IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

BRIEF OF CONSUMER ADVOCATE DIVISION REGARDING DIRECTORY ASSISTANCE

The Tennessee Regulatory Authority (TRA) in its public meeting of April 15, 1997 has directed that the parties submit a brief solely regarding legislative history as it relates to directory assistance (DA). The TRA granted the utilities motion to strike the entire brief of Tennessee consumers which in part applied the rules of statutory construction to legislative history regarding directory assistance.

In order to clarify the approach desired by the agency, the Consumer Advocate Division asked Mr. H. Edward Phillips of the TRA to inform all parties regarding the TRA's intent with respect to addressing the rules of statutory construction including their relationship to legislative history. This brief reflects the Consumer Advocate Division's understanding arising from that discussion.

Statutory Construction

UTSE and BellSouth have the burden of proving that directory assistance is not a basic service under Tenn. Code Ann. § 65-5-208 (a)(1). If DA is not a basic service UTSE can institute reasonable charges for the service. If DA comes within the classification of "basic

service" instead of non-basic service, charges for DA are included in the price of basic service and shall not change for four (4) years. At the hearing and in its argument to the TRA the utilities assert that neither DA, county-wide calling or metro/extended area calling are basic service because they are not expressly enumerated in Tenn. Code Ann. § 65-5-208(a)(1). Their argument is not determinative.

The Consumer Advocate Division agrees that the features are not expressly enumerated, but argues that the analysis does not stop there because the TRA must give effect to every word of Tenn. Code Ann. § 65-5-208 (a)(1). A statute need not expressly state what is necessarily implied in order to make it effectual. *Clanton v. Cain Sloan*, 677 S.W.2d 441, 445 (Tenn. 1984). In this regard the statute contains the words "usage" and the date of "June 6, 1995".[1] As a result the Consumer Advocate Division argues that the TRA must determine whether or not basic service "usage ...on June 6, 1995 (or on the effective date of the act)" included the features (DA, county-wide calling or metro/extended area calling).

An example of the statutory construction paradigm for this type of situation is contained in the case of *Blake v. Abbott Laboratories*, C.A. No. 03A01-9509-CV-00307, filed April 24, 1996 (Tenn. App.) Pet. to rehear denied. In *Abbott*, the Court of Appeals reversed the trial Court's dismissal of a class action suit. In part the suit alleged that the defendants conspiracy to sell infant formula at an excessively high price was an "unfair or deceptive act or practice" in violation of the Tennessee Consumer Protection Act.[2] The Court looked to the propriety of the

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[1]"June 6, 1995," apparently was substituted for "the effective date of this act, as provided in chapter 408. See Exhibit A.

[2]See, *Abbott* at page 2, paragraphs 32 and 34 of plaintiffs complaint. The most common name for such an allegation is "price fixing".

trial Court's decision that price fixing was not a violation of the act.

The Court proceeded by first setting forth the statute. In that case, Tenn. Code Ann. § 47-18-109 provided in pertinent part:

> 47-18-109. **Private right of action - Damages - Notice to division.** -- (a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an **unfair or deceptive act or practice declared to be unlawful by this part**, may bring an action individually to recover actual damages. (Emphasis added).

The *Abbott* Court held that:

> Our inquiry is whether price fixing is an unfair or deceptive act or practice. **While price fixing is not among the unfair or deceptive acts or practices specifically enumerated in T.C.A. § 47-18-104, it is clear that the enumeration of unfair or deceptive acts or practices is not exclusive nor limited only to those acts enumerated**....
>
> In any event, reasonable minds cannot differ, in good conscience, that price fixing is not an unfair practice. **We have hereinbefore set out the guidelines for statutory interpretation. ....We are required to give each word its common and ordinary meaning.**

The Court went on to define "unfair" using dictionaries and subsequently went on to consider its new holding in light of the General Assembly's stated purposes of the Consumer Protection Act. *Abbott* at p. 11-12.

The Consumer Advocate Division respectfully submits that this agency should use "the set out guidelines for statutory construction" to construe the statute in the case *sub judice*.

> The cardinal rule of Tennessee statutory interpretation is to ascertain and give effect to the intent and purpose of the Legislature in relation to the subject matter of the legislation, all rules of construction being but aids to that end. *Rippeth v.*

Connelly, 60 Tenn. App. 430, 447 S.W.2d 380, 381 (1969). A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. *Marion County Board of Commissioners v. Marion County Election Commission*, 594 S.W.2d 681 (Tenn. 1980). **The court should assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose.** *Anderson Fish & Oyster Company v. Olds*, 197 Tenn. 604, 277 S.W.2d 344 (1955). See also *Crowe v. Ferguson*, 814 S.W.2d 721 (Tenn. 1991). Where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is within legislative competency, "the duty of the courts is simple and obvious, namely, to say sic lex scripta [the law is so written], and obey it." *Miller v. Childress*, 21 Tenn. (2 Hum.) 320, 321-22 (1841). *Abbott,* at p. 7-8. (Emphasis added.)

The statute in question in the case *sub judice*, Tenn. Code Ann. § 65-5-208(a)(1), provides in pertinent part:

> **Classification of services - Exempt services - Price floor - Maximum rates for non-basic services.**--(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:
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> > (1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.

The TRA's inquiry, then, is whether directory assistance was a usage on June 6, 1995. While directory assistance is not among the services specifically enumerated, it is clear that the enumeration is not exclusive or limited only to those items enumerated.

In any event, reasonable minds cannot differ, in good conscience, that directory assistance

was not a usage on June 6, 1995. In addition, the TRA is required to give each word its common and ordinary meaning.[3]

The term "usage" is defined as follows:

1.a. The act, manner, or amount of using; use: *water usage*.

b. The act or manner of treating;

2. A usual, habitual, or accepted practice. See Syns at **habit**.[4]

American Heritage College Dictionary, Third Edition, Houghton-Mifflin Company, (1993).

> 1. The act or manner of using or treating. 2. Customary and accepted practice or procedure.

Webster's II, New Riverside University Dictionary, Houghton-Mifflin Company, (1994).

> A reasonable and lawful public custom in a locality concerning particular transactions which is either known to the parties, or so well established, general, and uniform that they must be presumed to have acted with reference thereto. Practice in fact.
>
> Habitual or customary practice which prevails within geographical or sociological area, and is course of conduct based upon series to actual occurrences, and in order to be controlling upon parties to contract, it must be adopted by them, or be well known to parties or to persons in their circumstances.

Black's Law Dictionary, Sixth Edition, West Publishing Company (1990).

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.*

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[3] The "Quality" of basic service can also include DA. Quality is the essential character of a service. **Webster's II, New Riverside University Dictionary**. It is descriptive of the composition of substance... definitive of character, nature and degree of excellence of an article. In pleading, it means an attribute or characteristic by which one thing is distinguished from another. **Black's Law Dictionary**.

[4] Habit- 1.a. a recurrent, often unconscious pattern of behavior acquired through frequent repetition. 2. Customary manner or practice.

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.). The act or manner of treating directory assistance on June 6, 1995 was as a toll free component of basic service. The usual, habitual, or accepted practice was to treat directory assistance as a toll free component of basic service. The reasonable and lawful public custom in the UTSE locality concerning basic service on June 6, 1995 known to the parties, or so well established, general, and uniform that parties must be presumed to have acted with reference thereto was that directory assistance was a toll free component of basic service and the practice in fact was that directory assistance was a toll free component of basic service.

Finally, the agency should look to the purposes and policy of the statute. In this regard, chapter 408 of the 1995 Public Acts as codified in Tenn. Code Ann. § 65-4-123 contains an express intention to protect consumers. It protects consumers by assuring just and reasonable rates.

With regard to the protection of consumers, the preamble to chapter 408 provides: "WHEREAS, Just and reasonable rates can be assured ..." This policy is further enunciated in Tenn. Code Ann. § 65-4-123 by establishing a new declaration of public policy. This section provides in pertinent part:

Declaration of telecommunications services policy.

> .... To that end, the regulation of telecommunications services and telecommunications services providers **shall protect the interests of consumers** without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable. (Emphasis added.)

This is the first time such a statutory declaration has been made with respect to the regulation of public utilities.

The declaration of policy is a marked departure from previously existing law which focused the agency's attention on the general supervision and control of utilities and financial stability of utilities. Moreover, reasonable minds cannot differ that Tenn. Code Ann. § 65-5-208 (a)(1) evinces an intent which is consistent with the declared policy of protecting the interests of consumers and assuring just and reasonable rates. Directory assistance was a customary usage included with basic service on June 6, 1995 and in fact continues to be a usage at this late date. Therefore, directory assistance is within the classification of basic service and UTSE has no statutory authority to institute charges for directory assistance.

Legislative History

Having established that the principled application of the rules of statutory construction require that directory assistance be classified as a basic service usage on June 6, 1995, there should be no further need of interpretive aids. The Consumer Advocate Division, however, at the direction of the agency, now considers the extrinsic interpretive aid of legislative history.

Resort to the genesis of chapter 408 of the 1995 Public Acts and its amendments can be useful when there is a need to resort to extrinsic aids such as legislative history in order to ascertain the legislative intent. (Citation omitted). However, proposed legislation, not enacted,

has no consequence whatever upon the interpretation of an existing statute. While such proposed legislation may indicate to some extent some of the individual legislators' interpretation of an existing statute, it is in no way controlling or, for that matter, relevant, to the court's duty to properly construe statutes. *Abbott*, at p. 7; See, *Clanton v. Cain Sloan*, 677 S.W.2d at 445, citing, *Murphy v. City of Topeka-Shawnee City*, 630 P.2d 186, 192, 6 Kan. App.2d 488 (1981).

In this regard, UTSE and BellSouth apparently drafted some proposed legislation while BellSouth was undergoing an earnings investigation to determine its future rates. The companies persuaded Senator Rochelle to sponsor the legislation in the Senate. See, e.g. Attachment 1, SB 891. Representative John Bragg was persuaded to sponsor the legislation in the House of Representatives. The bill number in the House was 695. See, e.g. Attachment 2.

The legislation gained some notoriety and the Consumer Advocate Division was asked to estimate the impact of the legislation. The Division estimated an $800 million adverse impact to consumers over a five year period plus the absence of other consumer protection.

The Tennessee Public Service Commission, the predecessor to this agency, was asked to confirm or deny the Consumer Advocate Division's impact statements. The agency did not deny the impacts. Moreover, the TPSC was embattled, and as it turned out, mortally wounded from its "perceived[5]" favoritism of utilities at the expense of consumers and "perceived" irregularities regarding campaign contributions and penalties. Indeed, Governor Sunquist had committed to eliminating the agency and it was fighting for its very existence. As a result, there was public and legislative concern regarding the legislation propose by UTSE and BellSouth and how

[5] Confirming or denying the validity of these perceptions is beyond the scope of this brief.

consumers would be protected.

The initial legislation was filed on February 2, 1995. After a number of hearings, the initial legislation was rewritten and substituted.[6] Even after the rewrite, Representative Bragg and others expressed some concerns about the legislation as amended. Representative Bragg subsequently announced that a committee composed of members of the House of Representatives, the utilities, and consumer representatives such as the American Association of Retired Persons (AARP) would review and make changes to the legislation in the House.[7] The Majority Leader of the House, Bill Purcell, headed the committee.

The committee had several meetings and proposed amendments to the rewritten and substituted legislation. See, Attachment 4, May 9, 1995 Memorandum from Representative Bragg to Representative Rufus Jones. A substantial portion of the amendments were adopted in the final legislation.

Besides determining relevance, the legislative criterion of decision sometimes provides a useful principle with which to weigh the probative force of historical information. The perspective from which a fact is viewed influences the judgment on its meaning and importance. *Sutherland on Statutory Construction*, § 48.02. Postpassage remarks by legislators, however explicit, cannot serve to change the legislative intent expressed prior to an act's passage. *Sutherland* at § 48.15.

Furthermore, statements by sponsors must be evaluated cautiously for two reasons. The

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[6] See, e.g., Attachment 3, April 7, 1995 Letter of State Representative Dan Byrd transmitting a rewrite of HB 695 by Representative Bragg.

[7] The Consumer Advocate Division did not participate in these negotiations.

first reason is that in actual practice the legislator who is identified as the sponsor of a bill often assumes that role at the instance of some private party who is interested in passage of the bill. The "sponsor" in fact knows no more about the bill than anyone else. Second, where the sponsor does have specific knowledge of the bill, his statements may sacrifice complete candor to partisan interest in enactment of the bill. *Sutherland* at § 48.15.

Generally, the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur because the bill already includes those provisions. Other interpretive aids may indicate that this is the case. Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill. An amendment may have been adopted, only because it better expressed a provision already embodied in the original bill or because the provision in the original bill was unnecessary as unwritten law would produce the same result without it. *Sutherland* at § 48.18.

Section 6 (b) of the original legislation stated in relevant part:

> For purposes of establishing the formula, all existing rates, terms and conditions for the services provided on February 1, 1995, are deemed just and reasonable, and those rates shall be the initial rates on which the formula is based.

The original legislation includes the terms and conditions for the services provided on February 1, 1995. "Terms and conditions" for services is synonymous with the concept of "usage". We know of no legislative objections to the terms and conditions language but this provision was not enacted.

The rewritten and substituted legislation set initial rates based upon the basic telephone service definitions and changed "terms and conditions" to "usage." The final legislation changed the basic telephone service definition to "... usage ...existing on the effective date of this act"[8]

With regard to Directory Assistance and County Wide Calling/Metro Area/Extended Area Calling, the following exchange took place:

> Wilder: Sen. Kyle.
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> Kyle: So in present, do you, in, all right. Second question concerns directory assistance. 411 service. Does one get directory assistance under universal service of this bill?
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> Wilder: Sen. Rochelle.
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> 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's competition out there. And so, so because there's competition now, that's not addressed in the bill.
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> Wilder: Sen. Henry. Sen. Kyle is still, I thought you yielded, Sen. Kyle. I apologize, you sat down, I didn't know.
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> Kyle: I'm sorry.
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> Wilder: Yes.
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> Kyle: In directory assistance, I believe, and I, I assume the Senate is going to go forward and, and pass this legislation today based upon the votes that I've seen and the mood that I feel on the floor. I, I hope that the House addresses the issue of 911 service. I question the wisdom of hoping they're going to do something, and hoping that we're going to agree with it, because with them, we're getting, we're concurring in amendments, we can't amend how the House deals with the 911 issue. And to me it's a very simple concept that we need to make sure that everybody that's 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's funded. I don't how that's funded when two or three people are in the phone business. This is not something

[8] Chapter 408, Section 9.

I've 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, I know there are not amendments on the point, and I haven't entered into the debate on that particular issue. The second matter...

Wilder: Sen. Rochelle.

Kyle: Yes, please.

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

Wilder: Sen. Kyle, Sen. Kyle.

Kyle: Secondly, the directory assistance issues, I didn't realize, I hope that is addressed in there also. Perhaps it may be, 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, why I am going to vote as I am going to vote on this bill. And I guess it goes back to the very first matter that we had. And I realize that I am most the unpersuasive person in the Senate on this point, but I will predict to you this time next year, we will have passed the telecommunications bill, there will be competition, it will be three weeks from the end of session, and you won't have agreed who your regulator is going to be unless that bill Sen. Haynes passes, passes this Senate. And you need to ask yourself, where you are going to be at this time next year if you don't agree, if you don't vote today, agree today, that you're going to support the creation of a regulatory body this year. You're going to find yourself right down here right now at the end, and until we determine the viability of that particular bill, I am not in a position to support this legislation.

Wilder: I have Sen. Henry, I think, and then Sen. Dixon.

Henry: Mr. Speaker, I'd like to make a statement on this bill. I think everybody agrees right now Tennessee enjoys very advantageous telephone rates. I believe that's agreed to by both the proponents and the opponents of this bill. If that's the case, you start from there. Yesterday, I spent more than an hour or two with the very best lawyers in Tennessee on, in opposition to this bill, and I spent the same amount of time with knowledgeable people who are for it. And what I make it out to be in the final analysis is this, when the competition begins, the new companies will pick off the best accounts from the Bell company, and in order to counteract

that, and to have some money to operate on to tool up to meet this competition, they need to make some money, and under this bill, they will have four years to see if by economy, they can do better than these lower rates which we already have, which are guaranteed for four years. If they are able to do that by economizing, they will have a fighting chance, even though their best accounts will have been picked off, and now, it seems to me that that's what the bill is all about.

Haynes: Sen. Dixon, and then Sen. Gilbert, and then Sen. Burks. Sen. Dixon, you're recognized.

Dixon: Thank you, Mr. Speaker, members of the Senate, I too rise to say that I won't vote for this bill. This is a bad bill. We haven't done our homework on this bill. There are so many unanswered questions, just simple. What are the basic services provided in this bill? When we look at it, what is, what is going to happen when somebody orders a phone, if they just disconnect that telephone? None of those points have been addressed. We always seem to be in hurry. But just about every citizen in this state has a telephone and you are going to impact their lives as you make a decision here today. If we're going to vote for this bill, we ought to do it in a responsible, diligent fashion. If we are going to support this legislation, we need to take the necessary time. Time ought not to be an object. We should be looking out for the interests of the citizens of this state first. I'm not concerned about what South Central Bell or AT&T. I'm concerned about those seniors that we will see this summer and them asking me why did you raise my phone bill or why did you change the way services were provided without at least talking to me about that. We haven't done that. We'll go back home, and at some point down the road, changes will be made, and when they will be made, I don't think we will have an adequate answer for those persons who are just common everyday citizens. We came here to represent them first, and then the interests of these other forces secondly. And I hope we never forget that, that we're here to represent the 5 million people of Tennessee first, and then those other interests second. Too many questions have been unanswered and the information is readily available. Sen. Gilbert talked about Mississippi. They've got a piece of legislation you can look at. Florida has got a piece of legislation you can look at. Georgia has got a piece of legislation you can look at. Pennsylvania has got a piece of legislation you can look at, and none of those pieces of legislation, ladies and gentlemen, look like what you are about to pass today.

Wilder: Sen. Gilbert.

Gilbert: Mr. Speaker, members of the Senate, first of all, I just to applaud Sen. Rochelle. He's done an excellent job on a very difficult bill. And I'm glad he's a

part of the Senate. I enjoy serving with him. It's a privilege and a pleasure. I also want to just compliment all the telecommunication companies and their employees that are here. We bandied your names about for the last couple of weeks and you're great corporate citizens, and we appreciate what you contribute. And obviously we're going to pass the bill here in a little bit, and hopefully it will be for the best of Tennessee. Sen. Rochelle, I need to ask you four simple questions just to make sure the record is straight so that I'll understand and so that everybody in the Senate will appreciate what the impact of this bill would be. First question, sir, if you would be so kind to tell us, is it not true under the bill as is before us with the amendments, that the telecommunication company, let me just use Bell, could institute charges for directory assistance?

Wilder: Sen. Rochelle. Sen. Rochelle.

Rochelle: *I believe they already are authorized to institute charges for directory assistance*, and they don't, they don't do any now, and so, that's my understanding, they are, **but it doesn't really change that**.[9]

Wilder: Sen. Gilbert.

Gilbert: The 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 took some kind of requirement by the PSC to do it, but I think the answer is under this bill, they'd 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 the PSC has ordered in past year, has been of great benefit, economic development. Is it not true, under the bill as you passed, that telephone companies could choose that system away and start charging again?

Wilder: Sen. Rochelle.

Rochelle: OK, I am told by the balcony[10], that is not, you say, can they take away, ask me again. What can they take away? What are you asking about?

Wilder: Sen., Sen. Gilbert.

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[9]Apparently, Senator Rochelle was referring to the TPSC approval of Directory Assistance charges prior to the reconsideration. No valid authorization was ever in effect.

[10] Presumably, BellSouth or UTSE, a proponent of the legislation.

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

Wilder: Sen. Rochelle.

Rochelle: For what?

Wilder: Sen. Gilbert.

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

Wilder: Sen. Rochelle.

Rochelle: Again, that's a question I, I, I've been trying to get you all for months now to ask me questions so that I can get you the answers. I'm told from the balcony, because I hadn't heard that one before, ***I'm told from the balcony, the answer to you is no.***[11]

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Wilder: Sen. Rochelle.

Rochelle: First, let me tell you on the directory assistance, I am told that the companies have an agreement with the consumer advocate that would be effective on that to prevent your concern there. And under, **under the rules as they would exist after this passed, no they would not be able to charge, charge tolls for what are now toll free**. In regard to the, to the, you are talking about the fiber optics network, what would encourage them to be forward thinking in the future? I guess, you know, I have to say to you, the company that is best equipped, the better, the company that becomes the most technologically advanced is the company that's going to be operating the most efficiently, and so that, that basic principle of the free market that you've got to consider not only your income, you've got to consider your outgo, you've got to consider the state of your technology. And so I think that's what will encourage every competitor to try to be as technology, as technologically advanced as possible. (Emphasis added).

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[11]Since neither county-wide calling or metro/extended area calling was enumerated in Tenn. Code Ann. § 65-5-208(a)(1), the only provision of the subsection it could have arisen under at the time was "usage". Therefore "usage" does have a meaning with regard to services.

Senator Rochelle states that with regard to directory assistance, the proposed legislation "...**doesn't really change that".** In addition, these passages either show that there was no intent to charge for directory assistance, or for what is now toll free, or it is not probative from the standpoint of determining whether or not it was the legislative intent for directory assistance to be a basic telephone service.

Pursuant to Tenn. Code Ann. §§ 4-5-313(1), (6) the Consumer Advocate Division respectfully requests and believes it appropriate for the TRA to take official notice that there was no tariff in effect in this state which permitted a company to institute charges or tolls for intrastate directory assistance at the time Senator Rochelle made his remarks.

In *Weinberger v. Rossi*, 456 U.S. 25, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982) respondents sought to rely upon isolated statements of a legislative sponsor which were inconsistent with the actual state of the law. *Id.* 456 U.S. at 34-35, 102 S.Ct. at 1517. The Court held that an isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish legislative intent. Id. And ordinarily, the contemporaneous remarks of a sponsor are certainly not controlling in analyzing legislative history. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980; *Chrysler Corporation v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979); followed, *Arkansas State Bank v. Resolution Trust Corp.*, 911 F.2d 161, 175 (8th Cir. 1990).

The exchange above shows that Senator Rochelle may not have had sufficient personal knowledge of the existing state of facts regarding directory assistance. As a result, the senator's remarks about directory assistance are not authoritative.

In the alternative, it shows that the legislative intent was that consumers would not be charged for what was previously free. The only language in Tenn. Code Ann. § 65-5-208 from which such an interpretation could arise is from the term "usage". When a customer subscribed to telephone service, that customer/consumer understands that County Wide Calling, Extended Area/Metro Area Calling, and Directory Assistance are the reasonable and lawful elements customarily in the service area since they have traditionally been considered part of basic local telephone service. As a result, "usage" does have a meaning with respect to the basic telephone service classification. Usage covers the free services customarily included with basic services and this construction is consistent with the declared legislative intent to protect consumers.

A Tariff Was Pending Which Could Have Changed The Customary Usage of Directory Assistance.

The questions of legislators regarding directory assistance should be considered in the context of the directory assistance contested case then pending at the Tennessee Public Service Commission. The Consumer Advocate Division requests the TRA to take official notice of the facts, the procedural posture of the contested case and the law. On October 6, 1994, BellSouth filed a tariff with the Tennessee Public Service Commission to institute directory assistance charges effective November 6, 1994.[12] 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

[12] See, Exhibit A to this reply.

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.[13] Upon consideration of the potential 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 provide some protection 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.[14] As a result, the agreement with BellSouth could have eliminated one of the free usages consumers received with basic telephone service.

Furthermore, BellSouth, upon proper notice, even without the agreement of the

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[13] 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."

[14] 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.

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 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.

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,[15] 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 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

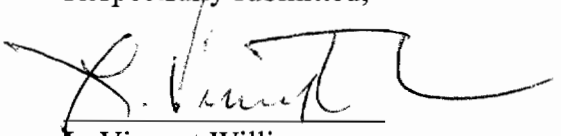
[15] The April 1995 version.

208(c) itself did not then have a time limit[16] 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-- the effective date of the act or 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 in part set a time frame for establishing toll free usage and basic service. 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, 1995[17] 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.

Respectfully submitted,



L. Vincent Williams

[16] It is beyond the scope of this brief to reach a final position regarding this possibility since it was never actually at issue.

[17] 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.

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 18th day of April, 1997.

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Washington, DC 20036

L. Vincent Williams

Exhibit A

SENATE BILL NO. 891

PASSED: May 25, 1995

JOHN S. WILDER
SPEAKER OF THE SENATE

JIMMY NAIFEH, *SPEAKER*
HOUSE OF REPRESENTATIVES

APPROVED this 6 day of June 1995

DON SUNDQUIST, *GOVERNOR*

State of Tennessee

SENATE BILL NO. 891

By Rochelle, Henry, Atchley, Rice, Hamilton

Substituted for: House Bill No. 695

By Bragg, Purcell, Jackson, Robinson, Napier, Bell, Wood, Davidson, Pinion, McAfee, Ford, Byrd

AN ACT To amend Tennessee Code Annotated, Title 65, Chapter 4, Parts 1 and 2 and Title 65, Chapter 5, Part 2, relative to the regulation of telecommunications service providers by the Public Service Commission.

WHEREAS, It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market; and

WHEREAS, Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each; and

WHEREAS, Just and reasonable rates can be assured without use of cumbersome rate base-rate of return methods; and

WHEREAS, Universally affordable basic telephone service should be preserved; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, Chapter 4, is amended by adding the following as a new appropriately designated section:

Section 65-4-_____. Declaration of Telecommunications Services Policy. The General Assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and, rates charged to residential customers for essential telecommunications services shall remain affordable.

SECTION 2. Tennessee Code Annotated, Section 65-4-101, is amended by adding the words and punctuation "telecommunications services," between the comma following the word "telegraph" and the words "or any other like system."

SECTION 3. Tennessee Code Annotated, Section 65-4-101, is amended by adding the following new language as subsections (c), (d), (e), (f), (g), and (h):

(c) "Telecommunications Service Provider" means any Incumbent Local Exchange Telephone Company or certificated individual or entity, or individual or entity operating pursuant to the approval by the commission of a franchise within Section 6 of this act, authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law.

(d) "Incumbent Local Exchange Telephone Company" means a public utility offering and providing Basic Local Exchange Telephone Service as defined by Section 65-5-208 pursuant to tariffs approved by the Commission prior to the effective date of this act.

(e) "Competing Telecommunications Service Provider" means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after the effective date of this act unless otherwise exempted from this definition by state or federal law.

(f) "Interconnection Services" means telecommunications services, including intrastate switched access service, that allow a Telecommunications Service Provider to interconnect with the networks of all other Telecommunications Service Providers.

(g) "Current Authorized Fair Rate of Return" means:

(1) for an Incumbent Local Exchange Telephone Company operating pursuant to a regulatory reform plan ordered by the Commission under TPSC Rule 1220-4-2-.55, any return within the range contemplated by Section 1220-4-2-.55 (1)(c)(1) or 1220-4-2-.55 (d);

(2) for any other Incumbent Local Exchange Telephone Company, the rate of return on rate base most recently used by the Commission in an order evaluating its rates.

(h) "Gross Domestic Product-Price Index (GDP-PI)" used to determine limits on rate changes means the final estimate of the Chain-Weighted Gross Domestic Product-Price Index as prepared by the U.S. Department of Commerce and published in the Survey of Current Business, or its successor.

SECTION 4. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language:

Section 65-5-207. Universal Service.

(a) Universal service, consisting of residential Basic Local Exchange Telephone Service at affordable rates and carrier-of-last-resort obligations must be maintained after the local telecommunications markets are opened to competition. In order to ensure the availability of affordable residential Basic Local Exchange Telephone Service, the Commission shall formulate policies, promulgate rules and issue orders which require all Telecommunications Service Providers to contribute to the support of universal service.

(b) The Commission shall, within thirty (30) days of the effective date of this act, initiate a generic contested case proceeding to determine the cost of providing universal service, determine all current sources of support for universal service and their associated amounts, identify and assess alternative universal service support mechanisms, and determine the need and timetable for modifying current universal service support mechanisms and implementing alternative universal service support mechanisms. The Commission shall issue its decision in the universal service proceeding prior to January 1, 1996.

(c) The Commission shall create an alternative universal service support mechanism that replaces current sources of universal service support only if it determines that the alternative will preserve universal service, protect consumer welfare, be fair to all Telecommunications Service Providers, and prevent the unwarranted subsidization of any Telecommunications Service Provider's rates by consumers or by another Telecommunications Service Provider. To accomplish these objectives, the Commission, if it creates or subsequently modifies an alternative universal service support mechanism, shall:

(1) restrict recovery from the mechanism by any Telecommunications Service Provider to an amount equal to the support necessary to provide universal service;

(2) consider provision of universal service by Incumbent Local Exchange Telephone Companies and by other Telecommunications Service Providers;

(3) order only such contributions to the universal service support mechanism as are necessary to support universal service and fund administration of the mechanism;

(4) administer the universal service support mechanism in a competitively neutral manner, and in accordance with established Commission rules and federal statutes;

(5) determine the financial effect on each universal service provider caused by the creation or a modification of the universal service support mechanism, and rebalance the effect through a one-time adjustment of equal amount to the rates of that provider;

(6) when ordering a modification, include changes in the cost of providing universal service in the rebalancing required by subsection (5);

(7) when performing its duties under subsections (5) and (6), order no increase in the rates for any Interconnection Services; and

(8) consider, at a minimum:

(i) the amount by which the embedded cost of providing residential Basic Local Exchange Telephone Service exceeds the revenue received from the service, including the cost of the carrier-of-last-resort obligation, for both high- and low-density service areas;

(ii) the extent to which rates for residential Basic Local Exchange Telephone Service should be required to meet the standards of Section 65-5-208(c);

(iii) intrastate access rates and the appropriateness of such rates as a significant source of universal service support.

(d) The commission shall monitor the continued functioning of universal service mechanisms and shall conduct investigations, issue show cause orders, entertain petitions or complaints, or adopt rules in order to assure that the universal service mechanism is modified and enforced in accordance with the criteria set forth in this section.

(e) Nothing in this section shall be construed to require the commission to raise residential Basic Local Exchange Telephone Service rates.

SECTION 5. Tennessee Code Annotated, Section 65-4-203, is amended by adding the following new subsection (c):

(c) The provisions of this Section shall not apply to Telecommunications Service Providers.

SECTION 6. Tennessee Code Annotated, Section 65-4-207, is amended by designating the existing language as subsection (a) and by adding the following new subsection (b):

(b) The provisions of this section shall not apply to Telecommunications Service Providers; provided, however, this section shall continue to apply with respect to any ordinance adopted, and any franchise granted pursuant to such an ordinance, prior to the effective date of this act.

SECTION 7. Tennessee Code Annotated, Section 65-4-201, is amended by designating the existing language as subsection (a) and by adding new subsections (b), (c) and (d) as follows:

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the Commission a

certificate of convenience and necessity for such service or territory; provided, however, that no Telecommunications Services Provider offering and providing a Telecommunications Service under the authority of the Commission on the effective date of this act shall be required to obtain additional authority in order to continue to offer and provide such Telecommunications Services as it offers and provides as of such effective date.

(c) After notice to the Incumbent Local Exchange Telephone Company and other interested parties and following a hearing, the Commission shall grant a certificate of convenience and necessity to a Competing Telecommunications Service Provider if after examining the evidence presented, the Commission finds:

(i) The applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and

(ii) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

A Commission order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a Competing Telecommunications Service Provider shall be entered no more than sixty (60) days from the filing of the application.

(d) Subsection (c) shall not be applicable to areas served by an Incumbent Local Exchange Telephone Company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider or unless such Incumbent Local Exchange Telephone Company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

SECTION 8. Tennessee Code Annotated, Title 65, Chapter 4, is amended by adding the following as a new appropriately designated section:

Section 65-4-_____. Administrative Rules.

(a) All Telecommunications Services Providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all Telecommunications Services Providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other Telecommunications Services Providers.

(b) Prior to January 1, 1996, the Commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a Basic Local Exchange Telephone Service or unbundled features or functions with services of other providers.

These rules shall also ensure that all Telecommunications Services Providers who provide Basic Local Exchange Telephone Service or its equivalent provide each customer a basic White Pages directory listing, provide access to 911 Emergency Services, provide free blocking service for 900/976 type services, provide access to Telecommunications Relay Services, provide Lifeline and Link-Up Tennessee services to qualifying citizens of the state and provide educational discounts existing on the effective date of this act.

(c) The granting of applications for certificates of convenience and necessity to Competing Telecommunications Service Providers or the adoption of a price regulation plan for Incumbent Local Exchange Telephone Companies shall not be dependent upon the promulgation of these rules.

SECTION 9. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language as:

Section 65-5-208. Competitive Rules.

(a) Services of Incumbent Local Exchange Telephone Companies who apply for price regulation under Section 65-5-209 shall be classified as follows:

1. "Basic Local Exchange Telephone Services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on the effective date of this act or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on the effective date of this act. Rates for these services shall include both recurring and nonrecurring charges.

2. "Non-Basic Services" are telecommunications services which are not defined as Basic Local Exchange Telephone Services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

(b) The Commission, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the Commission may exempt Telecommunications Service Providers from such requirements as appropriate. The Commission shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

(c) Effective January 1, 1996, an Incumbent Local Exchange Telephone Company shall adhere to a price floor for its competitive services subject to such determination as the Commission shall make pursuant to Section 65-5-207. The price floor shall equal the Incumbent Local Exchange Telephone Company's tariffed rates for essential elements utilized by Competing Telecommunications Service Providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the Commission shall exempt a service or group of services provided by an Incumbent Local Exchange Telephone Company from the requirement of the price floor. The Commission shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

(d) The maximum rate for any new Non-Basic Service first offered after the effective date of this act shall not exceed the stand alone cost of the service.

SECTION 10. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language as:

Section 65-5-209. Price Regulation Plan.

(a) Rates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this Section. Using the procedures established in this section, the Commission shall ensure that rates for all Basic Local Exchange Telephone Services and Non-Basic Services are affordable on the effective date of price regulation for each Incumbent Local Exchange Telephone Company.

(b) An Incumbent Local Exchange Telephone Company shall, upon approval of its application under subsection (c), be empowered to, and shall charge and collect only such rates that are less than or equal to the maximum permitted by this section and subject to the safeguards in Section 65-5-208 (c) and (d) and the non-discrimination provisions of this Title.

(c) The Commission shall enter an order within ninety (90) days of the application of an Incumbent Local Exchange Telephone Company implementing a price regulation plan for such company. With the implementation of a price regulation plan, the rates existing on the effective date of this act for all Basic Local Exchange

Telephone Services and Non-Basic Services as defined in Section 65-5-208 are deemed affordable if the Incumbent Local Exchange Telephone Company's earned rate of return on its most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j) is equal to or less than the Company's Current Authorized Fair Rate of Return existing at the time of the Company's application. If the Incumbent Local Exchange Telephone Company's earned rate of return on its most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j) is greater than the Company's Current Authorized Fair Rate of Return, the Commission shall initiate a contested, evidentiary proceeding to establish the initial rates on which the price regulation plan is based. The Commission shall initiate such a rate-setting proceeding to determine a fair rate of return on the Company's rate base using the actual intrastate operating revenues, expenses, rate base and capital structure from the Company's most recent TPSC 3.01 report as audited by the Commission staff pursuant to subsection (j). If the Incumbent Local Exchange Telephone Company's earned rate of return is less than its Current Authorized Fair Rate of Return, the Company may request the Commission to initiate a contested, evidentiary proceeding to establish the initial rates upon which the price regulation plan is based. Upon request by the Incumbent Local Exchange Telephone Company, the Commission shall initiate such a contested, evidentiary proceeding using the same rate-setting procedures described above. Rates established pursuant to the above process shall be the initial rates on which a price regulation plan is based, subject to such further adjustment as may be made by the Commission pursuant to Section 65-5-207.

(d) If not resolved by agreement, the Commission shall, on petition of the Competing Telecommunications Services Provider, hold a contested case proceeding within thirty (30) days to establish initial rates for new interconnection services provided by an Incumbent Local Exchange Telephone Company subsequent to the effective date of this act, which rates shall be set in accordance with the provisions set forth in this act. The Commission shall issue a final order within twenty (20) days of the proceeding.

(e) A price regulation plan shall maintain affordable Basic and Non-Basic rates by permitting a maximum annual adjustment that is capped at the lesser of one-half (1/2) the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An Incumbent Local Exchange Telephone Company may adjust its rates for Basic Local Exchange Telephone Services or Non-Basic Services only so long as its aggregate revenues for Basic Local Exchange Telephone Services or Non-Basic Services generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan.

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial Basic Local Exchange Telephone Service rates of an Incumbent Local Exchange Telephone Company subject to price regulation shall not increase for a period of four (4) years from the date the Incumbent Local Exchange Telephone Company becomes subject to such regulation. At the expiration of the four (4) year period, an Incumbent Local Exchange Telephone Company shall be permitted to adjust annually its rates for Basic Local Exchange Telephone Services in accordance with the method set forth in subsection (e) provided that in no event shall the rate for residential Basic Local Exchange Telephone Service be increased in any one (1) year by more than the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation.

(g) Notwithstanding any other provision of this act, a price regulation plan shall permit a maximum annual adjustment in the rates for Interconnection Services that is capped at the lesser of one-half (1/2) the percentage change in inflation for the United States using the Gross Domestic Product-Price Index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An Incumbent Local Exchange Telephone Company may adjust its rates for Interconnection Services only so long as its aggregate revenues generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by this subsection, provided that each new rate must comply with the requirements of Section 65-5-208 and the non-discrimination provisions of this Title. Upon filing by a Competing Telecommunications Service Provider of a complaint, such rate adjustment shall become subject to Commission review of the adjustment's

compliance with the provisions of this act and rules promulgated under this act. The Commission shall stay the adjustment of rates and enter a final order approving, modifying or rejecting such adjustment within thirty (30) days of the complaint.

(h) Incumbent Local Exchange Telephone Companies subject to price regulation may set rates for Non-Basic Services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g), the non-discrimination provisions of this Title, any rules or orders issued by the Commission pursuant to Section 65-5-208(c) and upon prior notice to affected customers. Rates for call waiting service provided by an Incumbent Local Exchange Telephone Company subject to price regulation shall not exceed, for a period of four (4) years from the date the company becomes subject to such regulation, the maximum rate in effect in the state for such service on the effective date of this act.

(i) Incumbent Local Exchange Telephone Companies subject to price regulation shall not be required to seek regulatory approval of their depreciation rates or schedules.

(j) For any Incumbent Local Exchange Telephone Company electing price regulation under Section 65-5-209(c), the Commission shall conduct an audit to assure that the TPSC 3.01 Report accurately reflects, in all material respects, the Incumbent Local Exchange Telephone Company's achieved results in accordance with Generally Accepted Accounting Principles as adopted in Part 32 of the Uniform System of Accounts, and the ratemaking adjustments to operating revenues, expenses and rate base used in the Commission's most recent order applicable to the Incumbent Local Exchange Telephone Company. Nothing herein is to be construed to diminish the audit powers of the Commission.

(k) Incumbent Local Exchange Telephone Companies subject to price regulation shall maintain their commitment to the FYI Tennessee Master Plan to the completion of the funded requirements with any alterations to the plan to be approved by the Commission.

SECTION 11. Tennessee Code Annotated, Title 65, Chapter 5, Part 2, is amended by adding the following new language as:

Section 65-5-210. Commission Jurisdiction.

(a) In addition to any other jurisdiction conferred, the Commission shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of this act.

(b) The Consumer Advocate shall retain all powers with respect to this act as is provided in Tennessee Code Annotated, Section 65-4-118, or any future legislation.

SECTION 12. Nothing in this act shall be construed as removing the powers of the Commission pursuant to Tennessee Code Annotated, Section 65-5-202.

SECTION 13. Nothing in this Act shall affect the authority and duty of the Commission to complete any investigation pending at the time this act becomes effective.

SECTION 14. Nothing in this act shall be construed to affect the assessment for ad valorem taxation of property used to provide telecommunications services, and to that end it is declared that the fifty-five percent (55%) level of assessments shall remain applicable to property used in whole or in part to provide telecommunications services other than cellular telephone services, radio common carrier services, or long distance telephone services.

SECTION 15. The General Assembly shall evaluate the implementation of the provisions of this act every two (2) years for not less than the next six (6) years by requiring the submission of a report prepared by the Commission consisting of the following information:

(a) The compliance of market participants with the provisions of this act;

(b) The status of universal service in Tennessee;

(c) The availability of service capabilities and service offerings subdivided by facilities-based and non-facilities-based, for each Telecommunications Services Provider;

(d) The number of customers, access lines served, and revenues, subdivided by residential and business, for each Telecommunications Services Provider;

(e) The impact of federal telecommunications initiatives;

(f) The degree of technological change in the marketplace;

(g) The technical compatibility between providers;

(h) The service performance of providers; and,

(i) Any other information the Commission considers necessary to proper oversight and evaluation.

SECTION 16. Each Telecommunications Service Provider shall file with the commission a small and minority owned telecommunications business participation plan within sixty (60) days of the effective date of this act. Competing Telecommunications Service Providers shall file such plan with the Commission with their application for a certificate. Such plan shall contain such entity's plan for purchasing goods and services from small and minority telecommunications businesses and information on programs, if any, to provide technical assistance to such businesses. All providers shall update plans filed with the commission annually. For purposes of this act, the term "minority business" means a business which is solely owned, or at least fifty-one percent (51%) of the assets or outstanding stock of which is owned, by an individual who personally manages and controls the daily operations of such business, and who is impeded from normal entry into the economic mainstream because of race, religion, sex or national origin and such business has annual gross receipts of less than four million dollars ($4,000,000). For purposes of this act, the term "small business" means a business with annual gross receipts of less than four million dollars ($4,000,000).

SECTION 17. (a) The Department of Economic and Community Development, with assistance from the Comptroller of the Treasury relative to loan guarantees, shall develop by rule an assistance program for small and minority telecommunications businesses no later than January 1, 1996. Such plan shall require Telecommunications Service Providers and Competing Telecommunications Service Providers to contribute a total of two million dollars ($2,000,000) each year for five (5) years for a total amount of ten million dollars ($10,000,000) to fund the small and minority telecommunications business assistance program. The Commission shall by rule determine the contribution to be made each year by each Telecommunications Service Provider and each Competing Telecommunications Service Provider to such program. The contribution of each such entity shall be determined in accordance with the process used to determine universal service support contributions in accordance with the provisions of Section 4(a). The small and minority telecommunications business assistance program shall provide for loan guarantees, technical assistance and services, and consulting and education services. The Department of Economic and Community Development shall administer the small and minority telecommunications business assistance program except that the Comptroller of the Treasury shall administer any loan guarantees provided pursuant to such program. It is the legislative intent that such program be designed with consideration of fair distribution of program assistance among the geographic areas of the state with no more than forty percent (40%) of program assistance to be awarded in any grand division and fair distribution of program assistance among small and minority telecommunications businesses.

(b) The Department of Economic and Community Development shall give an interim report on the development of the small and minority telecommunications business assistance program to the House and Senate State and Local Government Committees and to the House Commerce and Senate Commerce, Labor and Agriculture Committees no later than September 1, 1995. Such committees shall report its comments and recommendations on such report to the department within thirty (30) days of receiving such report.

(c) The small and minority telecommunications business assistance program developed by the Department of Economic and Community Development shall take effect on March 1, 1996, unless modified or repealed by legislation enacted prior to such date.

(d) There is established a general fund reserve to be allocated in accordance with the small and minority telecommunications business assistance program created by this act which shall be known as the small and minority telecommunications business assistance program fund. Moneys from the fund may be expended in accordance with such program. Any moneys deposited in the fund shall remain in the reserve until expended for purposes consistent with such program and shall not revert to the general fund on any June 30. Any interest earned by deposits in the reserve shall not revert to the general fund on any June 30 but shall remain available for expenditure in subsequent fiscal years.

SECTION 18. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 19. This act shall take effect upon becoming a law, the public welfare requiring it.

Exhibit B

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APPELLATE COURT CLERK
KNOXVILLE

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APR 03 1995

ANTITRUST DIVISION

IN THE COURT OF APPEALS

EILEEN M. BLAKE, on her own behalf and on behalf of all others similarly situated within the State of Tennessee,	)	BLOUNT CIRCUIT
	)	C.A. NO. 03A01-9509-CV-00307
Plaintiff-Appellant	)	
vs.	)	HON. W. DALE YOUNG
	)	JUDGE
ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO., and MEAD JOHNSON & CO.,	)	REVERSED AND REMANDED
Defendants-Appellees	)	

GORDON BALL, Knoxville, for the Appellant.

ROBERT J. WALKER and R. DALE GRIMES, Bass Berry and Sims, Nashville, for Bristol-Myers Squibb Co., and Mead Johnson Company.

CHARLES W. BURSON, Attorney General and Reporter, MICHAEL E. MOORE, Solicitor General, PERRY ALLAN CRAFT, Deputy Attorney General, and VERNON A. MELTON, JR., Amicus Curiae.

O P I N I O N

McMurray, J.

This case originated in the Circuit Court for Blount County. The complaint ostensibly attempted to state a class action against the defendants, alleging a violation of The Tennessee Unfair Trade Practices Act, (T.C.A. §§ 47-25-101 et seq.), hereinafter referred to as The Trade Practices Act, and The Tennessee Consumer Protection Act, (T.C.A. §§ 47-18-101 et seq.)[1] No order has been entered pursuant to Rule 23.03, Tennessee Rules of Civil Procedure, allowing the case to proceed as a class action.[2]

The defendants filed a joint motion to dismiss under the provisions of Rule 12, Tennessee Rules of Civil Procedure, asserting that the plaintiff's complaint failed to state a claim upon which relief can be granted. The motion was sustained and the case dismissed. This appeal resulted. We reverse the judgment of the trial court.

In their motion to dismiss, the defendants proceeded on the theories that The Tennessee Trade Practices Act applies only to transactions that predominately affect intrastate commerce as opposed to interstate commerce. Secondly, they assert that The Tennessee Consumer Protection Act of 1977 does not apply to the type of conspiracy alleged by the plaintiff.

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[1] Abbott Laboratories, Inc., have reached a settlement with the plaintiff and are, therefore, not parties to this appeal.

[2] The parties will be referred to as they appeared in the trial court, i.e., plaintiff and defendants.

Our review of the trial court's action in granting a motion to dismiss pursuant to Rule 12, T.R.C.P., is rather limited. When considering a Rule 12 motion to dismiss, we are required to accept the allegations of the complaint as true. Greenhill v. Carpenter, 718 S.W.2d 268 (Tenn. 1986). Our scope of review is de novo with no presumption of correctness. Montgomery v. Mayor of the City of Covington, 778 S.W.2d 444 (Tenn. App. 1988).

THE FACTS[3]

The plaintiff alleged that the defendants by independent action and conspiracy among themselves and others, not named as defendants, grossly overcharged Tennessee consumers who purchased baby food formula in the State of Tennessee. To substantiate this conclusion, the plaintiff alleges that:

* * * *

> 15. Defendants have been able to grossly overcharge for infant formula by various acts or practices, including, without limitation, banning, and conspiring to ban, direct advertising of infant formula to consumers and pursuing an aggressive effort to sell their products through physicians, nurses, and hospitals. Defendants refer to the medical market as the "ethical" market and to their sales strategy as "medical detailing."

* * * *

> 28. Beginning in 1980 and continuing through 1992, the defendants engaged in a continuing trust, combination, contract, arrangement and agreement, express or implied in violation of Section 47-25-101, et seq., of the Tennessee Unfair Trade Act which provides that "such combinations are hereby declared to be against public policy, unlawful and void."

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[3]The numbered paragraphs are set out verbatim as they appear in the plaintiff's complaint.

29. In violation of section 47-25-101, et seq., of the Tennessee Unfair Trade Practices Act, the ... trust, combination, contract, arrangement, and agreement consisted of an agreement, arrangement and concert of action among the defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the State of Tennessee. Such trust, combination, contract, arrangement and agreement had the effect, among others, of causing retail prices of infant formula purchased by plaintiff and other members of the class to be raised, fixed, maintained and stabilized at artificially high and non-competitive levels.

* * * *

32. For over twelve years, defendants have unilaterally committed, and have conspired amongst themselves to commit, an unfair or deceptive act or practice in violation of Section 47-18-109, et seq., of the Tennessee Consumer Protection Act in the sale and marketing of infant formula to thousands of Tennessee consumers at excessively high prices.

* * * *

34. In violation of the Tennessee Consumer Protection Act, defendants have supplied infant formula and engaged in unconscionable acts or practices in connection with its sales of infant formula to customers in Tennessee. Defendants unfair or deceptive acts or practices include the conspiracy to sell infant formula at an excessively high price.

DISCUSSION

Most of the plaintiff's allegations are conclusory rather than allegations of fact. A motion to dismiss for failure to state a claim upon which relief can be granted admits well-pled facts, not conclusions of the pleader. See Swallows v. Western Electric Co., Inc., 543 S.W.2d 581, 583 (Tenn. 1976).

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint. Sanders v. Vinson, 558 S.W.2d 838, 840 (Tenn.

1977); Holloway v. Putnam County, 534 S.W.2d 292, 296 (Tenn. 1976). These motions are not favored, see Moore v. Bell, 187 Tenn. 366, 369, 215 S.W.2d 787, 789 (1948), and are now rarely granted in light of the liberal pleading standards in the Tennessee Rules of Civil Procedure. See Barish v. Metropolitan Gov't, 627 S.W.2d 953, 954 (Tenn. Ct. App. 1981); 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1356 & 1357 (2d ed. 1990) ("Wright & Miller").

Tenn. R. Civ. P. 12.02(6) motions are not designed to correct inartfully worded pleadings. Wright & Miller § 1356, at 296. And so a complaint should not be dismissed, no matter how poorly drafted, if it states a cause of action. Paschall's, Inc. v. Dozier, 219 Tenn. 45, 50-51, 407 S.W.2d 150, 152 (1966); Collier v. Slayden Bros. Ltd. Partnership, 712 S.W.2d 106, 108 (Tenn. Ct. App. 1985). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when no set of facts will entitle the plaintiff to relief, Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 691 (Tenn. 1984), or when the complaint is totally lacking in clarity and specificity. Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986).

While it is not our role to create claims where none exist, Donaldson v. Donaldson, 557 S.W.2d 60, 62 (Tenn. 1977), we must always look to the substance of a pleading rather than to its form. Usrey v. Lewis, 553 S.W.2d 612, 614 (Tenn. Ct. App. 1977). Thus, when a complaint is tested by a Tenn. R. Civ. P. 12.02(6) motion to dismiss, we must take all the well-pleaded, material factual allegations as true, and we must construe the complaint liberally in the plaintiff's favor. Lewis v. Allen, 698 S.W.2d 58, 59 (Tenn. 1985); Holloway v. Putnam County, 534 S.W.2d at 296; Lilly v. Smith, 790 S.W.2d 539, 540 (Tenn. Ct. App. 1990).

Dobbs v. Guenther, 846 S.W.2d 270 (Tenn. App. 1992).

Testing the plaintiff's pleadings under the above rules, it appears that the only facts properly and well pled are that the defendants, along with others, conspired to fix prices and did fix prices of baby formula.[4] In reaching this conclusion, we are

[4]This statement is not intended to be a criticism of counsel. We agree with the observations of Judge McRae in Tacker v. Wilson, hereinafter cited, that a complaint ought not be dismissed for plaintiff's failure to state facts that ... only a discovery process might reveal. ... [T]he proof [in antitrust litigation] is largely in the hands of the alleged conspirators.

construing the pleadings most liberally and in favor of the plaintiff. We, therefore, find that the complaint states sufficient facts to allege price fixing.

THE TENNESSEE TRADE PRACTICES ACT

Our next inquiry is whether there is an individual remedy available to indirect purchasers under The Tennessee Trade Practices Act, (T.C.A. §§ 47-25-101 et seq.). To this inquiry, we respond in the affirmative. T.C.A. § 47-25-106 provides as follows:

> 47-25-106. Recovery of consideration as remedy for damages. — Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

It seems abundantly clear from the unambiguous provisions of T.C.A § 47-25-106, that there is an individual right, under the laws of this state, to maintain an action against any person or entity guilty of violating the provisions of Title 47, Chapter 25, whether the individual is a direct purchaser or indirect purchaser.

Apparently, this precise issue has not been addressed by the appellate courts of this state. The primary thrust of the defendants' argument that an indirect purchaser has no standing to maintain an action such as this is based on the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In Illinois

Brick the U. S. Supreme Court determined that indirect purchasers lack standing to recover under federal antitrust law. To support their position that a similar restriction is applicable to actions under the Tennessee Trade Practices Act, they assert that The General Assembly of Tennessee on three occasions has sought to pass legislation to expressly confer standing on indirect purchasers. We simply note that proposed legislation, not enacted, has no consequence whatever upon the interpretation of an existing statute. While such proposed legislation may indicate to some extent some of the individual legislators' interpretation of an existing statute, it is in no way controlling or, for that matter, relevant, to the court's duty to properly construe statutes.

The cardinal rule of Tennessee statutory interpretation is to ascertain and give effect to the intent and purpose of the Legislature in relation to the subject matter of the legislation, all rules of construction being but aids to that end. Rippeth v. Connelly, 60 Tenn. App. 430, 447 S.W.2d 380, 381 (1969). A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. Marion County Board of Commissioners v. Marion County Election Commission, 594 S.W.2d 681 (Tenn. 1980). The court should assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and purpose. Anderson Fish & Oyster Company v. Olds, 197 Tenn. 604, 277 S.W.2d 344 (1955). See also Crowe v. Ferguson, 814 S.W.2d 721 (Tenn. 1991). Where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is

within legislative competency, "the duty of the courts is simple and obvious, namely, to say sic lex scripta [the law is so written], and obey it." Miller v. Childress, 21 Tenn. (2 Hum.) 319, 321-22 (1841).

We find that the plaintiff in this case has standing to pursue an action for a violation of T.C.A. §§ 47-25-101 et seq., without reference to classification as a direct or indirect purchaser. There is no such limitation written into the statute. We do not find Tacker v. Wilson, 830 F.Supp. 422 (W.D. Tenn. 1993), cited by the defendants, to be persuasive authority to the contrary. In Tacker, the court disposed of the issue with the following statement:

> Plaintiff has alleged no facts that would indicate that plaintiff transacted business with any of the defendants. As a private party, plaintiff's remedy for a violation of [T.C.A.] § 47-25-101 would be found in [T.C.A.] § 47-25-106, but plaintiff has stated no claim for which relief can be granted.

Id. page 430

The bare assertion that plaintiff has stated no claim for which relief can be granted can hardly be taken as a determination that a private person has no standing to pursue a remedy under T.C.A. § 47-25-106.

The next inquiry is whether The Tennessee Trade Practices Act applies to the circumstances of this case. The defendants insist that the Tennessee Trade Practices Act applies only to transactions that predominately affect intrastate commerce, and that since the

complaint alleges a price-fixing conspiracy occurring outside of Tennessee, the plaintiff has failed to state a claim under Tennessee Law. We agree with the proposition of law as advanced by the defendants but not their conclusion. The Congress of the United States is vested with authority to regulate interstate commerce by virtue of The Constitution of the United States, Article 1, Section 8. Our court in examining the issue in Lynch Display v. National Souvenir Center, 640 S.W.2d 837 (Tenn. App. 1982) states that:

> The Tennessee antitrust law applies to transactions which are predominately intrastate in character. The transaction does not have to be exclusively intrastate to be affected. The old constitutional doctrine of mutual exclusivity between state and federal laws affecting commerce has long been rejected. (Citations omitted).

Id. 840.

The question before us, however, is not whether the plaintiff's claim is, in fact, predominately intrastate commerce or predominately interstate commerce, but whether the plaintiff's complaint states a claim cognizable under the laws of the State of Tennessee. We hold that it does.

We have carefully examined the complaint. Contrary to the defendants' assertions, we fail to find an allegation that the alleged conspiracy took place outside the State or that the transactions complained of occurred outside the state. It is alleged that the principal offices of the defendants are located outside the State of Tennessee and that the defendants intended their actions to artificially maintain high wholesale levels of infant formula in the entire United States. From that information,

alone, however, we cannot infer that the conspiracy, if any, occurred outside the State or that the transactions occurred outside the state. Since we are required take all the well-pled, material factual allegations as true, and construe the complaint liberally in the plaintiff's favor, we cannot dismiss a complaint on inferences which may reasonably be drawn from the pleadings unless the inferences are so incontestably conclusive as to exclude all other reasonable inferences. Such is not the case here.

It is settled in the undisturbed opinion of Standard Oil Co. v. State, 117 Tenn 618, 100 S.W. 705 (1906), quoted with approval in State ex rel Cates v. Standard Oil Co. Of Kentucky, 120 Tenn 86, 110 S.W. 565 (1908), that the "Legislature clearly intended to prohibit trusts, combinations, and agreements affecting all commerce not covered by the federal statute, and upon which it had a right to legislate. It did not intend to stop short of its power or to exceed it." Id. 580.

In State ex rel Cates, the court discussed the issue of "importation" as used in the statute. The court opined that once a product was imported into the state from other states or countries and became commingled with the common mass of property in this state, it is no longer an article of interstate commerce. "It is well settled that commerce in such imported articles may be regulated by state legislation." (Citations omitted).

We find nothing in the complaint or the entire record before us which justifies a finding by the trial court, on a Rule 12 motion, that the transactions complained of predominantly affect

interstate commerce as opposed to intrastate commerce. If it is later determined by some manner cognizable under Tennessee law that the actions complained of by the plaintiff predominately affect interstate commerce, then the defendants must prevail on this issue. On the other hand, if it is determined by any method cognizable under Tennessee law, that the transactions complained of predominately affect intrastate commerce, the plaintiff may proceed in this action.

In sum and substance, it is not determinable from the record before us that the acts complained of by the plaintiff predominately affect interstate commerce. We note that all parties argued facts, in the trial court, in their briefs and before this court that are not contained in the record before us. In reviewing a Rule 12 motion, we are not at liberty to assume facts not in the record. We, therefore, reverse the judgment of the trial court on this issue and hold that the complaint does state a cause of action under the Tennessee Trade Practices Act.

THE TENNESSEE CONSUMER PROTECTION ACT OF 1977

We must next look to the propriety of the trial court's judgment that the plaintiff cannot maintain this action under The Tennessee Consumer Protection Act of 1977, T.C.A. §§ 47-18-101 et seq.

T.C.A. § 47-18-109 provides in pertinent part as follows:

> 47-18-109. Private right of action - Damages - Notice to division. — (a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages. (Emphasis added).

Our inquiry is whether price fixing is an unfair or deceptive act or practice. While price fixing is not among the unfair or deceptive acts or practices specifically enumerated in T.C.A. § 47-18-104, it is clear that the enumeration of unfair or deceptive acts or practices is not exclusive nor limited only to those acts enumerated. Paragraph (b)(27) specifically states that "engaging in any other act or practice which is deceptive to the consumer or to any other person" falls within the scope of the statute.

In any event, reasonable minds cannot differ, in good conscience, that price fixing is not an unfair practice. We have hereinbefore set out the guidelines for statutory interpretation. We note that the terms unfair or deceptive as used in the Consumer Protection Act are in the disjunctive. We are required to give each word its common and ordinary meaning.

The term "unfair" is defined as follows:

> Contrary to laws or conventions, especially in commerce; unethical; unfair trading.

American Heritage Dictionary of the English Language, Third Edition, Houghton-Mifflin Company, (1992).

> 1. Not just or impartial; biased, inequitable,

> 2. Dishonest, dishonorable, or unethical in business dealings involving relations with employees, customers, or competitors.

Webster's New Twentieth Century Dictionary, unabridged, Second Edition, Prentiss Hall Press, (1983).

Defendants argue that since The Tennessee Trade Practices Act predates the Consumer Protection Act, and since it specifically addresses the conduct for which plaintiff seeks relief the construction sought by the plaintiff would result in a repeal by implication of part of The Tennessee Trade Practices Act. In support of this position, the defendants again assert that the General Assembly intended The Tennessee Trade Practices Act to apply only to conduct that predominantly affects intrastate commerce. Further, the defendants assert specifically, that to allow the plaintiff to prosecute a claim as an indirect purchaser under The Tennessee Consumer Protection Act of 1977 would conflict with The Tennessee Trade Practices Act. We expressly reject this argument based on our finding hereinabove stated that under our Tennessee Trade Practices Act, a plaintiff has standing as an indirect purchaser to maintain an action.

Further and finally, we note that T.C.A. §§ 47-18-102 and 47-18-112, provide respectively:

> 47-18-102. Purposes. — The provisions of this part shall be liberally construed to promote the following policies:
>
> (1) To simplify, clarify, and modernize state law governing the protection of the consuming public and to conform these laws with existing consumer protection policies;

(2) To protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;

(3) To encourage and promote the development of fair consumer practices;

(4) To declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state; and

(5) To promote statewide consumer education.

47-18-112. Supplementary law. — The powers and remedies provided in this part shall be cumulative and supplementary to all other powers and remedies otherwise provided by law. The invocation of one power or remedy herein shall not be construed as excluding or prohibiting the use of any other available remedy.

We interpret the foregoing sections of The Tennessee Consumer Protection Act of 1977, to mean what they say, i.e., the provisions of The Tennessee Consumer Protection Act of 1977, are cumulative remedies in all respects and their application under the circumstances of this case, at least for the purposes of a Rule 12 motion, are not inconsistent with the application of The Tennessee Trade Practices Act.

Parenthetically, we note that the same limitations must apply to the Tennessee Consumer Protection Act of 1977, as those applied to the Tennessee Trade Practices Act. If it is determined that the acts complained of predominately affect interstate commerce, the defendants must prevail. It is a well-settled principle of law that one cannot do indirectly what cannot be done directly. See i.e., Scott v. McReynolds, 225 S.W.2d 401 (Tenn. App. 1952);

Roberts v. Roberts, 767 S.W.2d 646 (Tenn. App. 1988) and Haynes v. City of Pigeon Forge, 883 S.W.2d 619 (Tenn. App. 1994).

We are of the opinion that the judgment of the trial court sustaining the Rule 12 motion and dismissing the plaintiff's complaint was error. We accordingly reverse the judgment of the trial court.

Costs of this cause are taxed to the defendants and this case is remanded to the trial court for the collection thereof and for such other and further action as may be necessary and not inconsistant with this opinion.

Don T. McMurray, J.

CONCUR:

Marschal P. Franks, J.

(Not participating)
Clifford E. Sanders, Sp. J.