BELLSOUTH

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Guy M. Hicks
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April 23, 1998

VIA HAND DELIVERY

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

Re: *Petition for an Investigation and/or Show Cause Order to Determine Just and Reasonableness of Rates Charged by BellSouth Telecommunications, Inc.*
Docket No. 98-00021

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss Consumer Advocate Division's "Complaint or Petition". A copy has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: ***Petition for an Investigation and/or Show Cause Order to Determine Just and Reasonableness of Rates Charged by BellSouth Telecommunications, Inc.***

Docket No. 98-00021

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS CONSUMER ADVOCATE DIVISION'S "COMPLAINT OR PETITION"

I. INTRODUCTION

On March 31, 1998, the Consumer Advocate Division ("CAD") filed a pleading styled as a "complaint or petition" in a docket to which the CAD is not even a party. Despite this procedural irregularity, the CAD's filing appears to be nothing more than the latest in an ongoing series of ill-conceived attempts by the CAD, the American Association of Retired Persons' ("AARP"), and AT&T to reregulate BellSouth's earnings. Although neither the CAD nor the AARP has opposed BellSouth's motion to dismiss the AARP's petition for an earnings investigation of BellSouth, the CAD offers a new twist by claiming that the Tennessee Regulatory Authority ("TRA") should require a reduction in BellSouth's earnings based upon an alternative regulatory scheme no longer applicable to BellSouth. The CAD's latest theory does not salvage the AARP's petition, which should be dismissed along with the CAD's filing, even assuming it is properly before the TRA.[1]

[1] Many of BellSouth's objections to the AARP's petition for an earnings investigation are equally applicable to the CAD's "complaint or petition," and, for ease of reference, BellSouth incorporates by reference those objections here. Suffice it to say, BellSouth's position is that, after it had elected price regulation, BellSouth's earnings were no longer subject to regulation, either under traditional rate-base-rate of return regulation or an alternative regulatory reform plan. This was confirmed by the Tennessee Court of Appeals in *BellSouth Telecommunications, Inc. v. Bissell*, 1996 Tenn. App. LEXIS 623 (Tenn. Ct. App. Oct. 2, 1996).

II. ARGUMENT

A. BellSouth Is Not Subject To Alternative Reform Regulation, Notwithstanding The CAD's Claims To The Contrary.

The AARP initiated this proceeding by requesting that the TRA conduct an earnings investigation of BellSouth pursuant to traditional rate-base-rate of return regulation. The CAD apparently seeks to participate in this proceeding, even though it has not filed a motion to intervene and even though it does not join in the AARP's request for an investigation of BellSouth's earnings. Apparently, the CAD does not believe such an investigation is necessary because, according to the CAD, BellSouth "is presently operating" pursuant to an effective alternative reform regulation plan under Rule 1220-4-2-.55 and should be required to place earnings in excess of the rate of return established for BellSouth in 1993 in its "deferred revenue account." (Petition ¶ 26). This claim is baseless because BellSouth's alternative regulatory reform plan expired at the end of 1995 and its deferred revenue account no longer exists.

In Tennessee, alternative regulation is not mandatory; rather a local exchange carrier has the option to elect to operate under an alternative regulatory reform plan "as an alternative to traditional ratemaking procedures...." Rule 1220-4-2-.55(1). The term of the carrier's alternative regulation plan was fixed based upon the length of the forecast test period utilized by the Commission. Under the Commission's rules, for any carrier electing alternative reform regulation, the Commission was required to project the carrier's earnings over a forecast test period of two to four years, "*which will be the period of the regulatory reform plan.*" Rule 1220-4-2-.55(1)(a) (emphasis added).

In BellSouth's case, after filing a petition for conditional election of alternative regulation in January 1993, the Commission projected BellSouth's earnings over a three year forecast test

period, commencing in 1993 and ending in 1995. *See* August 20, 1993 Order in *In Re: Earnings Investigation of South Central Bell Telephone Company,* 1993-1995, Docket No. 92-13527. Thus, consistent with the Commission's rules, BellSouth's regulatory reform plan was only in effect during the period from 1993 through the end of 1995. The plan did not extend beyond that date and certainly is not in place today. Indeed, BellSouth elected not to continue to operate under a regulatory reform plan by virtue of its applying for price regulation on June 20, 1995.

Furthermore, although the CAD devotes considerable attention to the deferred revenue account that had been established in connection with BellSouth's alternative reform regulation plan in 1993, the CAD conveniently ignores that BellSouth was required by the Commission to maintain the deferred revenue account only "for the period January 1, 1993 through December 31, 1995." *See* August 20, 1993 Order, *In re: Earnings Investigation of South Central Bell Telephone Company,* 1993-1995, Docket No. 92-13527, at page 16. As the CAD well knows, the funds placed in BellSouth's deferred revenue account have long since been dispersed. *See, e.g.,* August 1, 1994 Order, *In re: Earnings Investigation of South Central Bell Telephone Company,* 1993-1995, Docket No. 92-13527. Indeed, in its Order approving BellSouth's price regulation application, the Commission noted that there was "a $7.7 million deficit in the deferred revenue account to pay for rate reductions ordered in 1993." Order, *In re: Application of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company For a Price Regulation Plan,* Docket No. 95-02614, at 3 (Jan. 23, 1996). Thus, the CAD's contention that for the past two years BellSouth should have been placing alleged excess earnings in a deferred revenue account BellSouth was no longer required to maintain is absurd.

The CAD makes no attempt to explain how BellSouth can be subject to an effective alternative reform regulation plan after BellSouth elected price regulation and after the Tennessee Court of Appeals has ordered the TRA to approve BellSouth's price regulation application. *See BellSouth Telecommunications, Inc. v. Greer*, 1997 Tenn. App. LEXIS 668 *61 (Tenn. Ct. App., Oct. 1, 1997). Although the CAD relies upon the Court of Appeals' decision on rehearing in *Greer*, the only issue on rehearing was the effective date of BellSouth's price regulation plan -- an issue which the Court declined to decide in the first instance. The Court was not asked to decide on rehearing whether BellSouth was subject to an alternative reform regulation plan during the pendency of its price regulation application.

Despite the CAD's assertion, BellSouth cannot be compelled to comply with an alternative reform regulation plan that, by its own terms, expired at the end of 1995. Indeed, if BellSouth has continued to operate under such a plan and should have been making contributions to the deferred revenue account in 1996 and 1997, as the CAD now contends, it begs the obvious question: why did the CAD wait more than two years to bring this action? The obvious answer is that BellSouth did not continue to operate under an alternative regulatory reform plan after the end of 1995 and that the CAD is now only contending otherwise in a desperate grasp at regulatory straws. Having lost the *Greer* case in the Court of Appeals and having been spurned by the Tennessee General Assembly in its efforts to have BellSouth's earnings reregulated, the CAD is simply trying to obtain from the TRA that which it could not obtain in the courts or the legislature. The TRA should not condone such blatant "forum shopping."

B. BellSouth Is Not "Estopped" From Contesting The CAD's "Petition or Complaint."

The CAD's claim that BellSouth is "estopped" from contending that the TRA "cannot act in conformance with the regulatory reform rule" or "cannot make a decision regarding the disposition of funds to or from a deferred revenue account" is seriously flawed. (Complaint ¶¶ 21-22). The doctrine of judicial estoppel, even assuming it were applicable here, only applies with respect to statements of fact. *See Brown v. Brown,* 198 Tenn. 600, 281 S.W.2d, 492 (1955); *Monroe County Motor Co. v. Tennessee Odin Insurance Co.*, 33 Tenn. App. 223, 231 S.W.2d 386 (1950) (under estoppel doctrine, when one under oath in formal litigation has stated a given fact as true, he will not permitted to deny that fact in subsequent litigation). Here, the regulatory framework applicable to BellSouth is a question of law, not fact, thus rendering the estoppel doctrine wholly inapplicable.[2]

III. CONCLUSION

For the foregoing reasons, the TRA should dismiss the AARP's petition as well as the latest filing by the CAD.

[2] Even assuming the estoppel doctrine did apply, which BellSouth denies, an essential requirement is that "the party to be estopped must have assumed, either in the same or former litigation, a position inconsistent with the one the party now assumes." *Allen v. Neal*, 217 Tenn. 181, 188 396 S.W.2d 344 (1965). Here, the CAD cannot make this showing, since BellSouth has never stated in any proceeding that its earnings are subject to regulation after it had elected price regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 1998, a copy of the foregoing document was served on the parties of record, via U. S. Mail, postage pre-paid, addressed as follows:

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