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Guy M. Hicks
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August 10, 1999

VIA HAND DELIVERY

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

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to NEXTLINK's Motion "To Allow Contract to Become Effective." Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee***
Docket No. 98-00559

BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement TN98-6766-00 for Maximum 13% Discount on Eligible Tariffed Services
Docket No. 98-00210

BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Arrangement KY98-4958-00 for an 11% Discount on Various Services
Docket No. 98-00244

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO NEXTLINK'S MOTION "TO ALLOW CONTRACT TO BECOME EFFECTIVE"

BellSouth respectfully submits its response to the Motion of NEXTLINK Tennessee, Inc. ("NEXTLINK") to allow Contract Service Arrangements TN98-6766-00 and KY98-4958-00 "to be effective pending the final outcome of these proceedings." (NEXTLINK Motion at 1). Although it is not entirely clear what NEXTLINK has in mind, to the extent NEXTLINK is asking that the Authority approve these Contract Service Arrangements ("CSAs"), BellSouth agrees with NEXTLINK's motion. However, to the extent NEXTLINK is suggesting that the parties should be permitted to operate under the terms of a CSA that has not been approved by the Authority and that may be subject to unilateral modification by the Authority at some later date, BellSouth opposes the motion.

Because NEXTLINK's motion is couched in terms of allowing the CSAs "to take effect," it appears that NEXTLINK is attempting to draw a distinction between approving the CSA versus permitting the CSA to become effective. However, the Authority's rules do not permit

CSAs to "take effect" absent approval. On the contrary, the Authority's rules governing special contracts of public utilities expressly require that such contracts be filed with the Authority, subject to the Authority's "review and approval."

Furthermore, the statute upon with NEXTLINK relies -- T.C.A. § 65-5-203 -- does not apply to this case and, even if it did, does not permit the Authority to "allow the CSA to become effective pending a final decision." By its plain terms, T.C.A. § 65-5-203 only applies when a public utility seeks to "increase" existing rates or to "change or alter any existing classification." Here, as NEXTLINK readily acknowledges, the CSAs at issue will permit those customers to receive a discount off tariffed rates, which will result in a rate decrease, not a rate increase. Thus, T.C.A. § 65-5-203 simply does not apply.

Furthermore, even if Section 65-5-203 did apply, the statute does not confer the Authority with unlimited power to allow tariffs to take effect without agency approval as NEXTLINK suggests. Under that statute, in the event a public utility seeks to increase rates, the Authority can suspend the tariff pending a hearing, although the suspension cannot exceed nine (9) months after the tariff has been filed. T.C.A. § 65-5-203(a). If a tariff is suspended and has not been approved within six (6) months after filing, the utility may place the proposed increase or any portion thereof in effect prior to a final decision by the Authority upon notifying the Authority of its intent to do so. T.C.A. § 65-5-203(b)(1). The only circumstance in which the Authority has the power to allow a rate increase to take effect after the tariff has been suspended but before a final decision has been rendered is if "an emergency exists" or "the utility's credit or operations will be materially impaired or damaged by the failure to permit the rate to take effect...." T.C.A. § 65-5-203(b)(2).

In short, the Authority has the power to approve, reject, or suspend for a specified period of time a tariff seeking to increase rates. *See, e.g., Cumberland Tel. & Tel. Co. v. Railroad & Public Utilities Comm'n of Tennessee,* 287 F. 406, 411 (M.D. Tenn. 1921). If the Authority approves the tariff, does not suspend the tariff, or does not hear and determine the tariff's reasonableness within the time prescribed by statute, the rate increase becomes effective. *Id.* Once a tariff seeking to increase rates has been suspended, the only circumstances under which the tariff can subsequently "take effect" prior to agency approval is if: (1) the utility decides to place the tariff in effect after six (6) months; or (2) the Authority determines an emergency exists or that the utility's credit or operations will be adversely affected. NEXTLINK's view that Section 65-5-203 permits the CSAs, which have been suspended, to now "become effective pending a final decision" in these proceedings -- whenever that may be -- cannot be reconciled with the plain language of the statute.

Furthermore, NEXTLINK's continued assertion that CSAs are "like any tariff" is simply wrong. As the Tennessee Court of Appeals has recognized, a tariff "is the schedule of prices and regulations for a particular service which is filed with the [Authority] and serves as the official published list of charges, terms and conditions governing the provision of the service or facility." *BellSouth Telecommunications, Inc. v. Bissel*, 1996 Tenn. App. LEXIS 537 *2 (Tenn. Ct. App. August 28, 1996) (copy attached). According to the court, a tariff "functions in lieu of a contract between an end user and a service provider." *Id.* Here, the CSA is a contract between BellSouth and its end user customers, which is subject to the constitutional protections against "retrospective" laws and laws "impairing the obligations of contracts, " notwithstanding NEXTLINK's claims to the contrary. *See* Article I, Section 20 of the Tennessee Constitution.

BellSouth does not dispute that the Authority has ongoing regulatory oversight of BellSouth's CSAs or that the Authority has the power to prescribe reasonable rates that apply to special contract customers, as it did in *Application of Nashville Gas*, Docket No. 96-00977 (Feb. 19, 1997). However, this case is not about rates. Rather, in this case parties are challenging, and the Authority is considering, various contractual language in BellSouth's CSAs, including duration and termination provisions. Once a CSA is approved, no precedent or other rule of law permits the Authority to change unilaterally contract provisions that have been agreed upon by the parties.[1]

BellSouth agrees with NEXTLINK that customers should "receive service at the reduced rates provided in the contracts." NEXTLINK Motion at 3. However, in order for both BellSouth and its customers to enjoy the benefits of their agreement, the CSAs must be approved by the Authority. Such approval is warranted because the CSAs at issue comply with existing law. If the Authority decides to change the law applicable to special contracts, the Authority can certainly do so, and BellSouth will conduct itself accordingly in offering CSAs to customers and submitting the contracts to the Authority for approval. However, BellSouth's existing CSA customers should not be held hostage to the completion of such a lengthy regulatory process.[2]

[1] NEXTLINK's reference to T.C.A. § 65-5-101 is perplexing. NEXTLINK Motion at 2. First, Section 65-5-101 does not contain the language quoted by NEXTLINK in its motion. Second, the statute applied to the Commission's power to fix railroad rates and, in any event, has since been appealed. Accordingly, this statute has no bearing on the outcome of this case.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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[2] This is not to say that BellSouth and its CSA customers could not agree to a contract provision in the CSA that requires the renegotiation of certain terms to take into account changes in the applicable law pertaining to special contracts.

5TH CASE of Level 1 printed in FULL format.

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY, Petitioner/Appellant, v. KEITH BISSELL, CHAIRMAN; STEVE HEWLETT, COMMISSIONER; SARA KYLE, COMMISSIONER; Constituting the Tennessee Public Service Commission, Respondents/Appellees.

Consolidated Appeal No. 01A01-9504-BC-00165

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

1996 Tenn. App. LEXIS 537

August 28, 1996, FILED

SUBSEQUENT HISTORY: [*1] As Corrected September 19, 1996.

PRIOR HISTORY: APPEAL FROM THE TENNESSEE PUBLIC SERVICE COMMISSION AT NASHVILLE, TENNESSEE. Tennessee Public Service Commission Docket Numbers: 94-02610, 94-04482, 94-04483, 94-04485, 95-01137, 95-01139, 95-01140, 95-01141, 95-01142, 95-02207, 95-02208, 95-02639, 95-02640, 95-02641.

DISPOSITION: AFFIRMED AND REMANDED

COUNSEL: SANDRA L. RANDLEMAN, CHARLES L. HOWORTH, JR., BellSouth Telecommunications, Inc., Nashville, Tennessee, ATTORNEYS FOR PETITIONER/APPELLANT.

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DIANNE F. NEAL, General Counsel, Tennessee Public Service Commission, Nashville, Tennessee.

JUDGES: SAMUEL L. LEWIS, JUDGE, CONCUR: BEN H. CANTRELL, JUDGE, WILLIAM C. KOCH, Jr., JUDGE

OPINIONBY: SAMUEL L. LEWIS

OPINION: OPINION

Introduction

This appeal involves the judicial review of five Tennessee Public Service Commission orders. The orders approved tariffs filed by AT&T [*2] Communications of the South Central States, Inc., Sprint Communications Company, L.P., and MCI Telecommunications Corporation. BellSouth Telecommunications Inc., d/b/a South Central Bell, has appealed directly to this Court pursuant to Tenn.R.App.P. 12. They assert that the Tennessee Public Service Commission (Commission or PSC) should have denied the tariffs, as they violated the Commission's prior orders and policies. Additionally, BellSouth contends that the tariffs at issue in this proceeding violate the Tennessee Telecommunications Reform Act of 1995.

We have decided that the PSC did not act arbitrarily or abuse its discretion in approving the tariffs. Also, we decline to decide whether the tariffs violate the Tennessee Telecommunications Reform Act of 1995. The Commission did not render a decision with respect to its interpretation of the Tennessee Act. Accordingly,

we affirm the Commission's decision.

Procedural History

This case began on September 8, 1994, the date AT&T filed Tariff No. 94-200 n1 in the offices of the Tennessee Public Service Commission. From that date to June 8, 1995, AT&T filed thirteen additional tariffs n2, MCI filed three tariffs n3, and Sprint filed [*3] two tariffs. n4 After each of these companies filed their respective tariffs, petitioner/appellant, BellSouth Telecommunications, Inc. ("BellSouth"), filed petitions for leave to intervene, to suspend the tariffs, and to set hearings.

n1 A tariff is the schedule of prices and regulations for a particular service which is filed with the Commission and serves as the official published list of charges, terms and conditions governing the provision of the service or facility. Tariffs functions in lieu of a contract between an end user and a service provider.

n2 The numbers of the AT&T tariffs are 94-200, 94-277, 94-289, 94-292, 94-293, 94-280, 94-284, 95-014, 95-016, 95-103, 95-094, 95-127, 95-139, and 95-140.

n3 The numbers of the MCI tariffs are 94-247, 95-003, and 95-009.

n4 The numbers of the Sprint tariffs are 94-269 and 95-008.

As to the first six tariffs filed, including five AT&T tariffs and one MCI tariff, the Commission granted BellSouth's petitions to intervene, suspended the tariffs, and [*4] consolidated the petitions into docket number 94-02610. On February 22, 1995, the Commission heard oral arguments concerning the six petitions. In its final order, dated March 24, 1994, the Commission held "that the promotions and tariffs involved here are consistent with previous orders and rulings of this Commission and should be approved."

On April 24, 1995, BellSouth filed a petition to review pursuant to Rule 12 of the Tennessee Rules of Appellate Procedure. The petition asked that this court review the March 24, 1995 order as it applied to all six of the tariffs ("Appeal One"). Later, AT&T and MCI filed a joint notice of appearance pursuant to Rule 12(e) of the Tennessee Rules of Appellate Procedure. Sprint, pursuant to Rule 21(b) of the Tennessee Rules of Appellate Procedure, filed a Notice of Appearance, and requested that this Court allow it to adopt the briefs of intervenors AT&T and MCI. We granted the motion.

The next set of tariffs at issue includes two AT&T tariffs and one Sprint tariff. Again, BellSouth responded to the filings of the tariffs with petitions to intervene, to set hearings, and to suspend. Although the Commission failed to consolidate these petitions, [*5] it did treat them similarly. It granted BellSouth's petitions to intervene, but denied BellSouth's requests to suspend the tariffs. On May 12, 1995, the Commission filed its final order as to all three tariffs and stated as follows: "These tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." BellSouth appealed this decision on July 7, 1995, by filing a petition to review pursuant to Rule 12 ("Appeal Two").

The third group of tariffs includes two AT&T tariffs, two MCI tariffs, and one Sprint tariff. For all practical purposes, the history of this group is the same as that of the second group. BellSouth filed petitions as to each tariff. The Commission then granted the petitions to intervene, but denied BellSouth's requests that the Commission suspend the tariffs. The Commission held a hearing and entered a final order on May 12, 1995. The Commission concluded "that these tariffs were not in violation of any prior Commission Order and should be allowed to remain in effect." In response to the Commission's order, BellSouth filed a petition to review pursuant to Rule 12 ("Appeal [*6] Three").

The fourth group of tariffs includes two tariffs filed by AT&T. After the filings, BellSouth filed two petitions to "suspend the tariff filing, convene a contested case, and allow leave to intervene." In separate orders, the Commission allowed BellSouth to intervene in both proceedings and denied both of BellSouth's requests to suspend the tariffs. Later, the Commission considered the tariffs at its conference and concluded "that the[] tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." Following the decision in these cases, BellSouth filed a petition to review pursuant to Rule 12 on September 8, 1995 ("Appeal Four").

The final group of tariffs also involves only AT&T. On May 22, 1995, AT&T filed one tariff, and on June 8, 1995, AT&T filed two additional tariffs. In June 1995, BellSouth filed three petitions to "suspend [the] tariff filing, convene a contested case, and allow leave to intervene." Unlike the other cases, here the Commission denied BellSouth's petitions to intervene and its requests to suspend the tariffs. The Commission found: "Bell's filings [*7] fail to allege any new issues or evidence raised by these tariffs other than those previously re-

viewed and decided by the Commission." Once again, BellSouth filed a petition to review pursuant to Rule 12 on September 25, 1995 ("Appeal Five").

Thus, as of September 25, 1995, BellSouth had five appeals pending in this court. As a result, on September 26, 1995, the Commission, AT&T, and MCI filed a joint motion to consolidate the appeals and a memorandum in support of the motion. This court reserved judgment on the motion until October 25, 1995, when it ordered the appeals consolidated.

As these facts developed, another set of facts relevant to the outcome of this case began to unfold. On June 6, 1995, Governor Don Sundquist signed the Telecommunications Reform Act of 1995 ("the Act") into law. 1995 Tenn. Pub. Acts Ch. 408 § 7. Section seven of the Act amended Tennessee Code Annotated section 65-4-201 by adding subsection (b). This subsection provides 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 [*8] first obtaining from the commission a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

Tenn. Code Ann. § 65-4-201(b) (Supp. 1995).

On July 24, 1995, AT&T filed a petition asking the Commission to amend its existing certificate of convenience and necessity. AT&T wanted the commission to authorize it to "provide interexchange telecommunication services throughout Tennessee regardless of LATA boundaries." An administrative judge held a hearing and issued an initial order on September 22, 1995. In the initial order, the judge denied AT&T's petition to amend its certificate of convenience and necessity, but issued AT&T a new certificate as a "Competing Telecommunications Service Provider." On October 13, 1995, the Commission entered an order ratifying the initial order of the administrative judge. None of the parties in the present [*9] action filed an appeal as to this order before time expired.

At the beginning of oral argument, BellSouth stated that it was voluntarily dismissing the appeal as to the AT&T tariffs. As a result, Appeal Four and Appeal Five are voluntarily dismissed because both contained only AT&T tariffs. Further, AT&T had filed seven of the tariffs in the remaining appeals. Thus, this court is left with three appeals, which we consolidated into one appeal, and a total of five tariffs, three filed by MCI and two filed by Sprint. BellSouth has presented this court with two issues as to each of the tariffs. The issues are as follows:

[I] Whether the tariffs at issue in this proceeding violate the Tennessee Public Service Commission's Orders and its policy on intraLATA competition? [II] Whether the tariffs at issue in this proceeding violate the Telecommunication reform Act of 1995?

Standard of Review

Tenn. Code Ann. § 4-5-322 provides the appropriate standard of review for Tennessee appellate courts reviewing state agency decisions. Subsection (h) of that statute states:

(h) the court may affirm the decision of the agency or remand the case for further proceedings. The [*10] court may reverse or modify the decision if the rights of the petitioner have been prejudiced because of administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

BellSouth contends that subsections (1), (4), and (5) provide grounds for reversal.

This Court examines the Commission's adjudicatory decisions using the same standards of review applicable to the decisions of other administrative agencies. *Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, 876 S.W.2d 106, 110 (Tenn.Ct.App. 1993).* Thus, we observe the narrow, [*11] statutorily defined standard contained in Tenn. Code Ann. § 4-5-322(h)(4), and Tenn. Code Ann. § 4-5-322(h)(5),

rather than the broad standard used in other civil appeals. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 279 (Tenn.Ct.App. 1988);* citing *CF Indus. v. Tennessee Pub. Serv. Comm'n, 599 S.W.2d 536, 540 (Tenn. 1980).*

Additionally, courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. Wayne County v. Tennessee Solid Waste Disposal Control Bd., at 279; citing *Southern Ry. v. State Bd. of Equalization, 682 S.W.2d 196, 199 (Tenn.1984); Freels v. Northrup, 678 S.W.2d 55, 57-58 (Tenn. 1984).* We do not review the factual issues de novo, and therefore, do not substitute our judgment for the agency's as to the weight of the evidence. Id. citing *Humana of Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977).* However, we may construe statutes, and apply the law to the facts. *Sanifill of Tennessee v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 811 (Tenn. 1995).*

As to Tenn. Code [*12] Ann. § 4-5-322(h)(4)'s "arbitrary and capricious" standard, this court should determine "whether the administrative agency has made a clear error in judgment." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, at 110-11. An arbitrary decision is one not based on any course of reasoning or exercise of judgment, or one which disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. Id.

Tenn. Code Ann. § 4-5-322(h)(5) does not define what amounts to "substantial and material evidence." However, in reviewing an administrative decision with regard to Tenn. Code Ann. § 4-5-322(h)(5), this court should examine the record carefully to determine whether the administrative agency's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n at 111, quoting *Clay County Manor v. State Dep't of Health & Environment, 849 S.W.2d 755, 759 (Tenn. 1993).* In general terms this amounts to something less than a preponderance of the evidence, but more than a scintilla [*13] or glimmer. Wayne County v. Tennessee Solid Waste Disposal Control Bd., at 280.

The Development of Long Distance Telephone Regulation in the

United States

Early this century the American Telephone and Telegraph Company (AT&T) developed a long distance telephone network superior to its competitors. Later, AT&T'S long distance dominance extended to local calling when it limited connection of its long distance network to its local service network. Eventually, AT&T monopolized all telephone traffic in the United States. See *GTE Sprint Communications Corp. v. Public Util. Comm'n, 753 P.2d 212, 213 (Colo. 1988).* In 1974 the U.S. Department of Justice, responded to AT&T's hegemony by filing an antitrust claim. This claim, settled in 1982, resulted in the largest judicially supervised divestiture in American history. n5

n5 At the time of the settlement, or "Modified Final Judgment," AT&T was the largest corporation in the world. In 1980 the Bell System's total operating revenues exceeded $ 50 billion which constituted almost two percent of the gross national product of the U.S. that year. *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 152 (D.D.C. 1982),* aff'd sub nom. *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983).*

[*14]

The 1982 court-approved order, also known as the Modified Final Judgment (MFJ), accomplished two things significant to this appeal:

(1) it divested AT&T of its twenty-two subsidiaries, which now operate independently as regulated local monopolies. *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226 (D.D.C. 1982),* aff'd sub nom. *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983);*

(2) it created a new framework of ownership and rate structure by establishing "Regional Bell Operating Companies" (RBOCs), like BellSouth, which were to divide their territories into new geographical classifications known as "local access and transport areas" (LATAs). GTE Sprint Communications Corp. v. Public Communications Corp. v. Public. Util. Comm'n, at 214.

The MFJ allowed the RBOCs to retain a monopoly over local telephone services, but precluded the RBOC's from providing any long distance services. United States v. American Tel. & Tel. Co., at 227-8. Thus, the RBOCs can carry intraLATA traffic (local), but not interLATA traffic (long distance). The MFJ divided the original AT&T territory into 163 LATA's nationally, 5 of which are in Tennessee. [*15]

A state's power to regulate extends to all LATAs within its boundaries. *GTE Sprint Communications Corp. v. Public Util. Comm'n, 753 P.2d at 214.* The Tennessee Public Service Commission has regu-

latory authority over the telephone companies of this state. Tennessee *Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151, 155 (Tenn.App. 1992)*. The Commission exercises co-mingled legislative, executive, and judicial functions. *Id. at 158;* citing *Blue Ridge Transp. Co. v. Pentecost, 208 Tenn. 94, 343 S.W.2d 903, 904 (Tenn. 1961)*. Like other administrative agencies, the PSC must base the exercise of its rulemaking or adjudicatory authority on state law. *Id. at 161.*

At divestiture some state public utility commissions, including Tennessee's, initially barred interexchange carriers, n6 (IXCs) from providing intraLATA services. Nevertheless, technological advances in the 1980's brought new service capabilities to the IXCs. The knowledge of these capabilities prompted the IXCs to approach the PSC and request permission to provide some intraLATA services. On July 27, 1991, the PSC responded to the IXC's request and denied them intraLATA certificates which [*16] would have permitted them to compete freely in the intraLATA market. However, in an unprecedented step, the Commission agreed to allow the IXCs to provide some intraLATA communications services in 4 specific instances. These instances were exceptions to the PSC rule prohibiting intraLATA competition. Each exception involved access arrangements for the termination and/or origination of calls in local telephone exchanges. The four exceptions to the Commission's policy prohibiting intraLATA communication include:

(1) intraLATA calls made by customers subscribing to interLATA special access (Megacom-like) services;

(2) calls made over private lines that complete the intraLATA portion of an interLATA private line service;

(3) intraLATA "800" calls which are part of an interLATA offering; and

(4) calls prefixed by 10-XXX, 950-XXXX, or some other type of access code which users dial to reach the subscriber's interLATA carrier.

n6 Interexchange carriers are facilities based providers of intrastate, interLATA telecommunications services. In Tennessee these providers include AT&T, MCI and Sprint.

[*17]

In its Order the Commission stated:

Tennesseans may enjoy the benefits of "one-stop shopping" using a single carrier to handle both intra- and interLATA toll calls -- without opening the LATA's to competition and without [the] threatening value of service pricing. . . .

The Commission approves the parties' proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services available on a statewide basis.

In a footnote on page 5 of the June 27, 1991 Order the PSC stated:

Since the IXC's applications for intraLATA authority are denied, the carriers' tariff shall continue to describe only interLATA services. The applicants may, however, advertise that the carriers are able to provide statewide service to certain types of customers.

Later in the Order the Commission added:

The Commission approves the parties proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making [*18] these IXC services available on a statewide basis.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

The Commission added a footnote which provides in part:

The Commission has consistently followed a policy of protecting local exchange carriers from IXC competition in the intraLATA toll market.

On appeal, BellSouth seeks review of the Commission's orders of March 24, 1995, and May 12, 1995, approving MCI and Sprint tariffs. BellSouth argues that the tariffs violate the Tennessee Public Service Commission's orders and its policy on intraLATA competition. Specifically BellSouth claims that the tariffs "promote," "describe," and "solicit" the use of interexchange services for calls which are not incidental to interLATA service. Stated differently, BellSouth argues the tariffs approved in 1995 permits the interexchange carriers to impermissibly compete in

the intraLATA services market.

Analysis

I. Whether the tariffs at issue [*19] in this proceeding violate the Commission's prior orders and policy on intraLATA competition.

BellSouth asserts the 1995 PSC ruling contradicts the Commission's 1991 Order and earlier rulings. However, this Court believes that the June 27, 1991 Order is dispositive as to the issues in this appeal. The PSC historically has made its intent to prevent intraLATA competition clear. However, the June 1991 Order created four exceptions which permit interexchange carriers to carry intraLATA calls. As the Commission stated:

The Commission approves the parties proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

MCI and Sprint argue that the tariffs they filed simply represent an application of the permissible intraLATA exceptions created [*20] in 1991. They submit that the tariffs subject to this appeal do not wrongfully promote intraLATA services, but involve interexchange activity consistent with the Commission's current policy.

To properly determine the controversy between the parties we consider each tariff separately.

MCI 94-247

MCI filed Tariff 94-247 on October 28, 1994. The tariff allegedly offers credits to customers of "MCI Metered Use Service Option J" (MCI Vision) if their "incremental intraLATA usage" exceeds $ 100.00. For those customers accessing the service via a "PBX," the tariff offers a credit of up to $ 250.00 if their intraLATA usage exceeds certain amounts.

The text of the tariff states in part:

MCI Vision IntraLATA Usage Promotion

Beginning on November 27, 1994, and ending April 14, 1995, MCI will provide the following promotion to new and existing customers of Metered Use Service Option J (MCI Vision) who enroll in the promotion.

An MCI tariff filed with the PSC describes "MCI Vision" as:

An outbound customized telecommunications service which may include an inbound 800 service option using Business Line, WATS Access Line, or Dedicated Access Line Termination. It provides [*21] a unified service for single or multi-location companies using switched, dedicated, and card origination, and switched and dedicated termination.

MCI claims the tariff only contemplates the completion of intraLATA calls in exception category one (special access), exception category three (800 calls part of an interLATA offering), or exception category four (10-XXX prefixed or other dialing code calling). This Court cannot verify with certainty that a category one or category four exception applies. However, it does appear that MCI tariff 94-247 involves intraLATA "800" calls which are a part of an interLATA offering (category three). Thus, this Court cannot assert that "the administrative agency has made a clear error in judgment." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, at 110-11. We agree with the Commission that the tariff is "consistent with previous orders and rulings of this Commission and should be approved."

SPRINT 94-269

The Commission's Final Order on this tariff contains the following statement:

The Commission considered these tariffs at its regularly scheduled April 18, 1995 Commission Conference. It was concluded after careful [*22] consideration of the entire docket constituting the record in this matter, the Commission's prior decisions in Docket Nos. 89-11065 and 94-02610, the provisions of all applicable rules and statutes, particularly the provisions of TCA 65-5-203; that these tariffs were not in violation of the Commission's policy on IntraLATA competition as established in prior Commission Orders and should be allowed to remain in effect.

We have reviewed the text of Sprint Tariff 94-269, the PSC's order, and the briefs filed by the parties. Although neither BellSouth nor Sprint has adequately described the rationale for their positions as to this tariff, we cannot affirmatively say that the Commission's "findings, inferences, conclusions or decisions" are so arbitrary as to require reversal. This Court will defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience,

and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274 (Tenn.Ct.App. 1988).* As the Circuit Court of Appeals for the District of Columbia recently stated:

Where, as here the issue is the Commission's interpretation of a tariff, [*23] we defer to its reading if it is "reasonable [and] based upon factors within the Commission's expertise."

American Message Centers v. F.C.C., 311 U.S. App. D.C. 64, 50 F.3rd 35, 39 (D.C. Cir. 1995); quoting *Diamond Int'l Corp. v. FCC, 201 U.S. App. D.C. 30, 627 F.2d 489, 492 (D.C. Cir. 1980).*

MCI 95-003

This tariff involves a reduction to MCI's per-minute usage rates for its basic long distance service, Dial One/Direct Dial. It also revises the Time of Day chart to reflect accurate times. The tariff for Dial One/Direct Dial, also known as "Option A" describes the service as:

[A] one-way, dial in - dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers served by end offices that have been converted to equal access may originate call by dialing 10222.

Thus, it seems the tariff comports with the limitations imposed by the June 27, 1991 Order. The tariff only describes interLATA services, and users complete intraLATA [*24] calls via exception category four (10XXX prefixed or other dialing code calling).

The Commission's May 12, 1995 Order declared that MCI 95-003 "allowed consumers one-stop shopping" for telecommunications services and found no violation of any prior Commission Order.

This Court affirms the Commission's decision to uphold MCI Tariff 95-003, since the services contemplated fall squarely within an exception category. Thus, we do not consider the Commission to have been "arbitrary and capricious" in arriving at their conclusions as to this tariff.

MCI 95-009

MCI 95-009 involves the introduction of a service plan known as "Friends & Family Option B" and the introduction of a new Personal 800 option, "Personal 800 Plan R." Personal 800 Plan R describes the service as:

Personal 800 Plan R provides a telephone number at which calls may be received from any location within the state of Tennessee for a monthly subscription fee and one-time installation fee as identified in MCI'S F.C.C. Tariff No.1. MCI will provide to the customer and 800 telephone number, a 4-digit Security Code, and a 6 digit Rerouting Code which will allow the customer to use the "Follow-Me" Routing feature. The [*25] customer will be charged the per minute usage rates as described in MCI's F.C.C. Tariff No. 1.

This service plan comports with the 1991 Commission Order as it involves the use of "800" calls as a part of an interLATA offering (Category 3). The tariff for Friends and Family Option B is a variant of Option A or "Dial One/Direct Dial." The tariff for Option A describes the service as:

[A] one-way, dial in-dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers who prescribe to MCI may originate calls by dialing 1. All customers served by end offices that have been converted to equal access may originate calls by dialing 10222.

This plan uses exception category four of the 1991 PSC order (10XXX prefixed or other dialing code calling). Thus, MCI Tariff 95-009 complies with current Commission orders. We find that the approval of this tariff by the Commission was not "arbitrary and capricious" pursuant to Tenn. Code Ann. § 4-5-322(h)(4). [*26]

SPRINT 95-008

The Commission considered this tariff in a docket with MCI 95-003 and MCI 95-009. The Commission, as it had done in every tariff except MCI 94-247, refused to suspend the tariff as BellSouth had requested, finding "no basis on which to suspend the tariff." After reviewing Sprint Tariff 95-008 we too find no provision which violates the Commission's 1991 Order governing intraLATA competition. Thus, we affirm the Commission's conclusion as to this tariff.

We believe that BellSouth has not demonstrated that the MCI and Sprint tariffs were so inconsistent as to warrant this Court's finding the 1995 Commission Orders arbitrary and capricious. Additionally, we agree with MCI's position that the determinative issue in these cases was whether or not the tariff filings were consistent with

the 1991 Commission Order. As this determination involves a review of the Commission's orders, the issues in this case were legal in nature. Thus, we need not decide whether "substantial and material evidence" supports the Commission's decision as required by Tenn. Code Ann. § 4-5-322(h)(5).

II. Whether the Tariffs violate the 1995 Tennessee Telecommunications Act?

As previously [*27] discussed, the Telecommunications Reform Act of 1995 ("the Act") amended Tennessee Code Annotated section 65-4-201 by adding the following subsection:

(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, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

Relying on this amendment, BellSouth argued that MCI and Sprint lacked the authority to offer the services proposed in their tariffs because they failed to obtain the necessary certificates of public convenience. Despite its arguments, BellSouth must fail as to this issue because it is not properly before this court.

Tennessee Code Annotated section § 4-5-322 defines this court's [*28] scope of review. Pursuant to that section, "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ." Tenn. Code Ann. § 4-5-322(a)(1) (1991) (emphasis added). Upon review, this court "may affirm the decision of the agency or remand the case for further proceedings." Id. § 4-5-322(h) (emphasis added). When appealing a decision of the Public Service Commission, an aggrieved person shall file their petition for review in this court. Id. § 4-5-322(b)(1). Thereafter, this court must confine its review to the record and decide the issues without a jury. Id. § 4-5-322(g). This limited standard of review prohibits this court from reviewing an issue which the Commission did not decide.

In this case, the Commission did not decide if the tariffs violated the Act. BellSouth never raised the issue before the Commission. The Commission never addressed the issue in any of its orders relating to the five tariffs, and the record does not contain any evidence as to the issue. The only issue decided by the Commission was whether their approval of the tariffs was consistent with their Order from 1991. It is only on appeal [*29] to this court, that BellSouth raises the issue of a violation of the Act. Because there was neither a decision nor a record for this court to review, this court lacks the authority to address the issue on appeal. Moreover, it is not the role of this court to delve into the complicated issues facing administrative agencies unless called on to do so. This court is to give deference to the decisions of an administrative agency which has acted within its area of specialized knowledge. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 279 (Tenn. App. 1988).* We are not to substitute our judgment for that of the agency on highly technical matters. *Id. at 280.*

The Federal Telecommunications Act of 1996

On February 16, 1996, the U.S. Congress passed the Telecommunications Act of 1996. This Act does not provide for the wholesale preemption of state regulation of telecommunications services. Instead, the Act permits states to retain authority if the state regulation is consistent with it. In examining the provisions of the Federal Telecommunications Act of 1996, we find nothing which would alter our decision in this appeal. We believe the Commission's Orders [*30] governing the services of MCI and Sprint to be consistent with the 1996 Federal Act. n7

n7 The Court considered the following provisions of the 1996 Federal Telecommunications Act:

The caption of the Act:

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Section 253:

(a) IN GENERAL - No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect or prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY - Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and con-

sistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION - If, after notice and an opportunity for public comment, the Commission determines that a State or local government permitted or imposed any statute, regulation, or legal requirement that violate subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Section 261 (b):

EXISTING STATE REGULATIONS - Nothing in this part shall be construed to prohibit any State Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provision of this part.

Section 261(c):

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

[*31]

For the foregoing reasons we affirm the judgment of the Tennessee Public Service Commission. We tax costs on appeal to the Appellants, BellSouth.

SAMUEL L. LEWIS, JUDGE

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, Jr., JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

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