

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

RECEIVED
TENN. REG. AUTH.
APR 25 6 10 07
EXECUTIVE SECRETARY

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

RESPONSE OF CONSUMER ADVOCATE DIVISION

Comes the Consumer Advocate Division (ConAd) to respond to the Tennessee Regulatory Authority's oral directive to file responses of no more than five (5) pages in the above referenced case by Friday, April 25, 1997. The Consumer Advocate Division has moved to strike the briefs of UTSE and BellSouth on the grounds that the briefs either contain arguments on more than directory assistance or do not provide legislative history or statutory construction of the enacted legislation. Neither company offers legislative history of the final legislation or principled statutory construction methodology and would normally fail even if the division made no response.

With respect to the handling of enumerated classifications the following standards are useful:

An appropriate guide to classifying the objects specifically enumerated is provided by the following from Sutherland Statutory Construction, 4th ed. § 47.18:
In most instances there is a wide range of ways in which classes could be defined, any one of which would embrace all of the members in an enumeration.
Germaneness to the subject and purpose of the statute, viewed in terms of legislative intent or meaning to others, is the basis for determining which among various semantically correct definitions of the class should be given effect. *Nance ex rel. v. Westside Hospital*, 750 S.W.2d 740 (Tenn. 1988).

* * *

In construing a statute, it is the duty of the courts to give every word and phrase some meaning. e.g., *United Cannery, Inc. v. King*, 696 S.W.2d 525 (Tenn.1985). Legislative intent is derived from construing a statute in its entirety, and it should be assumed the Legislature used every word purposely and that those words convey some intent and have a meaning and a purpose. E.g., *Tennessee Growers, Inc. v. King*, 682 S.W.2d 203 (Tenn.1984).
It is incumbent upon the courts to apply the controlling law, whether or not cited or

OFFICIAL FILE
PLEASE
DO NOT REMOVE

relied upon by either party. *City of Memphis v. International Brotherhood of Electrical Workers*, 545 S.W.2d 98 (Tenn.1976); *Simmons v. State ex rel. Smith*, 503 S.W.2d 103 (Tenn.1973). Cf. *Smith v. Norris*, 218 Tenn. 329, 403 S.W.2d 307 (Tenn.1966). Obviously that principle applies to the interpretation of legislative acts as well as the common law. ...

The Court did not decide this case on an issue not mentioned or briefed, but by taking cognizance of words appearing on the face of the statute that the parties and the courts below had ignored, in spite of the affirmative rule of statutory construction that every word and phrase of a statute must be given some meaning.

The foregoing fundamental precepts provide the authority and indeed the duty of this Court to consider the words of the statute that have caused the defendants consternation.... Opinion on Petition to Rehear, *Nance ex rel. v. Westside Hospital*, 750 S.W.2d 740 (Tenn. 1988).

BellSouth and UTSE do not prove that directory assistance is not usage under the law. With respect to an interim version of the legislation the Consumer Advocate stated the evident fact that the version did not expressly make directory assistance (or “DA”) a basic telephone service and the Division’s position is consistent. It is a familiar rule that the legislature is presumed to have knowledge of its prior enactments **and to know the state of the law at the time it passes legislation.** *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 4 (Tenn. 1986). Under the circumstances then existing, usage might not have included directory assistance, under the amended legislation if the TPSC had approved BellSouth’s directory assistance tariff (or if the TPSC approved directory assistance for UTSE under specific circumstances). This possibility for change no longer exists. **“Usage¹” in the Amended Legislation Included Directory Assistance but the Circumstances Existing Then, and the Final Legislation Are Different and Therefore Preclude Such an Outcome for Either BellSouth or UTSE.**

Even though it is true that there was no express legislative declaration of directory assistance as a basic service, and that the Consumer Advocate Division stated to the General Assembly that the then amended legislation did not expressly make directory assistance a basic service, does not mean that directory assistance and other services included in the basic service charge was not usage

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

contemplated by the statute. Second, although usage included directory assistance, it was also true that there was an opportunity for directory assistance, under the actual conditions then existing, to be a non-basic service for BellSouth, and a lesser possibility that DA could be a non-basic service for UTSE. Third, these opportunities ended on June 6, 1995, under the final version of the legislation, because no directory assistance tariff was in effect.

We respectfully request the TRA to take official notice of the records regarding Tariff No. 94-223 and Docket No. 94-02876. These official records show the history regarding directory assistance. In addition, the Division respectfully requests that the TRA take official notice of Tenn. Code Ann. § 65-5-203(b)(1) and exhibit A regarding legislative history of the Senate/House final bill resolution.

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

On October 6, 1994, BellSouth filed a tariff with the Tennessee Public Service Commission to institute directory assistance charges effective November 6, 1994.² The Consumer Advocate was permitted to intervene. On December 20, 1994, the Tennessee Public Service Commission by a 2-1 vote approved the directory assistance tariff. An Order approving the tariff, was entered on January 5, 1995. The Consumer Advocate Division subsequently filed a Petition for Stay and a Petition for Reconsideration.

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

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

² See, Exhibit A to this reply.

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

reduction agreement with BellSouth. Under the terms of the agreement, the division would no longer object to BellSouth's directory assistance tariff. In addition, the agreement contained other features of benefit to Tennessee consumers.

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

Furthermore, BellSouth, upon proper notice, even without the agreement of the Consumer Advocate Division and the TPSC could have instituted its directory assistance tariff on April 6, 1995, pursuant to Tenn. Code Ann. § 65-5-203(b)(1) and eliminated directory assistance as a free usage. 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. The division was merely being clear about the effect of the language under the circumstances.⁵

UTSE's opportunity to change free usage in the time frame was more limited than BellSouth's, but within the realm of possibility. In addition, pursuant to section 10(c) of the then amended legislation,⁶ a company with an earned rate which was less than its current authorized fair rate of return could request a proceeding to establish initial rates. UTSE therefore, could have possibly initiated a price regulation plan hearing to set initial rates, under section 10(c) of that amendment, which might have changed usage if approved by the TPSC, because section 208(c) itself did not then have a time limit which established the date for determining usage basic telephone service and there was no clear effective date.

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

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

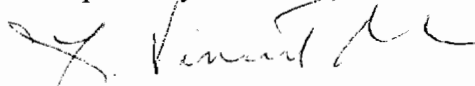
⁶ The April 1995 version.

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

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

Wherefore the Consumer Advocate Division prays that the Tennessee Regulatory Authority find that UTSE has not met its burden of proof with respect to the contested issues, including, but not limited to, its statutory authority or the TRA's statutory to institute charges for directory assistance as a matter of law.

Respectfully submitted,



L. Vincent Williams

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Response has been mailed postage prepaid to the parties listed below this 25th day of April, 1997.

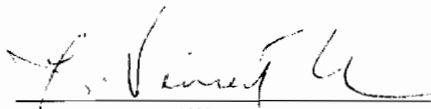
Val Sanford, Esq.
230 4th Ave., North, 3rd Floor
P.O. Box 198888
Nashville, TN 37219-8888

H. LaDon Baltimore, Esq.
211 Seventh Avenue No.
Suite 320
Nashville, TN 37219-1823

Guy M. Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

Richard Tettlebaum
P.O. Box 770
300 Bland Street
Bluefield, WV 24701

Jim Wright, Esq.
United Telephone-
Southeast, Inc.
14111 Capital Blvd.
Wake Forest, NC 27587



L. Vincent Williams

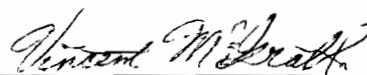
⁷ In other words usage could be different upon the condition that changes in usage was approved or implemented prior to June 6, 1995. See, e.g. Sutherland on Statutory Construction § 21.06.

AFFIDAVIT

Comes the Affiant, Vincent McGrath, after being duly sworn who deposes and says:

1. I am the Legislative History Coordinator of the Tennessee State Library and Archives, 403 Seventh Avenue North, Nashville, TN 37243-0312.
2. The Consumer Advocate Division of the Office of the Attorney General requested copies of recordings of the Senate/House Committee that resolved the differences in the enacted version of SB 891 and HB 695.
3. After a reasonable search, I have been unable to find any recordings in the current collection of the Tennessee State Library and Archives that I believe to be relevant to the Consumer Advocate Division's request. Neither I nor the Tennessee State Library and Archives accept responsibility for completeness of data.

Further the Affiant sayeth not.



Vincent McGrath

Sworn to and subscribed before me

this 24 day of April, 1997.


NOTARY PUBLIC

My commission expires on: Feb 28, 2001