BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

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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

RESPONSE TO BELLSOUTH'S MOTION TO DISMISS

BellSouth filed a Motion to Dismiss the complaint of the Consumer Advocate Division arguing that BellSouth is not operating pursuant to an Alternative Regulatory Reform Plan, that the Court of Appeals "ordered the TRA to approve" its price regulation plan, and while conceding that it is judicially estopped from factually alleging that it was not operating pursuant to an alternative regulation plan under rule 1220-4-2-.55, the company argues that it is not judicially estopped from asserting questions of law which are contrary to and inconsistent with operating pursuant to an alternative regulatory reform plan. This response shows that the company's motion should be denied.

We address BellSouth's contentions, first, by showing that the Court of Appeals is constitutionally incompetent to "order the TRA to approve BellSouth's price regulation plan application"; second, by showing the implications of BellSouth's position and by demonstrating that there are no provisions for approving a price regulation plan unless a company has a currently authorized return in accordance with statute and therefore AARP's position regarding

an earnings investigation is validated,[1] and alternatively that the statute reverts BellSouth to the alternative regulation order for 1220-4-2-.55; finally, BellSouth is judicially estopped from making arguments inconsistent with and contrary to facts upon which it had to assert to receive a benefit.

I. Under the Constitution and laws of Tennessee, the Setting of Rates and the Ultimate Approval of Applications for Price Regulation Is the Exercise of Legislative Power, and the Court of Appeals, an Entity Exercising the Judicial Power, Is Not Competent to Order the Exercise of Legislative Power.

BellSouth argues that the Court of Appeals ordered the TRA to approve the company's price regulation plan application. In doing so it misapprehends the extent of the Court's competency and ignores the fact that the Court corrected its overreaching in its decision on BellSouth's motion to rehear or clarify.[2]

The statute providing for price regulation provides in pertinent part that approval of a price regulation is exclusively granted to the Tennessee Regulatory Authority. Tenn. Code Ann. §§ 65-5-209 (a),(c) and 65-5-210 (a). Tenn. Code Ann. § 65-5-209(a), for example, provides in pertinent part:

> 65-5-209. Price regulation plan.
> (a) .... Using the procedures established in this section, the authority shall ensure[3] that rates for all basic local exchange telephone services and

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[1]The Consumer Advocate Division moves to amend its complaint by separate document to plead alternative positions based upon the new assertions in BellSouth's motion. If the company is not operating pursuant to the alternative regulatory reform plan, an earnings investigation is the appropriate mechanism because the company can not qualify for regulation under a price regulation plan. It has no current authorized return.

[2]BellSouth Telecommunications v. Tennessee Regulatory Authority, Appeal No. 01A01-9601-BC-00008, filed November 19, 1997 (M.S., Tenn. App.).

[3]Not the Court.

> non-basic services are affordable on the effective date of price regulation[4] for each incumbent local exchange telephone company. (Emphasis added.).

This subsection shows that approval of a price regulation plan is expressly and exclusively committed to the Tennessee Regulatory Authority; that the authority must use the procedures in Tenn. Code Ann. § 65-5-209 to ensure that rates are affordable on the effective date of price regulation; and rates are inextricably connected with approval of an application.

A. The Court of Appeals would violate the Tennessee Constitution if it ordered approval of BellSouth's application because ratemaking is a legislative power and the Court would be ignoring the required division of powers between the branches of government.

Article II of the Tennessee Constitution provides in pertinent part:

> Sec. 1. Division of powers.
> The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> Sec. 2. Limitation of powers.
> No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

In its initial Order the Court of Appeals stated "we remand the case to the Tennessee Regulatory Authority *with directions to approve* BellSouth's application for a price regulation plan."[5] (Emphasis added). On rehearing, the Court of Appeals held that its:

> ...October 1, 1997 opinion focused on the procedure employed ... Rather than focusing on the substance or merits of the Commission's decision .... The doctrine of separation of powers counsels the courts to avoid requiring an administrative agency to take a particular action except in the most extraordinary circumstances. .... Now it falls upon the Tennessee Regulatory

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[4]No effective date has been set.

[5]BellSouth Telecommunications v. Tennessee Regulatory Authority, Appeal No. 01A01-9601-BC-00008, filed October 1, 1997 (M.S., Tenn. App).

> Authority *to **consider** BellSouth's application* for a price regulation plan *in accordance with Tenn. Code Ann. § 65-5-209....*
> Ordering the Authority to grant BellSouth's application for a price regulation plan ... would invade the Authority's jurisdiction..." (Emphasis added.)

There can be no dispute that the Court changed its position from "directions to approve" to "it falls upon the Tennessee Regulatory Authority to consider BellSouth's application."

The basis for the Court's change is twofold. First, it recognized that its earlier decision would violate the separation of powers.[6] Second, it recognized that its determinations were procedural and not based on the merits. Moreover, the Court would have violated the due process rights of other parties had it maintained its position.[7]

The designation of the powers exercised by the TRA under Article II has long been settled. It is the law of this state that the powers of this agency and it predecessors in fixing rates and charges is legislative. In Re Cumberland Power Co., 147 Tenn. 504, 511, 249 S.W. 818(1922) favorably citing, L. & N. R. Co. v. Garrett, 231 U.S. 298, 305, 307, 334 S.Ct. 48, 51, 58 L.Ed. 229 (1913).

It has long been the law of this state that the powers of this agency and it predecessors in fixing rates and charges is legislative. In Re Cumberland Power Co., 147 Tenn. 504, 511, 249

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[6]In fact, any and all "should have found(s)" in the October 1, 1997 opinion violated the constitutional separation of powers under the same reasoning the Court ultimately used to change its position. This agency should and perhaps must ignore all non-procedural suggestions by the Court.

[7]For example, the Court found that "While the Commission permitted BellSouth to present legal arguments concerning its authority to adjust its Form PSC-3.01 report, it did not provide BellSouth with an opportunity to prove that the staff's findings or conclusions with regard to the "out-of-period adjustments," "abnormal or unusual expenses," and "known charges" were factually incorrect. Given the interests at stake, the Commission should have permitted BellSouth to prove that the suggested adjustments were incorrect or not supported by the facts." All parties should have had an opportunity to show that BellSouth's suggested adjustments were not correct.

S.W. 818(1922) favorably citing, L. & N. R. Co. v. Garrett, 231 U.S. 298, 305, 307, 334 S.Ct. 48, 51, 58 L.Ed. 229 (1913):

> It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body....The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within its proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power.... But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the courts.);

and Western Union v. Myatt, 98 F. 335 (Circuit Court, Kansas 1899):

> The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. ... Myatt, at 341-342.

As a result it is clear that the power being utilized by the Tennessee Public Service Commission and its successor the Tennessee Regulatory Authority are legislative and prospective in application.

The Court in Myatt further held:

> The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inhere in the constitution itself, and is as much a part of it as though it were definitely defined therein.[8]

The distinction made in Cumberland Power is still valid law. As the U.S. Supreme Court holds "the distinction between legislative and judicial functions is a vital one not subject to change or alteration inherent in the constitution. As a result it is clear that the distinction in the power being utilized by the Tennessee Public Service Commission and its successor the Tennessee Regulatory Authority is a crucial issue and that power is legislative.

The Tennessee Constitution prohibits encroachment by one branch of government upon the powers of another and the judicial branch has the negative duty of not interfering with the exercise of legislative power. In State v. Hall, Supreme Court No. 03-S01-9701-CR-00010, filed December 15, 1997 (S.Ct.) the Court cited State v. Brackett, 869 S.W. 2d 936, 939 (Tenn. Crim. App. 1993) wherein that Court stated:

> Article II, § 1 of the Tennessee Constitution provides that the powers of government are to be divided into the Legislative, Executive, and judicial Departments. In general, the "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to administer and enforce law; and the "judicial power" is the authority to interpret and apply law. The Tennessee constitutional provision prohibits an encroachment

[8]See, Hoover Motor Express v. Railroad & Public Utilities Commission, 195 Tenn. 593, 261 S.W.2d 233 (1953) (the Constitution divides the government into three distinct and independent departments, and Sec. 2 of art II, forbids the exercise by one of the function of another department.)

by any of the departments upon the powers, functions and prerogatives of the others. Richardson v. Young, 122 Tenn. 471, 125 S.W. 664 (1910). The branches of government, however, are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute. Anderson County Quarterly Court v. Judges of 28th judicial Circuit, 579 S.W.2d 875 (Tenn. App. 1978).

In Anderson County Quarterly Court vs. Judges of the 28th Judicial Circuit, 579 S.W.2d 875 (Tenn. App. 1978) the Court of Appeals held:

> Our democracy is based on a constitutional form of government. As such, one of its basic and fundamental features is the vesting of governmental powers in three branches, the executive, legislative and judicial. It is generally acknowledged that these branches are "coordinate, independent, coequal, and potentially coextensive." See generally 16 Am.Jur.2d Constitutional Law § 210 (1964). See also Tenn.Const. art. II, §§ 1-2 (1870). It has been declared that the division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government. 16 Am.Jur.2d Constitutional Law § 212 (1964).
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> The three branches of government are independent in exercising their assigned duties, whether they be constitutional in nature, statutory or otherwise. Thus, our Supreme Court has stated:
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> "It will therefore be observed that the power of the legislature over the judicial branch of the government must conform to the limitations expressed in the Constitution. It should be noted that the Constitution does not reserve to the Legislature all right to deal with any other branch of the government with certain exceptions, but there is an express prohibition of any branch of the government exercising any power properly belonging to another branch except in the cases expressly directed or permitted by the Constitution itself." Moore v. Love, 171 Tenn. 682, 686, 107 S.W.2d 982, 983 (1936), citing Lawyers' Tax Cases, 55 Tenn. (8 Heisk.) 565; The Judges' Cases, 102 Tenn. 509, 629, 53 S.W. 134, 138 (1899).
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> As it has been aptly stated:
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> Each department of the government must exercise its own delegated powers, and unless otherwise limited by the constitution, each exercises such inherent power as will protect it in the performance of its major duty; one department may not be controlled or even embarrassed by another department unless the constitution so ordains. 16 Am.Jur.2d Constitutional Law § 213 (1964).
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> * * *

> Thus... in deference to separation of powers, judges will lean over backward to avoid encroaching on the legislative branch's [power].... Carrigan, Inherent Powers of the Courts, Nat'l C. St. Judiciary 1 (1973) [hereinafter cited as Carrigan].
> Whatever negative aspects the separation of powers doctrine has on the ability of the courts to operate effectively and efficiently, there is a corollary positive aspect of the doctrine.
> However, *the separation of powers doctrine, properly understood, imposes on the judicial branch not merely a negative duty not to interfere with the executive or legislative branches,*[9] but a positive responsibility to perform its own job efficiently.

When the Court of Appeals initially directed approval of BellSouth's price regulation plan it violated its negative duty not to encroach or interfere with the legislative branch. Upon recognizing its encroachment and interference it sought to and did correct its overreaching in the order on Petition to Rehear. As a result BellSouth's inference that the agency must approve its application without ensuring that rates are affordable on the effective date of price regulation and without evaluating BellSouth's application in accordance with other procedures is without merit.

C. Ordering Disapproval or Approval of the application is beyond the competency of the Court of Appeals.

In addition to the existence of legal authority showing that the TRA's power is legislative and that the constitution provides for a separation of power, case law also holds that the Court is not competent to interpose, substitute or impose their own judgment on the TRA. In

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[9]See e.g., Holmes v. Owens, Appeal No. 02A01-9706-CV-00115, filed February 23, 1998 (Tenn. App., W.S.) Review under the common law writ is limited to whether the "inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily, or fraudulently." McCallen v. City of Memphis, 786 S.W.2d 633, 638 (Tenn. 1990)(quoting Hoover Motor Exp. Co. v. Railroad and Public Utilities Commission, 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (Tenn 1953)). This Court's primary resolve is to refrain from substituting its judgment for that of the local governmental body. McCallen, 786 S.W.2d at 641. An action should be invalidated only if it constitutes an abuse of discretion.

Hoover Motor Express v. Railroad and Public Utilities Commission, the decision on appeal was whether certificates of convenience and necessity should be issued for the use of State highways for hauling freight by a motor carrier. 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (Tenn. 1953). The Court of Appeals sought to impose its contrary factual decision on the Commission with regard to an application for convenience and necessity. 195 Tenn. 593, 598-599, 261 S.W.2d 233 (1953). The Supreme Court rejected the Court of Appeal's encroachment and held that:

> By its opinion, the Court of Appeals has undertaken to perform an administrative or legislative function, which is beyond its competency.
>
> Sec. 1, of art. II, of the Constitution of 1870, divides the Government into three distinct and independent departments, and Sec. 2, of art. II, forbids the exercise by one of the function of another department. Definition of the exact limitation of the function of each of the three departments is not undertaken in the Constitution. That definition, as a matter of construction and interpretation of the Constitution, is the highest function of the Judiciary whose construction prevails over any construction or interpretation of the Constitution undertaken either by the Legislature or the Executive.
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> * * *
>
> [The supervisory jurisdiction of the Court] *cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case.* The supervisory powers of the Court should not be confounded with its appellate jurisdiction.[10] Hoover v. Commission, 195 Tenn. at 601, 261 S.W.2d at 236. (Emphasis added.)

The Court further held that:

> Control and regulation of certain motor carriers were vested in the Railroad and Public Utilities Commission by the Motor Carriers Act, Chapter 119, Public Acts of 1933, Code Supplement, 5501.1-5501.23. By the Act, the Utilities Commission is given the same control over certain motor carriers as it had theretofore over so-called 'utilities' or 'corporations affected with a public interest.' The Act expressly so provides, Code Supplement, secs.

[10]See also, Jonesboro, Fall Branch & Blair v. Brown, 67 Tenn. 489 (1875) (It does not follow, that because the right claimed depends upon a construction of law that a Court may decide it. The Courts can only decide a case to the extent of its jurisdiction. Id. at 494.)

5501.15-5501.16. That control is exclusive and final. McCollum v. Southern Bell T. & T. Co., 163 Tenn. 277, 280, 43 S.W.2d 390. The action of the Commission in giving or withholding certificates of convenience and necessity is an administrative function no different from the action of the Commission in the rate-making power of which Judge Cook, speaking for a unanimous Court, said:

> The courts cannot directly or indirectly exercise the rate-making power.

Hoover, 195 Tenn at 604, 261 S.W.2d at 238.

In its first order in the case *sub judice*, the Court exceeded constitutional boundaries by directly and indirectly exercising the ratemaking power. Its most direct exercise of ratemaking power was to direct approval of BellSouth's application. Other indirect exercises of rate-making power occurred when the Court sought to tell the agency, without hearing or judging the credibility of any witness, what it "should have" decided.

II. BellSouth Is Either Operating Pursuant to an Alternative Regulation Plan or it Does Not Qualify for Price Regulation.

BellSouth argues that it is not operating pursuant to an alternative regulation plan. If its allegation is true then it does not qualify for price regulation and its application should be dismissed.[11] Tenn. Code Ann. § 65-4-101 provides in pertinent part:

> (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 § 1220-4-2-.55 (1)(c)(1) or 1220-4-2-.55(d); (emphasis added).
>
> (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.

[11] If BellSouth is not operating pursuant to alternative regulation, an earnings investigation is also required.

As CAD noted *supra*, Tenn. Code Ann. § 65-5-209 (a) requires that a price regulation plan must be arrived at "[U]sing the procedures established in this section". The procedures in section 209 require a "***current*** authorized fair rate of return existing at the time of the company's application.[12] BellSouth is therefore arguing that it has no "current authorized fair return" and is certainly not operating pursuant to a regulatory reform plan ordered by the commission under TPSC rule 1220-4-2-.55 as defined in Tenn. Code Ann. § 65-4-101 (g) (1).[13] If this "fact" is true BellSouth can not qualify for price regulation using the procedures of section 209 until and unless the TRA evaluates its rates and enters an order establishing a current rate of return on rate base.[14]

III. BellSouth's Decision to Make an Application for Approval of a Price Regulation Plan Is Not the Same Thing as Electing to Immediately Discontinue Alternative Regulation.

BellSouth argues that its:

> "... regulatory reform plan was only in effect during the period from 1993 through the end of 1995.[15] The plan did not extend beyond that date *and certainly is not in place today.*[16] Indeed, *BellSouth elected not to continue*

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[12]Tenn. Code Ann. § 65-5-209 (c).

[13]BellSouth argues that the plan is "certainly not in place today." BellSouth Motion to Dismiss, p. 3.

[14]Tenn. Code Ann. § 64-4-101 (g) (2) in such a case, AARP's complaint which seeks to establish an earnings investigation has renewed validity and the Consumer Advocate Division will amend its complaint to incorporate such an outcome.

[15]How BellSouth concluded that the regulatory reform plan lasted "through the end of 1995" is unknown.

[16]BellSouth Motion to Dismiss, p. 3.

> *to operate*[17] *under a regulatory reform plan* by virtue of its applying for price regulation on June 20, 1995."

Tenn. Code Ann. § 65-5-209 (c) requires a "current" authorized return to evaluate for price regulation. As a result an application or a mere election would not change a company's status until price regulation was approved.

IV. BellSouth Is Estopped from Arguing as a Matter of Law That it Is Not Operating Pursuant to an Alternative Regulation Plan.

BellSouth makes contradictory arguments. It argues that its regulatory reform plan expired at the end of 1995. At the same time it argues that the plan expired after two (2) years. Two (2) years from the beginning of the plan ended on August 19, 1995.

The hearing on its application was held in November 1995. At that hearing BellSouth never alleged that it was not operating pursuant to a regulatory reform plan even though it had "elected" price regulation in June 1995. Moreover, on February 14, 1996, Messrs. Bennett Ross and Charles Howorth filed a Motion for a Stay Pending Appeal. Footnote 2 at page 4 of the Motion stated:

> The fair rate of return is the return authorized in the most recent case applicable to BST See T.C.A. § 65-4-101 (g) (1). BST's fair rate of return, as determined in the August 20 Order, was a range of 10.65% - 11.85%.[18]

For convenience the statutory citation contained in the footnote states in pertinent part:

> (g) "Current authorized fair rate of return" means:

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[17]In fact, BellSouth made no affirmative election not to continue to operate under a regulatory reform plan. At the very least it knew or should have known that its plan might not be approved. In such an event the alternative regulation plan is much more profitable to BellSouth because it provides a 60 basis point increase over the normal just and reasonable rate.

[18]A copy of the cover page and page 4 of BellSouth's Motion for a Stay Pending Appeal is attached as Exhibit A.

> (1) For an incumbent local exchange telephone company ordered by the commission under TPSC rule 1220-4-2-.55 **operating pursuant to a regulatory reform plan...** (emphasis added).

After successfully obtaining the stay which permitted it to retain millions of dollars, however, it now argues that it is not operating pursuant to a current authorized return or alternative regulation.

As is pointed out in 28 Am.Jur.2d, Estoppel and Waiver, § 27, the doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith and justice and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of another who reasonably relied thereon and such an estoppel cannot arise against the party except when justice to the rights of others demands it. Seagram Distillers v. Jones, 548 S.W.2d 667 (Tenn. App. 1976). Justice to the rights of Tennessee consumers demands forbidding BellSouth to speak against its own acts, representations and its commitments under alternative regulation.

Indeed, BellSouth's behavior is similar to the position it took in 1984 where it sought to finesse the Tennessee Public Service Commission. In South Central Bell v. Tennessee Public Service Commission, 675 S.W.2d 718 (Tenn. App. 1984) the company alleged that it would refund monies if the TPSC granted it a rate increase. After the increase was granted the company changed its position and sought to retain the money. The Court of Appeals found that the company was estopped. The Court held that:

> It has been held that the acceptance and retention of benefits may estop an attack upon the validity of an administrative order. 2 Am Jur.2d Administrative Law § 487, p.294 n.11.
> In Brown vs. Humble Oil & Ref. Co., 126 Tex 296, 83 S.W.2d 935, 87 S.W.2d 1069, 99 ALR 1107, ALR 1393, it was held that one who applied

> to an oil and gas commission for a permit to drill and was granted such permit under a rule of the commission was not in a position to attack the validity of the rule under which they "received and now hold their benefits", citing Baker vs. Corman, 109 Tex 85, 198 SW 141.
> In Callanan Road Improvement Co. vs. United States, 345 U.S. 507, 97 L ed. 1206, 73 S Ct 803 (1953), it was held that one who has invoked the power of the Interstate Commerce Commission to approve a transfer of a certificate of public convenience is estopped to deny the power of the Commission to issue the certificate in the form in which it existed prior to the transfer.
> In Federal Power Commission Vs.. Colorado Interstate Gas Co., 348 U.S. 492, 99 L ed 583, 75 S Ct 467 (1955), it was held that, where a gas company applied for approval of a merger and proposed that, as a condition of approval, any loss sustained in gasoline operations be excluded from cost of dry gas in setting gas rates, and where said condition was accepted, the merger was approved and the gas company obtained the benefits of the merger, it could not while retaining the benefits of the merger attack the validity of the condition, even if such attack would have been proper otherwise.
> The foregoing authorities support the position of this Court in the present case that, after proposing that relief be granted for anticipated expenses on condition that the benefits of the relief be relinquished by refund to the extent that the anticipated expenses did not become reality, by failing to challenge the validity of the November 20, 1980, order by timely petition for review, by placing in effect the rates conditionally raised and by collecting the extra revenue generated thereby, the Telephone Company is estopped to deny the validity of the action it sought and from which it has benefitted.

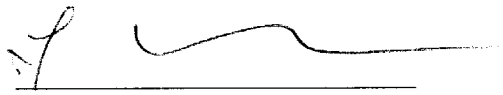
In this case a condition for evaluating the company's application was that it is currently operating pursuant to alternative plan.[19] BellSouth has accepted and retained the benefits of a rate of return range 60 basis points higher than it would have been under normal regulation, it has failed to challenge the validity of the Court of Appeals Order under Tenn. Admin. Rule 1220-4-2-.55 and Tenn. Code Ann. § 65-4-101 (g) (1), and it has collected additional revenue due to its representation that it was qualified under (g)(1). It should be

[19]Tenn. Code Ann. § 65-4-101(g)(1).

estopped from receiving extraordinary benefits during the pendency of this appeal and its motion to dismiss should be denied.

Wherefore, the Consumer Advocate Division prays that BellSouth's Motion to Dismiss be denied.

Respectfully Submitted,



L. Vincent Williams

CERTIFICATE OF SERVICE

I, L. Vincent Williams, hereby certify that a copy of the foregoing Response was served on the following parties of record by facsimile or by depositing a copy of the same in the United States mail, postage prepaid, addressed to them, in accordance with the following list, this 26th day of May, 1998:

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L. Vincent Williams

IN THE TENNESSEE COURT OF APPEALS
MIDDLE SECTION AT NASHVILLE

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Petitioner,	)	Case No._____
v.	)	
	)	(TPSC No. 95-02614)
TENNESSEE PUBLIC SERVICE COMMISSION,	)	
Respondent.	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR A STAY PENDING APPEAL

I. INTRODUCTION

Petitioner BellSouth Telecommunications, Inc. ("BST") has filed herewith a petition for review of the January 23, 1996 Order of the Tennessee Public Service Commission in Docket No. 95-02614, in which BST sought implementation of a new regulatory plan adopted by T.C.A. § 65-5-209. This order requires, in part, that BST reduce its rates by $56.285 million annually. Pursuant to T.C.A. § 4-5-322(c), BST respectfully requests that the Court stay the proposed rate reductions reflected in that Order pending resolution of this appeal.

As required by T.C.A. § 4-5-322(c), BST has given notice of its request for a stay to the Attorney General and Reporter, as

initiate a contested, evidentiary proceeding to establish the initial rates on which the price regulation plan is based." *Id.*[2]

On September 15, 1995, the Commission staff issued its report of the audit of BST's TPSC 3.01 Report for the twelve-month period ending March 31, 1995 (hereinafter "Staff Report"). It stated that:

> Except for three corrections made by the Staff, the rate of return reported on the March, 1995 TPSC 3.01 Report is accurately taken from the Company's books and records, and reflects Commission ordered ratemaking adjustments. Nothing came to our attention to indicate that the Company had not complied with Generally Accepted Accounting Principles or USOA, Part 32, accounting. The corrected rate of return for the twelve months ended March 1994 as taken from the books is 10.30%.

(Staff Report at 1-2). The audited return of 10.30% was thus *below* BST's current authorized fair rate of return.

Nevertheless, the Staff recommended that the Commission conduct a contested, evidentiary hearing to set BST's initial rates for price regulation purposes because, according to the Staff, the Company had an "adjusted" 12.74% return. The Staff arrived at this figure by adjusting BST's earned rate of return for such things as "out of period and non-recurring items" and

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[2] The fair rate of return is the return authorized in the most recent rate case applicable to BST. See T.C.A. § 65-4-101(g)(1). BST's fair rate of return, as determined in the August 20 Order, was a range of 10.65% - 11.85%.