

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: TARIFF FILING BY UNITED)
TELEPHONE-SOUTHEAST, INC. TO) Docket No. 96-01423
REFLECT ANNUAL PRICE CAP)
ADJUSTMENT (TARIFF NO.96-201))
)

REC'D
APR 15 11 08 AM '08
EXECUTIVE SECRETARY

RESPONSE IN OPPOSITION TO BELLSOUTH'S MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION TO SUBMIT TESTIMONY IN REBUTTAL OR TO EXPLAIN, OR IN THE ALTERNATIVE MOTION TO STRIKE THE CONSUMER ADVOCATE STATEMENTS TO THE LEGISLATURE

Comes the Consumer Advocate Division and submits this response to BellSouth and UTSE's Motion to Strike, or in the alternative Motion to Submit Testimony in Rebuttal or to Explain, or in the alternative, Motion to Strike the Consumer Advocate's Statements to the Legislature and to further submit that the company's motion is without merit and should be denied.

BellSouth seeks to strike the Consumer Advocate Division's [Reply] Brief on Statutory Construction. The Consumer Advocate Division's brief not only points out that BellSouth asks the TRA to make its decision on a version of the which was never enacted, but also submits statements of the Consumer Advocate with respect to the unenacted legislation even though it is clear that the Consumer Advocate is not a member of the legislature.

In making its motion BellSouth makes two arguments and again resubmits the statements made to the General Assembly by the Consumer Advocate during a hearing on an amendment which was not enacted. At the hearing the Consumer Advocate was prevented from fully

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explaining his knowledge of the proceedings before the General Assembly. See, R. Vol. 1, p.233. In fact, because the statements made by the Consumer Advocate pertained to a version not enacted, they were not included in the Consumer Advocate Division's initial brief on legislative history. Once the parties put the factual matter of the Consumer Advocate Division's statements at issue, however, **due process requires the right to rebuttal**. This is particularly true where opposing parties attempt to use the statement to prove a matter they assert. As a result, the Consumer Advocate Division respectfully moves to submit testimony in rebuttal or to explain rebuttal the representations made by UTSE and BellSouth, or to explain the statements made by the Consumer Advocate. In the alternative, the Consumer Advocate Division moves to strike the briefs of UTSE and BellSouth because they construe a version of the statute which was not enacted.

With respect to the other arguments BellSouth does not argue that the briefs of the Consumer Advocate Division are not helpful or useful, nor does it argue for an extension of time in its own right, nor does it show that the Consumer Advocate Division's brief violated any contested case rule of the TRA. In fact, the UAPA requires that an Administrative Law Judge or Hearing Officer must charge the agency with the law.

The Consumer Advocate Division stands by its representation that the failure to file the Motion for Extension of Time before noon was inadvertent and constituted excusable neglect. The innuendo's of BellSouth are without merit. If the companies needed an extension of time they were free to seek it themselves.

There was more than one legal issue in this case. In fact, the bulk of the case was in regard to legal issues. Moreover, there were several requests for briefs in this case. Director

Kyle began the inquiry as follows:

DIRECTOR KYLE:

13 Q. So we don't -- **I don't have any**
14 **Legislative history in front of me that indicates to**
15 **me what the legislators who were voting understood**
16 **that local service to be.** Mr. Hicks has suggested
17 that they may have been explained individually what
18 local service -- when you opt to have a phone in
19 your home and pay for that local service, the
20 Legislature may have been told that includes DA, and
21 they may have voted for this bill on the premise
22 that this included DA. I mean, we don't know.

Transcript at p. 230. Emphasis added.

Director Malone subsequently made the request which was ratified by Chairman Greer.

11 DIRECTOR MALONE: What I would
12 like to do, Mr. Chairman, and following up to
13 Director Kyle's question, and I don't know if this
14 is the appropriate place to do it, but we definitely
15 in cross-examining these witnesses, the parties have
16 gotten into statutory construction and how 65-5-208
17 ought to be construed. And I find it a little
18 curious that attorneys would be that deep in the
19 statutory construction -- well, General Williams
20 says he has reviewed it.
21 **I would like to get the parties**
22 **as posthearing briefs of this hearing to submit**
23 **briefs on the statutory construction, because**
24 **largely that is what we're looking at.** If the
25 Legislative history provides us no guidance, I would
1 like to know that.

2 CHAIRMAN GREER: Well, my
3 concern -- **and I agree**, and my concern goes to the
4 point that Mr. Hickerson made himself is that
5 apparently December 1994 is not the first time one
6 of the local incumbents suggested that there be a

7 Directory Assistance charge. So this would not have
8 been a new issue to the General Assembly.

9 So not being a new issue to the
10 General Assembly, my question is if they felt
11 strongly about it and knew that a tariff had already
12 been approved even though it had been repealed,
13 obviously it was a hot issue with some people. I
14 was not even on the Commission and had read it in
15 the paper and knew that it was an issue, so I can't
16 believe that the General Assembly operated in a
17 vacuum.

18 And my question has to be to all
19 the parties, why is it not addressed? So what's the
20 Legislative history? **So I agree**, in the posthearing
21 briefs, I would like for this issue to be
22 addressed. Transcript at pp. 233-234.

Therefore, the Chairman agreed with Director Malone that briefs on statutory construction should be submitted, including statutory construction of Tenn. Code Ann. § 65-5-208.

Furthermore, page 261 of the transcript shows the following exchange:

4 DIRECTOR KYLE: Don't you want
5 to brief the legal issue first?

6 MR. HICKS: I think **the issues**
7 that the Directors show interest in lend themselves
8 more to a brief than oral arguments. The issue is
9 dealing with Legislative history and interpretation
10 of the statute.

This exchange shows that BellSouth understood that the brief was to incorporate a number of **issues** including “interpretation of the statute” and the Motions of BellSouth and UTSE are without merit.

The foregoing statement show that the briefs were with respect to both legislative history and statutory construction and not simply directory assistance. Therefore, BellSouth’s and UTSE’s argument that a single issue was to be argued in the brief are without merit.

BellSouth's and UTSE's Brief Should Be Stricken Because the Companies Do Not Provide Legislative History or Statutory Construction of the Enacted Version of the Statute and Because They Do Not Place the Consumer Advocate's Statements with Respect to an Interim Version of the Statute Which Was Not Enacted.

"Usage"¹ in the Amended Legislation Included Directory Assistance but the Circumstances Existing Then, and the Final Legislation Are Different and Therefore Preclude Such an Outcome for Either BellSouth or UTSE. Even though it is true that there was no express legislative declaration of directory assistance as a basic service, and that the Consumer Advocate Division stated to the General Assembly that the then amended legislation did not expressly make directory assistance a basic service, does not mean that directory assistance and other services included in the basic service charge was not usage contemplated by the statute. Second, although usage included directory assistance, it was also true that there was an opportunity for directory assistance, under the actual conditions then existing, to be a non-basic service for BellSouth, and a lesser possibility that DA could be a non-basic service for UTSE. Third, these opportunities ended on June 6, 1995, under the final version of the legislation, because no directory assistance tariff was in effect.

A little additional history is useful since the companies do not place the Consumer Advocate Division's statement in the proper context. We respectfully request the TRA to take official notice of the records regarding Tariff No. 94-223 and Docket No. 94-02876. These

¹ Usage is a repetition of acts and is a fact. Usage, by constant repetition, general use, and antiquity, develops into custom, and custom, when fully developed, is a law. United States v. Guy H. James, 390 F. Supp. 1193, 1209-1210 (M.D. Tenn 1972); citing, American Lead Pencil Company v. Nashville Chattanooga & St. Louis Railway, 124 Tenn. 57, 64-65, 134 S.W. 613, 615, 32 L.R.A., N.S. 323 (1910). See, also, Sutherland on Statutory Construction § 47.21 (In order to prevent their rejection as surplusage, general words take an unrestricted meaning on the ground that the legislature, by the addition of general words to an exhaustive enumeration, must have intended that they have meaning outside the class.)

official records show the history regarding directory assistance. In addition, the Division respectfully requests that the TRA take official notice of Tenn. Code Ann. § 65-5-203(b)(1).

A Tariff Was Pending Which Would Have Changed Usage to Exclude Directory Assistance.

On October 6, 1994, BellSouth filed a tariff to institute directory assistance effective November 6, 1994.² The Consumer Advocate was permitted to intervene. On December 20, 1994, the Tennessee Public Service Commission by a 2-1 vote approved the directory assistance tariff. The decision was near fiat by the TPSC since it approved the tariff without consideration of the massive new revenues of \$22 million to BellSouth. An Order approving the tariff, was entered on January 5, 1995. The Consumer Advocate Division subsequently filed a Petition for Stay and a Petition for Reconsideration.

However, the term of one of the commissioners who supported the directory assistance Order expired and a new person, Sara Kyle, became a commissioner. At a subsequent Commission Conference, Commissioner Steve Hewlett moved to reconsider the commission's directory assistance decision and was seconded by Commissioner Kyle.

At or near the same time, the Consumer Advocate Division and BellSouth entered into negotiations regarding directory assistance. Although there was a successful vote to reconsider, the Consumer Advocate Division did not take anything for granted since a decision still could have been finally reached to permit directory assistance.³ Upon consideration of the potential

² See, Exhibit A to this reply.

³ In fact there were procedural questions with unknowable results. For example, Tenn. Code Ann. §§ 4-5-317(b) and (c) provided that the same persons should participate in the reconsideration "if available."

disadvantages to consumers because of the then existing conditions, the division entered into a rate reduction agreement with BellSouth. Under the terms of the agreement, the division would no longer object to BellSouth's directory assistance tariff. In addition, the agreement contained other features of benefit to Tennessee consumers.

Unless some unknown objectors were permitted to intervene, or the TPSC staff reversed itself and presented new policy reasons against directory assistance, BellSouth would have a very good argument that denial of the agreed upon tariff was arbitrary and capricious.⁴ As a result, the agreement with BellSouth would have eliminated one of the free usages consumers received with basic telephone service.

Furthermore, BellSouth, upon proper notice, even without the agreement of the Consumer Advocate Division and the TPSC could have instituted its directory assistance tariff on April 6, 1995, pursuant to Tenn. Code Ann. § 65-5-203(b)(1) and eliminated directory assistance as a free usage. Subsection (b)(1) provides in relevant part:

If the investigation has not been concluded and a final order made at the expiration of six (6) months from the date filed of any such increase, change or alteration, the utility may place the proposed increase, change or alteration, or any portion thereof, in effect at any time thereafter prior to the final commission decision thereon upon notifying the commission, in writing, of its intention so to do; provided, that the commission may require the utility to file with the commission a bond in an amount equal to the proposed annual increase conditioned upon making any refund ordered by the commission as hereinafter provided.

Since the directory assistance tariff was filed on October 6, 1994 and six (6) months ended on April 6, 1995, BellSouth had the unilateral ability to implement its tariff. The unilateral

⁴ Agreement or not, a number of legislators and members of the public still objected to a directory assistance charge for a number of good reasons.

implementation by BellSouth would have eliminated the free directory assistance usage received with basic service and under the legislation, as then amended, directory assistance in its territory would have been a non-basic service, unless the General Assembly expressly forbid it.

In summary, even though “usage” included directory assistance and county wide calling and metro/extended area calling, at the time of the Consumer Advocate’s presentation to the legislature on April 18, 1995, unless the General Assembly expressly exempted directory assistance, BellSouth could have had it as a non-basic service unilaterally, or by virtue of its agreement with the Consumer Advocate, or the near certain approval by the TPSC under the conditions then existing. Moreover, the questioning Senator had requested to meet with the Consumer Advocate several days prior to the hearing. He and others were opposed to the DA agreement reached by BellSouth and the Consumer Advocate Division. The Senators were opposed for good reason from their point of view, e.g., the cost of constituent service would increase because directories were not always available and even if they were available many businesses and persons would not be in the directory. The division was merely being clear about the effect of the language under the circumstances.⁵

UTSE’s opportunity to change free usage in the time frame was more limited than BellSouth’s, but within the realm of possibility. In addition, pursuant to section 10(c) of the then amended legislation,⁶ a company with an earned rate which was less than its current authorized fair rate of return could request a proceeding to establish initial rates. UTSE therefore, could

⁵ Since the amended legislation placed some of the services reduced through the negotiated into non-basic service. There was no established, effective control on rates.

⁶ The April 1995 version.

have possibly initiated a price regulation plan hearing to set initial rates, under section 10(c) of that amendment, which might have changed usage if approved by the TPSC, because section 208(c) itself did not then have a time limit which established the date for determining usage basic telephone service. Thus, the TPSC, at such a hearing, could have implemented a directory assistance charge and would have likely done so if it had already permitted BellSouth to have DA.

The final legislation, however, establishes a date for the determination of usage-- June 6, 1995-- foreclosing that alternative. Furthermore, UTSE, although it claimed that it was earning less than its authorized rate of return never initiated a timely proceeding under section 209(c) in which it could arguably request a change in the initial rates or usage.


Therefore, the enacted version of the legislation essentially set a time frame for establishing free usage. The tariff changing usage had to be approved before June 6, 1995, or else usage was set under the basic telephone service classification. No company obtained TPSC approval prior to June 6, 1995⁷ or exercised its statutory right to place a DA tariff in effect under Tenn. Code Ann. § 65-5-203(b)(1). As a result usage continues to include directory assistance and the usages on that date are now custom and law.

BellSouth's representations regarding the Motion for Extension of Time are without merit. The Consumer Advocate Division submitted its brief within 3½ days of the Consumer Advocate seeing the typed transcript. In addition, the division prevented any prejudice to other parties by ordering that the Division's Administrative Secretary hold the companies briefs and

⁷ In other words usage could be different upon the condition that it was done prior to June 6, 1995. See, e.g. Sutherland on Statutory Construction § 21.06.

prevent disclosure until after the Division's brief was filed. As a result counsel for the Consumer Advocate Division did not have knowledge of the arguments of its opponents. Finally, the Motion for Extension of time affected only the Consumer Advocate and the TRA, it was not a motion which would have required the other parties to adjust their schedules.

Respectfully submitted,


L. Vincent Williams

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been faxed and mailed postage prepaid to the parties listed below this 15th day of April, 1997.

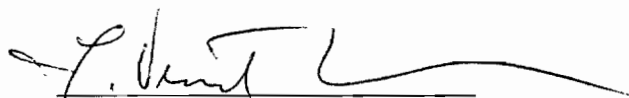
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