer Advocate") filed in the Tennessee Supreme Court an application for permission to appeal the Court of Appeals' decision The Supreme Court denied that application on June 15, 1998

On June 29, 1998, the Court of Appeals issued its mandate to the Authority to implement the Court's decisions of October 1, 1997 and November 19, 1997 On July 10, 1998, BellSouth filed a Motion to Implement Appellate Court's Mandate ("Motion to Implement") Thereafter, this matter was considered at the Authority Conference on July 21, 1998, for the purpose of requesting interested parties to file responses to BellSouth's motion<sup>1</sup> Responses were submitted to the Authority by the following parties Consumer Advocate Division, Office of the Attorney General ("Consumer Advocate"), MCI Communications, Corp ("MCI"), AT&T Communications of the South Central States, Inc ("AT&T") and American Association of Retired Persons ("AARP")

Pending before the Authority at the October 27, 1998, Special Authority Conference were (1) BellSouth's Motion to Implement Appellate Court's Mandate, and (2) a "Motion to Begin Afresh or Alternatively a Complaint or Petition," as amended, filed by the Consumer Advocate

## **I FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A Procedural History**

On June 20, 1995, BellSouth filed an application with the Tennessee Public Service Commission ("Commission") to operate under price regulation pursuant to Tenn Code Ann § 65-

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<sup>1</sup> At the July 21, 1998 Authority conference the Directors voted to receive in Docket No 95-02614 written responses from parties to be filed within fourteen (14) days The American Association of Retired Persons ( AARP ) subsequently requested a one day extension for filing its response which was granted by the Authority at its August 18 1998 Conference

5-209 The application requested that the Commission enter an order approving a price regulation plan for BellSouth effective October 1, 1995, with the initial rates being those in effect on June 6, 1995

On September 15, 1995, the Commission Staff issued its Report of BellSouth's Form 3 01 report for the twelve months ended March 31, 1995, which the Commission had concluded was the appropriate 3 01 report to audit under Tenn Code Ann § 65-5-209(j) The Report stated

Except for three corrections made by the Staff, the rate of return reported on the March, 1995 TPSC 3 01 Report is accurately taken from the Company's books and records, and reflects Commission ordered ratemaking adjustments Nothing came to our attention to indicate that the Company had not complied with Generally Accepted Accounting Principles or USOA, Part 32, accounting The corrected rate of return for the twelve months ended March 1995 as taken from the books is 10 30%

The audited return of 10 30% was below BellSouth's then authorized return of 10 65% - 11 85%

The Report also reflected that the Commission Staff adjusted BellSouth's corrected rate-of-return for out of period adjustments, abnormal or unusual financial occurrences, and known changes occurring through March 31, 1995, which resulted in an "adjusted" return of 12 74% Because this "adjusted" return was above BellSouth's authorized rate of return, the Staff recommended that the Commission conduct a contested case hearing to set BellSouth's initial rates for price regulation purposes

On September 20, 1995, the Commission accepted the Staff's audit report and subsequently convened a contested case proceeding for the purpose of establishing BellSouth's rates prior to entering price regulation On January 23, 1996, the Commission entered its order implementing a price regulation plan for BellSouth, finding that BellSouth's rate of return should be 10 35% and

requiring that BellSouth file tariffs to reduce its rates by \$56,285 million dollars (\$56,285,000), consistent with the rate design established by the Commission<sup>2</sup>

On February 14, 1996, BellSouth filed a petition for review with the Tennessee Court of Appeals. BellSouth contended that the Commission's "adjustments" to BellSouth's earned rate of return were unlawful and that its initial rates for the purposes of price regulation should have been those rates existing as of June 6, 1995, because BellSouth's earned rate of return on its most recent Form 301 Report as audited by the Commission Staff was less than BellSouth's authorized rate of return<sup>3</sup>

On October 1, 1997, the Court of Appeals entered its order and opinion vacating the Commission's January 23, 1996, Order and all earlier entered orders. The Court held that Tenn Code Ann. § 65-5-209(j) empowered the Commission to audit BellSouth's Form 301 Report for the following purposes: (1) to verify that the information on the report accurately reflects the information in BellSouth's books and records, (2) to verify that the report was prepared consistently with generally accepted accounting principles, and (3) to verify that BellSouth's calculations reflected the Commission's previously issued orders. 972 S.W.2d at 680. The Court stated that "[t]he Commission's authority to adjust the figures on the Form PSC-301 Report is limited to correcting errors with regard to these three categories." *Id.*

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<sup>2</sup> The Commission's Order of January 23, 1996, reflects a two to one (2-to-1) decision, in which Commissioner Sara Kyle and Chairman Keith Bissell supported the above-mentioned reduction in BellSouth's rates. Commissioner Steve Hewlett concurred with the overall rate reduction, however, he did not concur with the rate design adopted by the majority.

<sup>3</sup> AT&T also filed a petition for review of the Commission's order, alleging that the Commission had failed to follow the proper standards and procedures in implementing a price regulation plan for BellSouth. According to AT&T, before an application for price regulation can be approved, the tariff and rate for each service offered by an incumbent must be reviewed to determine whether they are just and reasonable as well as nondiscriminatory. The Court rejected this position and specifically stated that the Commission had already determined that these rates and tariffs were just and reasonable and nondiscriminatory; it is not required to make the determination again absent some specific reason to do so. See 972 S.W.2d at 682.

The Court of Appeals concluded that the Commission exceeded its authority by adjusting the earned rate of return reflected on BellSouth's Form 3 01 Report "to compensate for out of period items, abnormal or unusual expenses, and known changes" According to the Court

[The Commission] had already concurred with its staff's conclusion that the rate of return on BellSouth's corrected Form PSC-3 01 report was 10 30% Since this rate did not exceed BellSouth's currently authorized rate of return of between 10 65 and 11 85%, the Commission should have found that BellSouth's existing rates were affordable under Tenn Code Ann § 65-5-209(a) and should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995 as required by Tenn Code Ann § 65-5-209(c)

*Id.* In addition to vacating the Commission's orders, the Court of Appeals remanded the case to the Authority "with directions to approve BellSouth's application for a price regulation plan" *Id.* at 682 The parties filed petitions for re-hearing before the Court of Appeals

On November 19, 1997, the Court of Appeals issued an order denying the petitions for rehearing BellSouth in its petition asked the Court of Appeals to fix the effective date of its price regulation plan as March 1, 1996 The Court noted that its "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" *Id.* at 683

On January 20, 1998, the Authority and the Consumer Advocate filed an application for permission to appeal with the Tennessee Supreme Court The Supreme Court denied the application on June 15, 1998, and on June 29, 1998, the Court of Appeals issued its mandate to the Authority

**B Contentions Of The Parties**

**1 BellSouth**

In its Motion to Implement, BellSouth urges the Authority as a matter of law to approve its application for price regulation, contending that it seeks nothing more and nothing less than what BellSouth requested in its June 20, 1995 application. BellSouth further contends that the Authority must approve its application without a new audit and hearings by noting that, had the Commission acted lawfully, BellSouth would have been operating under a price regulation plan effective October 1, 1995, with initial rates being those in effect on June 6, 1995, and that BellSouth should not be penalized for the Commission's failure to follow the law.

BellSouth supports its position by asserting that the Court of Appeals held that the Commission "should have found that BellSouth's existing rates were affordable under Tenn Code Ann § 605-5-209(a) and should have approved BellSouth's application for price regulation based on BellSouth's rates existing on June 6, 1995, as required by Tenn Code Ann § 65-5-209(c)." *Greer*, 972 S W 2d at 680. Accordingly, BellSouth asserts that the Court of Appeals has remanded this case with explicit instructions for the Authority to approve BellSouth's application for a price regulation plan.

BellSouth also cites *Hoover, Inc v Metropolitan Board of Zoning Appeals for Davidson County, Tennessee*, 955 S W 2d 52, 55 (Tenn Ct App 1997), and *Getty v Federal Savings & Loan Ins Corp*, 805 F 2d 1050, 1061 (D C Cir 1986), for the proposition that the fundamental purpose of a remand is to place the parties and the agency in the position they would have been in had the agency not acted improperly. BellSouth further anchors its position by opining that the Authority cannot lawfully conduct further proceedings, specifically that the Authority cannot

conduct an audit of BellSouth's most recently filed Form 3 01 Report. It states that convening a proceeding to conduct such an audit would violate Tenn. Code Ann. § 65-5-209 as interpreted by the Court of Appeals.

While contending that the Authority must approve its application for price regulation, BellSouth acknowledges that putting it in the same position it would have been in had the Commission not acted improperly poses certain practical difficulties. Accordingly, contingent upon the approval of its application for price regulation with an effective date of October 1, 1995, based on the rates existing on June 6, 1995, and the adoption of the price regulation methodology stipulated to in *In re United Telephone Southeast, Inc. Tariff No. 96-201 to Reflect Annual Price Cap Adjustment*, Docket No. 96-01423, BellSouth stated that it would not object to entry of an order which also provides that

(1) increases in the initial rates for Basic Local Exchange Telephone Service shall not occur until August 1, 2002, consistent with Tenn. Code Ann. § 65-5-209(f),

(2) increases in the rates for Call Waiting shall not occur until August 1, 2002, consistent with Tenn. Code Ann. § 65-5-209(h),

(3) annual adjustments in basic and nonbasic rates pursuant to Tenn. Code Ann. § 65-5-209(e) shall be calculated from August 1, 1998, and the calculation of the Service Price Index for basic and nonbasic services shall be based upon service volumes for the month of August for the year of the annual filing and upon service prices in effect on August 1, 1998 or as reset by the TRA under Tenn. Code Ann. § 65-5-207, and

(4) annual adjustments in Interconnection Services pursuant to Tenn. Code Ann. § 65-5-209(g) shall be calculated from August 1, 1998.

(BellSouth's Memorandum in Support of Motion to Implement Appellate Court's Mandate, at 5)

**2      Consumer Advocate Division**

In its Motion to Begin Afresh, filed on July 22, 1998, the Consumer Advocate takes the position that the Authority should begin the hearing process afresh before approving BellSouth's application for a price regulation plan. The Consumer Advocate's argument shifts between what it construes the law to require the Authority to do and what it believes the Authority should do based upon the Consumer Advocate's view of sound and substantive policy in evaluating BellSouth's application at this point in time.

The salient points of the Consumer Advocate's arguments are as follows: (1) economics have changed, and BellSouth was not and is not operating pursuant to a price regulation plan causing existing rates and prior rates to be unjust and unreasonable, (2) Tenn. Code Ann. §§ 65-5-201 and 65-5-203(c) are applicable to BellSouth until it is validly regulated under another valid order and regulatory mechanism, (3) because the effective date of price regulation is linked to affordable rates, it is inappropriate to use results from administrative procedures related to a different effective date in lieu of procedures to ensure affordability at a later date, (4) the Commission Staff audit did not assure that the Form 301 report accurately reflected in all material respects BellSouth's achieved results in accordance with Generally Accepted Accounting Principles ("GAAP") as adopted in Part 32 of the Uniform System of Accounts, and the appropriate ratemaking adjustments,<sup>4</sup> (5) the Commission Staff recognized that it had not performed audit work necessary to attest to BellSouth's compliance as is required by Tenn. Code Ann. § 65-5-209, (6) failure to start afresh would place BellSouth in an improved position and the Authority should not

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<sup>4</sup> In fact the CAD asserts that the procedural error began with the Tenn. Code Ann. § 65-5-209 (j) audit and that the audit should begin afresh and an opportunity for a contested case on the ensuing audit should be granted. It should be noted that this prong of the CAD's attack on the audit was originally raised before the Commission but not pursued by the CAD before the Court of Appeals.



improve BellSouth's position, citing *Getty v Federal Savings & Loan Insurance Corporation*, (7) the Consumer Advocate asserts that it has a due process right to challenge the Commission Staff's Report, a right denied by the Commission, and that the Authority must advocate that BellSouth's 3 01 Report is in accordance with GAAP and Part 32 through witnesses subject to cross-examination, (8) that BellSouth is operating pursuant to TRA Rule 1220-4-2-55, and that BellSouth is estopped from denying the same

### **3     AT&T**

In asserting its position, AT&T relies upon the Court of Appeals' findings that the Commission exceeded its authority by making adjustments to BellSouth's Form 3 01 report and that the Commission should have found that BellSouth's rates were affordable and should have approved its application for a price regulation plan based on its rates existing on June 6, 1995. In so doing AT&T has alleged that BellSouth's Motion to Implement makes an unwarranted leap from what the Commission should have done to a conclusion as to what the Authority must now do. AT&T argues that the Court of Appeals' action of vacating not only the Commission's January 23, 1996, Order, but also all prior related orders with respect to BellSouth's application, is an indication that the Authority must now consider afresh BellSouth's application for a price regulation plan in accordance with Tenn. Code Ann. § 65-5-209 as construed by the Court. AT&T additionally takes the position, as does the Consumer Advocate, that any person in this proceeding, including AT&T, whose legal rights and privileges are affected by the Authority's interpretation or use of the Commission Staff audit would have the right to a contested case hearing to challenge that interpretation or use.

AT&T also argues that nothing in Tenn Code Ann § 65-5-209, or in any other statute or opinion of the Court, gives the Authority the power to approve, implement, or make effective a price regulation plan retroactively. Thus, according to AT&T, the Authority has no power to approve, implement, or make effective BellSouth's price regulation plan as stated in BellSouth's original application. AT&T argues that the limitation on the power of the Authority to make BellSouth's price regulation plan effective as of October 1, 1995, is not only practical, but is also imposed by law. BellSouth's Motion to Implement seeking the approval of its price regulation plan effective October 1, 1995, according to AT&T, is inconsistent with the law.

Finally, AT&T, in noting the passage of time between the Commission Staff audit and these proceedings, conclude that a report for the period ending March 31, 1995, filed in June 1995, could not be considered "most recent" for the purpose of implementing and making effective a price regulation plan in 1998.

#### **4     American Association of Retired Persons**

AARP basically argues that BellSouth's Motion to Implement should be rejected because it does not follow the procedures set forth in the Court of Appeals' October 1, 1997, opinion and its November 19, 1997, decision on rehearing. AARP asserts that (1) the Court of Appeals did not address the question of which Form 3 01 report should be used when implementing BellSouth's price regulation plan, (2) the Authority must now exercise its own expertise and decide this issue, and (3) since the Commission's January 23, 1996, Order has been vacated, the Authority must now issue a completely new order that addresses the substance or merits of BellSouth's price regulation plan. According to AARP, BellSouth's proposal does not address the substance or merits of BellSouth's price regulation plan, rather it simply approves the rates in effect today. AARP also

contends, similar to the positions put forth by the Consumer Advocate and AT&T, that the Authority must now conduct a complete audit since the Commission Staff's audit of BellSouth's Form 3 01 report is only a partial audit

**C. Discussion**

The Court of Appeals' October 1, 1997, decision and the Court's subsequent decision on November 19, 1997, denying BellSouth's motion for rehearing have become the law of this case and operate as the legal interpretation of the requirements of Tenn Code Ann § 65-5-209. In fact, in its decision on rehearing, the Court referred to its October 1, opinion as providing guidance to the Authority in further considering BellSouth's application. *See Greer*, 972 S W 2d at 683. The Court's October 1, opinion, makes it clear that consideration pursuant to Section 65-5-209 requires the approval of BellSouth's application for a price regulation plan.

While all parties agree unequivocally that the Authority has been directed by the Court of Appeals to approve BellSouth's application for a price regulation plan, there is disagreement among the parties as to what manner and under what circumstances Authority approval is to be effectuated. For example, the Consumer Advocate, AT&T, and the AARP question which Form 3 01 report should be used as a basis for the approval of BellSouth's application for price regulation. These parties contend that the Authority should rely upon BellSouth's most recent Form 3 01 Report, which would necessitate a new audit. BellSouth asserts that the Authority should rely on the March 31, 1995 Form 3 01 report.

The Court of Appeals construed Tenn Code Ann § 65-5-209(c) as requiring "an audit of the existing telephone company's most recent Form PSC-3 01 report available when the company filed its application for a price regulation plan." 972 S W 2d at 668, n 14. BellSouth had already

filed a Form PSC-3 01 report for the twelve months ending on March 31, 1995, when it applied for a price regulation plan. It is reasonable to conclude from the Court of Appeals' opinion that the March 31, 1995 Report "was BellSouth's most recent report" for purposes of the Section 65-5-209(j) audit. *Id.* Thus, in considering BellSouth's application for a price regulation plan, the Authority is relying upon BellSouth's Form 3 01 report for the twelve months ending on March 31, 1995. To do otherwise would, in the opinion of the Authority, be contrary to the Court's October 1, 1997, opinion.

AT&T asserts that BellSouth "amended" its June 20, 1995, application for a price regulation plan by filing its Motion to Implement which contained an offer to extend the caps on the rates for basic services and Call Waiting until 2002. Thus, according to AT&T, the most recent Form 3 01 report for purposes of the audit is at least the Form 3 01 report on file at the time BellSouth filed its Motion to Implement on July 10, 1998.

BellSouth's Motion to Implement only requested that the Authority enter an order approving the application that BellSouth filed for price regulation on June 20, 1995, including the originally requested effective date of October 1, 1995. BellSouth's statement that it would not object, under specified circumstances, to the entry of an order granting BellSouth's application and making BellSouth subject to price regulation on a going forward basis does not constitute an amendment to the price regulation application. AT&T's position fails to consider that the purpose of the remand from the Court of Appeals is to place BellSouth and the Authority in the position that they would have been in had the Commission not acted improperly. *See Hoover*, 955 S W 2d at 55. It is clear to the Authority that in remanding this case to the Authority, with directions to approve BellSouth's application, the Court intended that the Authority consider BellSouth's pending application.

BellSouth's Motion to Implement only proposed a manner in which the Authority could move forward in a case that had "new life" breathed into it by action of the Court and did not constitute an amended price regulation application

The Consumer Advocate, AT&T, and the AARP also object to the Authority's reliance upon the March 31, 1995, Form 3 01 report in approving BellSouth's price regulation plan, arguing that the Commission Staff audit of that report does not comport with the requirements of Tenn Code Ann § 65-5-209(j) For example, the Staff audit report contains a "statement of negative assurance," which does not meet the positive assurance requirements of generally accepted auditing standards and which is a prohibited expression in an auditor's report in conformity with GAAP Furthermore, Mike Gaines, then Manager of the Commission's Telecommunications Section, testified that the Commission "simply did not have the staff or time available to do an audit necessary to issue a positive opinion that the company's accounting was in accordance with GAAP and Part 32 Accounting" and acknowledged that the Commission Staff relied upon the work of other auditors, even though the Staff "did not talk with the auditors or review the work papers related to those audits"<sup>5</sup> Notwithstanding the qualifying language in the Commission Staff audit and any deficiencies in the process employed by the Staff, the audit report of BellSouth's March 31, 1995, Form 3 01 report was presented to the Commission intact and was determined by the Commission to be in compliance with Section 65-5-209(j) The Commission voted unanimously to

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<sup>5</sup> Whether or not the Commission Staff conducted an audit that complied with the requirements of Section 65-5-209(j) the Authority rejects the AARP's argument that the Commission Staff "may have improperly included an adjustment under the abnormal and unusual category rather than the staff corrections to [Net Operating Income] category While there may be a question in the AARP's mind under which category this adjustment should fall, an important aspect of conducting an independent audit is to render professional judgment Substituting a party's judgment for that of the Commission's auditors is a proposition that could result in as many different judgments as there are parties and in the Authority's view goes far afield of what must be decided in approving BellSouth's application for a price regulation plan

set BellSouth's rates based on expenses, revenues, and rate base from the Staff audit report of BellSouth's March 31, 1995, Form 3 01 report

It should be noted that in its summary of the case's history, the Court stated that the Commission Staff concluded that BellSouth's March 31, 1995, Form 3 01 report "complied with the generally accepted accounting principles as adopted in Part 32 of the Uniform System of Accounts " 972 S W 2d at 668 The Court of Appeals also specifically found that the Commission "concurred with its staff's conclusion that the rate of return on BellSouth's corrected Form PSC-3 01 Report was 10 30 percent " The Court concluded that "the Commission should have found that BellSouth's existing rates were affordable under Tenn Code Ann § 65-5-209(a), and should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995, as required by Tenn Code Ann § 65-5-209(c) " 972 S W 2d at 680

It is not clear whether the Court fully considered the meaning of a negative assurance statement, or whether it fully considered its meaning and notwithstanding such consideration, chose the language that it did The Court's opinion does not discuss the technical definitions or the significance of the accounting principles dictated by GAAP or by Part 32 of the USOA Nonetheless, the grammatical change the Court made to the Commission Staff's actual statement transformed the Commission Staff's technically correct statement of negative assurance to a technically incorrect positive statement of compliance Still, however, given the Court's statement that the Commission concluded that the audit complied with GAAP as adopted in Part 32 of the USOA, it is reasonable to conclude that the testimony of witnesses in the record persuaded the Court that even if the audit contained some flaws, such flaws were not material to the result of the

finding that BellSouth's rate of return from the March 31, 1995, Form 301 Report was 10.3 percent

Although the Commission Staff's audit report contained a statement of negative assurance, the Court of Appeals had before it the testimony of Mike Gaines who headed the Staff audit. Mr. Gaines testified before the Commission under cross-examination by James Harralson of BellSouth during the hearing on November 1, 1995, to the following

Q If stated in accordance with generally accepted accounting principles as adopted by Part 32, and in accordance with ratemaking adjustments from the August 20, 1993, order in the company's last rate case, what should the rate of return on line 29 be?

A 10.30

(Nov. 1, 1995 Tr., Vol. I at 89) From this response, even with the negative assurance of the audit, the Court reasonably could have concluded that the result of the audit, i.e., a finding that BellSouth's earned rate of return was 10.30%, would have been the same had the audit contained a positive opinion. Based upon the evidence in the record, the Authority concludes that the Court of Appeals found that the lack of a positive opinion was not material to the ultimate result. Furthermore, other than the improper adjustments challenged by BellSouth, none of the other parties raised an issue on appeal as to whether the audit, absent such adjustments, complied with the requirements of Section 65-5-209(j).

After carefully and painstakingly reviewing the record before it, the Court rendered a well-written and well-reasoned opinion that the Authority is bound to follow. The Authority has received this remand from the Court of Appeals with a lawful directive to approve BellSouth's application for

a price regulation plan After reviewing the Court's opinion and the briefs of the parties, the Authority must conclude that the Court said what it meant and meant what it said

The Consumer Advocate, AT&T, and the AARP argue eloquently, capably, and forcibly that the Authority must rehear all issues anew In support of their position, these parties rely upon the Court of Appeals' language that its "October 1, 1997, opinion settles the dispute concerning what Tenn Code Ann Section 65-5-209 requires" and that "it now falls upon the Tennessee Regulatory Authority to consider BellSouth's application for a price regulation plan in accordance with Tenn Code Ann Section 65-5-209 " 972 S W 2d at 683 This language however, does not constitute the whole of the Court's opinion Equally applicable with respect to this remand is that the Court, after outlining what it considered to be the Commission's errors in conducting the audit, determined that, absent the improper adjustments, the audit performed by the Commission Staff was sufficient under Section 65-5-209 to approve BellSouth's application This is set forth in the following language of the Court's opinion

The Commission exceeded its authority under Tenn Code Ann § 65-5-209(c) & (j) by adjusting the figures in BellSouth's Form PSC-3 01 report to compensate for out of period items, abnormal or unusual expenses, and known charges It had already concurred with its staff's conclusion that the rate of return on BellSouth's corrected Form PSC-3 01 report was 10 30% Since this rate of return did not exceed BellSouth's currently authorized rate of return of between 10 65 and 11 85%, the Commission should have found that BellSouth's existing rates were affordable under Tenn Code Ann § 65-5-209(a) and should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995, as required by Tenn Code Ann § 65-5-209(c)

972 S W 2d at 680

Additional language to this effect appears in the October 1, 1997, decision wherein the Court addresses AT&T's arguments concerning the procedure followed by the Commission The Court again indicates that the audit performed by the Commission Staff, without the adjustments



challenged by BellSouth, complied with the requirements of Section<sup>3</sup>65-5-209(j) and was sufficient to support a determination that BellSouth's rates were affordable under Section 65-5-209(c) so as to require the Commission's approval of BellSouth's application. The Court stated

AT&T also argues that the Commission did not complete its task because it failed to review each of BellSouth's rates and tariffs to determine whether they were affordable and non-discriminatory. We need not address this issue in light of our holding that the Commission should have approved BellSouth's application for a price regulation plan based on the rates in existence on June 6, 1995. Since the Commission had already determined that these rates and tariffs were just and reasonable and nondiscriminatory, it is not required to make this determination again absent some specific reason to do so.

972 S W 2d at 681-682 (footnote omitted)

Moreover, the Court chose language in its remand which specifically relies on the action taken by the Commission and which indicates that in the Court's judgment, which judgment the Authority is now bound to enforce, the Commission Staff audit complies sufficiently with the statute such that this Authority is required to proceed to approve BellSouth's application without performing another audit. The Court closes its October 1 opinion with the following language

In summary, we vacate the Commission's January 23, 1996 order and all related orders with regard to BellSouth's application for a price regulation plan. Since the Commission has adopted its staff's conclusion that BellSouth's rate of return reported on its Form PSC-3 01 Report for the twelve months ending March 31, 1995 is less than its current authorized rate of return, we remand the case to the Tennessee Regulatory Authority with directions to approve BellSouth's application for a price regulation plan. In light of our conclusion that the Commission did not have the Authority to adjust the actual results on BellSouth's Form PSC-3 01 Report, we need not consider the remaining issues raised by BellSouth and AT&T. These issues and all other issues raised by the parties are accordingly pretermitted.

972 S W 2d at 682

Finally, the Court's October 1, 1997, opinion sets forth the reasons why the adjustments to BellSouth's rate of return made by the Commission Staff were not permissible under the scope of the

audit contemplated by Section 65-5-209(j). The Court could have<sup>3</sup> but did not discard the entire audit. To the contrary, by making statements such as the Commission should have approved BellSouth's application and "we remand the case to the TRA with directions to approve BellSouth's application for a price regulation plan," the plain language of the Court's opinion reveals that the court determined that the remainder of the audit is legally sound, that no further audit is necessary, and that the Authority had no discretion other than to approve BellSouth's application for price regulation plan "absent some specific reason to do so." Given the strength of the Court's acceptance of Commission Staff's audit as being 65-5-209(j) compliant, such specific reasons are not present in this case.

The Authority is unpersuaded by AT&T's contention that any person, including AT&T, whose legal rights and privileges are affected by the Authority's interpretation or use of the Commission Staff's audit has the right to a contested case hearing to challenge that interpretation or use. Equally unpersuasive is the Consumer Advocate's assertion that it has a due process right to challenge the Staff's audit report which was denied to it by the Commission. With respect to AT&T's contention, the Court of Appeals' holding that BellSouth was entitled to a hearing on the Commission Staff's audit was limited solely under the circumstances presented in this case to BellSouth. Further, both AT&T's and the CAD's arguments are inconsistent with *Consumer Advocate Division v Bissell*, 1996 Tenn App LEXIS 528, \*12 (Tenn Ct App Aug 28, 1996) (holding that "tariff does not violate the due process rights of the ratepayers because it raises or lowers their rates without a hearing"), and *AT&T Communications of the South Central States, Inc v Greer*, 1996 Tenn App LEXIS 776, \*11 (Tenn Ct App Dec 6, 1996).

With respect to the effective date of BellSouth's price regulation plan, certain parties have raised issues of retroactivity and the amendment of BellSouth's application. AT&T states that, "Nothing in TCA Section 65-5-209 or in any other statute or in any opinion of the Court gives the TRA the power to approve, implement, or make effective the price regulation plan retroactively. Thus, the TRA has no power to approve, implement, or make effective BellSouth's price regulation plan as stated in BellSouth's original application." After reviewing the Court's opinion and the filings, a determination by this Authority that BellSouth's price regulation plan would have been effective October 1, 1995, had the Commission acted lawfully is squarely within the Authority's discretion. The Authority concludes further that BellSouth's Motion to Implement does not constitute an amendment to BellSouth's price regulation application. The fact that BellSouth stated in its Motion to Implement that it would not object, under specified circumstances, to the entry of an order that grants BellSouth's application but makes BellSouth subject to price regulation on a going forward basis does not constitute an amendment to the price regulation application. The Authority exercises its discretion and finds that October 1, 1995, is the appropriate effective date. Approving BellSouth's application for a price regulation plan with an effective date of October 1, 1995, is necessary to place BellSouth in the position that it would have been in had the Commission not erred, which is consistent with the Court of Appeals' opinion.<sup>6</sup> October 1, 1995, is the effective date that BellSouth had requested in its application filed on June 20, 1995, and would have been the effective date of BellSouth's plan had the Commission acted in a manner consistent with the requirements of Tenn. Code Ann. § 65-5-209.

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<sup>6</sup> It also is consistent with the general purpose of a remand announced by the Court of Appeals in *Hoover v Metropolitan Board of Zoning* where the Court stated that the general purpose of remand is to 'place the parties and the Agency in the position they would have been in had the agency not acted improperly.

As noted in *Getty v Federal Savings & Loan Insurance Corporation*, the remand should not be used to place the petitioner in a better position. The Authority's decision here does not do that. Here, but for the errors of the Public Service Commission, BellSouth would have been operating pursuant to a price regulation plan sometime in 1995 with the initial rates being those existing as of June 6, 1995. This is supported by the Court of Appeals in its October 1, 1997 decision, when it stated that the Public Service Commission "should have found that BellSouth's existing rates were affordable under Tenn. Code Ann. § 65-5-209(a) and should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995 as required by Tenn. Code Ann. § 65-5-209(c)." 972 S.W.2d at 680.

The potential benefits of price regulation are numerous. Price regulation provides BellSouth with greater flexibility in pricing, allowing it to respond to competitive pressures and the changing cost structures of the telecommunications industry. Price regulation also provides sustained incentives for BellSouth to improve its economic performance through productivity increases and cost reductions. Price regulation encourages BellSouth to make appropriate investments and capacity expansion. These improvements should facilitate BellSouth's deployment of new service offerings desired by Tennessee consumers, while also providing BellSouth the opportunity to earn a return that is sufficient to attract necessary capital investment.<sup>7</sup>

Based on the foregoing and consistent with the mandate and the opinion of the Court of Appeals on remand of *BellSouth Telecommunications Inc. v Greer*, the Directors voted unanimously to approve BellSouth's application for a price regulation plan with an effective date of October 1, 1995, with the initial rates being those existing as of June 6, 1995. The Directors also

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<sup>7</sup> The comments contained in this paragraph were made by Director Greer.

voted unanimously to accept and adopt the terms offered in the "Memorandum in Support of BellSouth Telecommunications, Inc.'s Motion to Implement Appellate Court's Mandate with the exception that all references to August dates be changed to December

The motion to approve having been adopted unanimously by the Directors renders moot the Consumer Advocate's Motion to Begin Afresh

**IT IS THEREFORE ORDERED THAT**

1 BellSouth's application for a price regulation plan with an effective date of October 1, 1995 with the rates existing on June 6, 1995, is hereby approved

2 BellSouth's price regulation plan shall be subject to the price regulation methodology stipulated to in *In re United Telephone Southeast, Inc Tariff No 96-201 to Reflect Annual Price Cap Adjustment*, Docket No 96-01423

3 Increases in BellSouth's initial rates for Basic Local Exchange Telephone Service shall not occur until December 1, 2002, consistent with Tenn Code Ann § 65-5-209(f)

4 Increases in BellSouth's rates for Call Waiting shall not occur until December 1, 2002, consistent with Tenn Code Ann § 65-5-209(h)

5 Annual adjustments in BellSouth's basic and nonbasic rates pursuant to Tenn Code Ann § 65-5-209(e) shall be calculated from December 1, 1998, and the calculation of the Service Price Index for basic and nonbasic services shall be based upon service volumes for the month of December for the year of the annual filing and upon service prices in effect on December 1, 1998 or as reset by the Authority under Tenn Code Ann § 65-5-207

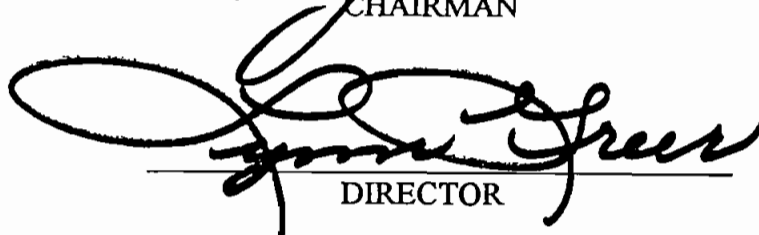
6 Annual adjustments in BellSouth rates for Interconnection Services pursuant to Tenn Code Ann § 65-5-209(g) shall be calculated from December 1, 1998

7 The Motion to Begin Afresh filed by the Consumer Advocate is moot

8 Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from the date of this Order

9 Any party aggrieved with the Authority decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Division, within sixty (60) days from and after the date of this Order

  
CHAIRMAN

  
DIRECTOR

  
DIRECTOR

ATTEST

  
EXECUTIVE SECRETARY