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Guy M. Hicks
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March 21, 1997

FROM TN
REG. AUTH.
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GUY M. HICKS
EXECUTIVE SECRETARY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *United Telephone-Southeast, Inc. Tariff No. 96-201 To Reflect Annual Price Cap
Adjustment*
Docket No. 96-01423

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Brief Regarding Statutory Construction of T.C.A. § 65-5-208 in the above referenced matter. A copy has been provided to counsel of record.

Very truly yours,


Guy M. Hicks

GMH:ch

ORIGINAL FILED
DO NOT REPLY

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *United Telephone-Southeast, Inc. Tariff No. 96-201 To Reflect Annual Price Cap Adjustment*

Docket No. 96-01423

BELLSOUTH TELECOMMUNICATIONS, INC.'S
BRIEF REGARDING STATUTORY CONSTRUCTION
OF T.C.A. § 65-5-208

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EXECUTIVE SECRETARY

During the March 11, 1997 hearing in this docket, the Directors requested the parties to submit briefs on the statutory construction of section 65-5-208 and to specifically address any relevant legislative history that might clarify whether the General Assembly intended for directory assistance to be included in the statutory definition of “basic local exchange telephone services.” BellSouth respectfully submits this brief in response to that request. As explained below, the legislative history confirms the plain language of the statute, i.e., that directory assistance is not included in the unambiguous statutory definition of basic services. The legislative history also reveals that the position the Consumer Advocate Division (“CAD”) has taken in this docket regarding directory assistance contradicts statements the CAD made to the Joint Committee on State and Local Government regarding the 1995 telecommunications legislation’s effect on directory assistance.

1. The plain language of the relevant statutes reveals that the General Assembly did not intend to include directory assistance in the statutory definition of basic services.

The most compelling indication of legislative intent is the plain language of a statute. *See Kultura, Inc. v. Southern Leasing Corp.*, 923 S.W.2d 536, 539 (Tenn. 1996)(“Whenever possible, legislative intent should be determined from the plain language of the statute, ‘read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.’”).¹ Section 65-5-208(a) plainly defines “basic local exchange telephone services” to include a distinct set of services, and it just as plainly states that all other services are “non-basic services.” Because directory assistance is not one of the enumerated basic services, it cannot be included in the statutory definition of “basic local exchange telephone services” without impermissibly forcing a construction that would extend the plain meaning of the statute.

The plain language of Section 65-4-124 further indicates that the General Assembly did not intend for directory assistance to be included in the statutory definition of basic services. This statute requires the Tennessee Regulatory Authority (“TRA”) to promulgate rules ensuring that all providers of basic service provide their subscribers with distinct elements of service. Again, directory assistance is not included in this statutory list of elements associated with basic service. Accordingly, the General Assembly clearly did not intend to include directory assistance in the statutory definition of basic services.

¹ During the hearing, the Consumer Advocate cited *Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977) for the identical proposition.

2. The legislative history of the 1995 telecommunications legislation confirms that the General Assembly did not intend to include directory assistance in the statutory definition of basic services.

In response to a question posed during the May 24, 1995 Senate floor debate on the 1995 telecommunications legislation, Senator Rochelle unequivocally stated “[o]ne does not get directory service under the basic set of services -- basic services, no.” Tr. at 36.² In response to a later question, Senator Rochelle stated that local exchange companies “already are authorized to institute charges for directory assistance and they don’t do any now, so that’s my understanding that [the legislation] doesn’t really change that.” Tr. at 39. Senator Gilbert then explained that prior to the passage of the legislation, “I did not know that [local exchange companies] could charge residential customers for directory assistance service and as I understood it, it took some kind of requirement by the PSC to do it” Tr. at 39. Senator Gilbert then clearly stated that “under this bill [local exchange companies] would be permitted to do it [charge residential customers for directory assistance service] without PSC approval.” Id (emphasis added).

Further, during the May 24, 1995 House floor debate on the legislation, Representative Purcell summarized the changes the House committee had made to the Senate bill. Representative Purcell’s summary of the House committee’s changes once

² Copies of the cited portions of these floor debate transcripts, which were prepared from the audiotapes by Brief Encounters, Inc. of Nashville, Tennessee, are attached collectively as Exhibit 1. Senate Bill 891, which was passed on May 25, 1995 and approved by the Governor on June 6, 1996, was the subject of the floor debate.

again confirms that the legislation deliberately sets forth the services that are included in the “basic service” category:

We made absolutely clear in this Legislation through this amendment that white pages listings for example, nine hundred and nine seventy six blocking services, for example, that 911 emergency services, for example, would be maintained as basis [sic] service We made sure, for example again, that the services that I described are included.

Tr. at 15 (emphasis added). As Representative Purcell stated, the General Assembly clearly listed the services that are included in the “basic service” category, and directory assistance simply is not one of those services.

Representative Purcell’s comments also evidence the plain legislative intent behind the requirement in Section 65-5-208(a) that basic services be provided “at the same level of quality as is being provided on June 6, 1995.” This requirement ensures

[t]hat any consumer that signs up for basis [sic] service would know that these things [the services meeting the statutory definition of basic services] they would receive and at the same time we made sure that it would be at least at the same level of quality that they now receive their services. Many were concerned that quality might slip, that competition might change the quality level of the voice transmission and data transmission that your constituents receive -- this amendment makes it absolutely clear that cannot occur.

Id. (emphasis added). The “same level of quality” requirement of Section 65-5-208(a), therefore, governs the level of the transmission quality of the services included in the statutory definition of basic services. Contrary to the Consumer Advocate’s argument during the hearing, this provision does not govern the price charged for such services, and it clearly does not “bootstrap” every service provided on June 6, 1995 into the unambiguous statutory definition of basic service.

3. During the committee debates on the 1995 telecommunications legislation, the Consumer Advocate Division conceded that directory assistance is not subject to the basic services restrictions.

On April 18, 1995, the CAD addressed the Joint Committee on State and Local Government regarding the 1995 telecommunications legislation. In the course of discussing the fact that the legislation contained “some very particular and precise language about what basic service should be,” the CAD stated that “[a] company can freeze out various services by making them too prohibitive for a consumer to have. They can make directory assistance so high that no one would use it.”³ Upon hearing this statement, Senator Cohen interjected, “Let me hear that again. They can make directory assistance so high that nobody would use it?” The CAD replied, “Yes sir. Their flexibility is essentially unlimited.” Senator Cohen concluded by thanking the CAD for its “testimony here on directory assistance. . . .” The CAD’s position in this docket, therefore, contradicts its frank concession before the Joint Committee that directory assistance is a non-basic service that is not subject to the restrictions applicable to basic services.

4. Section 65-5-208(b) does not permit the TRA to alter the “non-basic” status of directory assistance.

The General Assembly carefully balanced the pricing mechanisms for basic services against those for nonbasic services. Section 65-5-209(f), for example, prohibits incumbent local exchange companies subject to price regulation from increasing basic rates for four years. Section 65-5-209(h), in turn, allows companies electing price

³ Although the tapes of these committee proceedings were not transcribed, BellSouth has transcribed the relevant portions of these proceedings. See Exhibit 2 and accompanying affidavit. BellSouth will make the tapes of these proceedings available to TRA upon request.

regulation to set rates for nonbasic services “as the company deems appropriate,” subject only to statutory annual inflation-based caps, statutory nondiscrimination provisions, and statutory price floors and anti-competitive pricing prohibitions. This deliberate pricing flexibility would be severely undermined if Section 65-5-208(b) were read to allow the TRA to simply redefine a statutorily-defined nonbasic service as a basic service.

Moreover, Part 2 of Chapter 5 of Title 65 imposes numerous requirements upon local exchange companies, including tariff filings, classification restrictions, pricing restrictions, and reporting requirements. The General Assembly, however, recognized that in certain situations, such restrictions would be inappropriate. Section 65-5-208(b), therefore, permits the TRA to “exempt[] a service or group of services from all or a portion of the requirements of this part,” and it requires the TRA to “exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.” *Id.* (emphasis added). Although BellSouth has found no legislative history specifically addressing this section, the plain language of section 65-5-208(b) makes it clear that the General Assembly intended to allow the TRA to relieve certain services from the restrictions otherwise imposed by statute. It did not intend to allow the TRA to impose more restrictions than the General Assembly itself had imposed on such services. Accordingly, this section does not allow the TRA to disturb the General Assembly’s deliberate assignment of directory assistance to the “non-basic services” category by moving it to the more restrictive classification of “basic local exchange telephone services.”

Respectfully submitted,

BellSouth Telecommunications, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 1997, a copy of the foregoing document was served on the parties of record, via U. S. Mail, postage pre-paid, addressed as follows:

Ed Phillips, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Vincent Williams, Esquire
Consumer Advocate Division
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Nashville, TN 37219-8888



EXHIBIT 1

ROCHELLE: One does not get directory service under the basic set of services - basic services, no. They don't now, I don't believe. Right now there is competition out there. And so, so because there is competition now, that's now addressed in the bill.

SPEAKER: Senator Henry. Senator Kyle, sir - I thought you yield, Senator Kyle, I apologize.

KYLE: In directory assistance - I believe and I assume the Senate is going to go forward and pass this legislation today based upon the (inaudible) I've seen and the mood that I feel on the floor. I hope that the House addresses the issue of 911 service. I question the wisdom of hoping they are going to do something and hoping that we are going to agree with it because by then we are getting in that (inaudible) that we are concurring in amendments that we can't amend how the House deals with the 911 issue and to me it is a very simple concept that we need to make sure that everybody has got a telephone in this state has 911 service and doesn't have the option of not having it. I don't know how that is funding, I don't know how that is funded. I don't know how that is funded when two or three people are in the phone business. This is not something I have raised today, I mean I asked this question four weeks ago. Well, on that -- but I hope that the House can resolve that and I know there are not amendments on the point. I haven't entered into the debate on that particular issue.

The second matter

SPEAKER: Senator Rochelle.

ROCHELLE: If I could clarify the answer to that on that - my understanding is that 911 - again it was assumed that it would be in there because you have got a separate 911 statute. There has been the request made by a House group that has been looking at the bill to expressly state it. That's what we anticipate will be done, but yes, my understanding the 911 service will be included in the basic...

SPEAKER: Senator Kyle. Senator Kyle.

KYLE: Secondly, the directory assistance issue, I didn't realize .. I hope that is addressed over there also. Perhaps it will be, and perhaps it will not. Perhaps there is full competition on directory information services today. I was unaware of that particular matter. Mr. Speaker, I want to clarify to everyone in this room

. the amendments, that the telecommunication company, let me just use Bell - could institute charges for directory assistance?

SPEAKER: Senator Rochelle. Senator Rochelle.

ROCHELLE: I believe they already are authorized to institute charges for directory assistance and they don't do any now, so that's my understanding that it doesn't really change that.

SPEAKER: Senator Gilbert.

GILBERT: First answer, let me just add, I did not know that they could charge residential customers for directory service assistance and as I understood it, it took some kind of requirement by the PSC to do it, but I think the answer is under this bill they would be permitted to do it without PSC approval.

Second, one of the things that many of us have enjoyed in our own counties, is county-wide calling, Metropolitan calling, that's something that the PSC has ordered in past years and it has been of great benefit, economic development. Is it not true, under the bill as you passed that telephone companies could choose to take that system away and start charging again?

SPEAKER: Senator Rochelle.

ROCHELLE: I'm told by the balcony that it is not. Can they take away? ... Ask me again? What can they take away -- what are you asking about?

SPEAKER: Senator Gilbert.

GILBERT: Can they start charging again for it? Is it a basic service?

SPEAKER: Senator Rochelle.

ROCHELLE: For what?

SPEAKER: Senator Gilbert.

GILBERT: For instance, in the Knox County region we can now call into the adjoining counties without a toll charge. That was something that the PSC mandated. Now the question is under this system can that be taken away and can charges be assessed for those kinds of calls.

SPEAKER: Senator Rochelle.

what's expected of them. So, Mr. Speaker, I urge you to give careful consideration now to majority leader Purcell as he explains to you and gives to you, the Amendment No. 1 which is a rewrite of the bill and I think a tremendously better bill than we had when we started out. Thank you very much.

SPEAKER: The gentleman renews his motion. Mr. Clerk, call up the first Amendment.

CLERK: Amendment --

SPEAKER: The next amendment.

CLERK: Amendment No. 17 by Representative Purcell spread on the members desk.

SPEAKER: Representative Purcell.

PURCELL: Thank you, Mr. Speaker, members of the House. If the House members will remember where we were last week when we last took up this matter, at that time, the previous 16 amendments were withdrawn or in the case of one amendment was rolled down. But this amendment is the heart of everything that Mr. Bragg just talked about in the heart of our vision and I hope your vision for the future of telecommunications in Tennessee. This is the amendment that rewrites in most important ways, the Senate bill that was sent to us now, I suppose two weeks ago. I don't care to talk at any length about perhaps the deficiencies that we found, I think it's perhaps better to emphasize the positive. As Mr. Bragg said, we looked at that bill over a period of weeks and made the improvements that we think give us the confidence that this is not only the right thing for Tennessee as a whole but the right thing for your constituents and therefore the right thing for you today. The rewrite of this bill begins right with Section 1. We restated the declaration of policy, the basic foundation upon which this bill will stand and that policy now stated, taking language that was proposed initially by one of the wisest telecommunications lawyers in this State. A policy that says straight-forwardly and in a simple way, that not only a court but a citizen can understand that what we're trying to do here is foster the development of an efficient and advanced state-wide system of services and it's a system that needs to remain affordable. That's the basic statement of policy, that's the promise on which everything else stands and the amendment that's before you, you have that assurance. We make clear the powers of both the Public Service Commission and then the success with the Tennessee Regulatory Authority in

Section 4 of the bill, the authority of that body to issue orders and do those things that they need to do, to be a regulator. We make clear for the first time, their ability to monitor the continued functioning of universal service. There were many issues when the bill first came before us as to whether or not that was a one time snatch-shot look or whether it would enable the Authority to continue to look on a regular basis on where we were on universal service. The change in this amendment makes that clear. There were those who were concerned that the FYI plan that had been established by the Public Service Commission and upon which many promises were based, would in some way be set aside or that the promises put a -- put an easier way, wouldn't be fulfilled. Section 10 of the bill, Section 10K of the amendment rather, makes it absolutely clear that those funded requirements that were placed upon the companies in this State must be fulfilled. The direction is clear, there should be no question about it. There were concerns that the productivity factor that was placed in the bill was not a -- sufficient to protect consumers. Many of you have heard the discussion, let me just say that we changed the productivity factor so that the consumers get the benefit of productivity whether inflation is high or inflation is low. We placed in the bill a provision that is identical in effect to the provision placed in the Georgia Legislation by the Georgia Legislature that make sure again, that whatever the inflationary situation in this State, it's low now and our change is particularly directed toward low inflation times that the consumers will be protected whatever later increases may be required in telephone rates. We made absolutely clear in this Legislation through this amendment that white pages listings for example, nine hundred and nine seventy six blocking services, for example, that 911 emergency services, for example, would be maintained as basis service. That any consumer that signs up for basis service would know that these things they would receive and at the same time we made sure that it would be at least at the same level of quality that they now receive their services. Many were concerned that quality might slip, that competition might change the quality level of the voice transmission and data transmission that your constituents receive -- this amendment makes it absolutely clear that cannot occur. There are further protection for consumers placed within the bill. We made sure, for example again, that the services that I described are included. We further clarified basic protections to make sure that it's not just the monthly bill that is maintained, that is frozen for four years in basis services but as well, that non-recurring cost that was not assured in the Senate bill. That means the cost

EXHIBIT 2

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *United Telephone-Southeast, Inc. Tariff No. 96-201 To Reflect Annual Price Cap Adjustment*

Docket No. 96-01423

AFFIDAVIT OF CAROLYN HANESWORTH IN SUPPORT OF
BELLSOUTH TELECOMMUNICATIONS, INC.'S
BRIEF REGARDING STATUTORY CONSTRUCTION
OF T.C.A. § 65-5-208

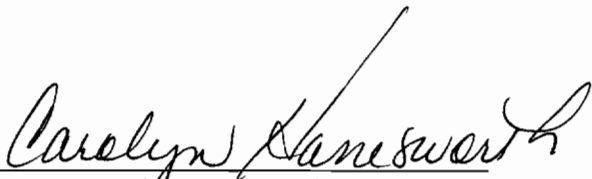
STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, Carolyn Hanesworth, being duly sworn, hereby depose and say:

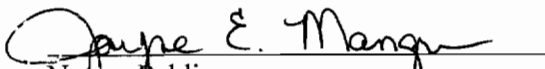
1. I am the Administrator in the Legal Department for BellSouth Telecommunications, Inc. in Tennessee.

2. I have accurately transcribed to the best of my ability the attached excerpt from the record of the proceedings before the Joint Committee on State and Local Government of the Tennessee Legislature held on April 18, 1995, beginning at 12:40 p.m. (Tape # 3, at 528 and following), attached hereto as Exhibit 2.

Further affiant saith not.


Carolyn Hanesworth

Sworn to and subscribed before me
this 21 day of March, 1997.


Notary Public

My Commission Expires:

9/23/2000

Senator Cohen:

The Consumer Advocate.

Williams:

Vincent Williams, Consumer Advocate Division of the Attorney General's Office. I think that there have been some good questions that have been asked today and I think that there has been some good information provided today. It sometimes concerns me about hearings of this type when ... of course, these are sort of non-evidentiary hearings meaning no one is under oath about what they say, but all of us have a duty of course to be direct and accurate with the quest... and respond to the questions asked. I agree with Mr. Burcham that there is no forecast in earnings. Not only that -- I mean -- it appears that we differ a bit the PSC witness, Dr. Kline, in that a rate review would go forward when the statute ... the proposed provision of Section 10 clearly says that the rate review only goes forward if you meet certain tests. And the test is whether or not the PSC 3.01 is within the range. If it's within the range, the different ranges, then there is no earnings review. If it's outside the range, meaning above the range, then there is -- there can be an earnings review, and if it's below the range, the company asks. And what our concern is that the PSC 3.01 does not accurately determine what price this should be, number one. The number two, it doesn't accurately state what prices should be in the future, which is what we're talking about going from here to the year 2000. So what the PSC talks about is historic earnings, which allows people to claim expenses in one period that won't be the expenses there tomorrow or the next day. And that the earnings of the company and the rates that are being charged should be rates that recognize that these expenses don't exist. The ... There was some mention of the rule which we at the Consumer Advocate, and I believe, nearly every other company other than the incumbent local carriers objected to in the Commission. Nearly every carrier here, even the ones that changed sides here for this proceeding, objected to the Commission's rule, and they objected to it on the basis -- on some of the same bases (sic) that we have here and they objected to it because -- and we challenged the rule that the Commission did not have authority to mandate price increases without an evidentiary hearing, which they tried -- which apparently the rule was attempting to do. It gave an inflation increase to the companies without an evidentiary hearing. It set productivity factors without a single evidentiary hearing. Nobody made an evidentiary hearing of that. Nobody made an evidentiary hearing that the companies ought to be entitled to inflations (sic) by look-examining the costs. It was an attempt to do it by rule. I thought I might share with you a little bit about that process where everyone was meeting together. When I became Consumer Advocate, I was asked by one of the Commissioners hold a meeting and see if we could arrive at a negotiated settlement about the rule, with the rule. And what happened was the Consumer Advocate was put in a room with South Central Bell and said ... and we were advised that this was going to be the rule and you have to decide whether you're going to go along with it or not. And so we asked, where's everyone else? Where's AT&T? Where's

MCI? And where are these other parties? And those parties ... they weren't there because they didn't count. And so we objected to that rule. We objected to the proceeding, and we refused to go along with a situation where the Commission, an entity which was supposed to be making an investigation and making an informed decision based on the facts would promulgate that by rule. We also did it because they would ... that rule would be denying Tennessee consumers some of the very things that they contracted for in the FYI plan as Commissioner Hewlett indicated and that FYI plan was supposed to be effective to the year 2000. In 1991, they projected those expenses and they projected benefits from FYI to the year 2000. And so, what we are here to say, and ... we do not take a position on bills ... we're here to share with the General Assembly what the operation of the bills do when they are applied by people ... when they are applied by technical people who understand how those nuances go. One bill is a combination of insertions and omissions. As Commission Hewlett indicated there are (sic) some very particular and precise language about what basic service should be. And that was for a reason. And it excludes the ability of some communities to have video services. It excludes the ability of various communities to have different and new technologies. And so we were concerned about that aspect, and that narrow definition of universal service. We were concerned about the way that prices were granted increases. Now I've heard a lot of testimony about cap, and I think that the understanding needs to be clear that this is a cap of the aggregate revenues of the company, which I think there was some testimony that it was \$1.2 billion. And that any service can be capped up to the aggregate revenues of the company, up to billions of dollars. If they want to make some adjustment somewhere, they can ... A company can freeze out various services by making the cost of them too prohibitive for a consumer to have. They can make directory assistance so high that no one would use it. They can take away the rights of the elderly to

Senator Cohen:

Let me hear that again. They can make directory assistance so high that nobody would use it?

Williams:

Yes sir. Their flexibility is essentially unlimited. They can take .. they can ... they can charge call blocking -- that's the block of 900 numbers, for example. They can make ... If they decide ... If they can be reasonable, they can take call blocking and charge it so that no one would want to use call blocking. If they wanted to deal with the listings if someone wanted an unlisted number, they can make the price of the unlisted number so high that people won't want to use it. They are able to deter services through sheer pricing power when there is no effective alternative to the consumer. And so, competitive services we believe should be regulated -- I mean unregulated, and monopoly services, where the company is the only provider, should be regulated. And it should be regulated through some oversight by whatever entity you would choose. So what we're sharing with you is

that the 891 -- because of the way it's structured endangers all the things that the Staff fought for over the years at the Public Service Commission. What we have fought for since I have been Consumer Advocate. And so those -- all of those things, and all of those services that we are talking about that many Tennesseans find important to them are dramatically affected, and can be dramatically affected solely by the company's decision and not by regulation of the Public Service Commission because of the narrow language that is used to keep them from being able to do certain things.

Senator Cohen:

Thank you Mr. Williams. You have spoken well for the Consumer Advocate's office during your testimony here on directory assistance and are a testimony to the good work of Senator Cooper in passing the bill that created you. Senator Miller?