BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

CONSUMER ADVOCATE DIVISION	)	
	)	
vs.	)	
	)	Docket No. 99-00391
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	

REPLY OF THE CONSUMER ADVOCATE DIVISION TO RESPONSE OF BELLSOUTH

Comes the Consumer Advocate Division to reply to the response of BellSouth. We respectfully submit that BellSouth's response is inappropriate and insufficient to deny the relief CAD sought and that evidentiary hearings should be held.

BellSouth argues that "[T]he TRA should refuse to convene a contested case..." for the declaratory order sought by the Consumer Advocate Division. However, the company overlooks the fact that the contested case has already begun. Tenn. Code Ann. § 4-5-223 provides only two (2) procedural mechanisms upon the filing of a petition for a declaratory order. The agency may convene a contested case[1] or the agency may refuse to issue a declaratory order.[2]

Therefore, when the agency directed BellSouth to respond[3] the contested case had already begun. Certainly, the contested case had begun no later than June 22, 1999 when the agency voted 3-0 to provide BellSouth time to respond to the request for declaratory order. These steps

[1]Tenn. Code Ann. § 4-5-223 (1).

[2]Tenn. Code Ann. § 4-5-223 (2). Tenn. Code Ann. § § 4-5-223 (1) and (2) are agency actions and are distinguishable from Tenn. Code Ann. § 4-5-223 (3) situations in which the agency fails to take any action at all, but this non-action is statutorily directed to be considered the action or refusal.

[3]See, Tennessee Regulatory Authority Notice of June 16, 1999, (Attached as Exhibit A) setting a schedule.

by the Authority were not failures to act. Indeed, when the agency takes any action the case has been convened.

Tenn. Code Ann. § 4-5-317 options are substantially similar to 4-5-223 options. Tenn. Code Ann. § 4-5-317 requires the agency to deny a petition for reconsideration or grant the petition and set a hearing or issue an order. Subsection 317 also provided that inaction is deemed to be a denial. In Consumer Advocate Division v. Tennessee Regulatory Authority, No. 01A01-97087-BC-00391, CAD filed a petition for reconsideration and the agency took action in response to the petition but ultimately denied it. The TRA and Nashville Gas Company filed motions to dismiss CAD's appeal on the ground that the Court of Appeals had no jurisdiction when there was no affirmative setting of the matter for further proceedings and there was no express granting of the Tenn. Code Ann. § 4-5-317 Petition for Reconsideration when the subsequent order expressly stated that CAD's petition was denied. The Court of Appeals denied the agency's motion to dismiss because the agency took action.

BellSouth also overlooks the fact that the Consumer Advocate Division's Petition and Complaint against it are predicated upon facts and law. The decision in every case must be premised upon the facts of that case and the law. The United Telephone case facts are distinguishable from the BellSouth facts. For example, the legislative history demonstrates that the passage of the legislation was predicated in part upon the representations of BellSouth with respect to the agreement it had with the CAD on DA. No representations of an agreement between United Telephone and CAD regarding DA was prior to legislative approval.[4] Moreover, the TRA's order only applied to United Telephone. United, for example, had no filed directory

[4] The facts stated herein do not exhaust the distinguishable facts.

assistance tariff which made directory assistance a basic service, but nevertheless was providing directory assistance usage to its customers. In this case, BellSouth had a tariff specifically making directory assistance usage a basic service.

Moreover, the facts of the United case do not contain statements or admissions of impossibility by United. BellSouth, however, made statements or admissions of impossibility of assessing a DA charge in May 1996 -- long after the company filed its application for price regulation.

BellSouth further misapprehends the issues with respect to Tenn. Code Ann. § 65-5-209 (b). That subsection specifies that [A]n incumbent local exchange company shall, upon approval of its application under subsection (c), be empowered to, and shall charge and collect...

Tenn. Code Ann. § 65-5-209 (b) is not ambiguous, the statutory phrase "shall, upon approval of its application under subsection (c), be empowered to, and shall charge and collect" has to mean something. In Oakley v. Oakley, 686 S.W.2d 85, 87 (Tn. Ct. App. 1984) The Court of Appeals equates the meaning of "upon approval" to "until such time as approved." The Court stated:

> In its ordinary common sense, the word "valid" means "of binding force, sustainable and effective in law." It cannot be said that the Property Settlement Agreement between the parties was "binding," since by the express language contained therein its validity was made contingent upon the approval of the court. Therefore, there could be no "valid" Property Settlement Agreement until such time as the Law and Equity Court of Gibson County approved it.

See, also Costello v. Acco Transportation, 33 Tenn. App. 411, 434, 232 S.W.2d 297, 307-8 (1949). BellSouth admits that the December 9, 1998 Order states that "BellSouth's application for a price regulation plan ... is hereby approved." BellSouth response, p. 5. It appears that there

could be no empowerment of BellSouth to charge and collect until after the approval. Indeed, empowerment is based upon the contingency of approval. As a result, there is a conflict in the December 9, 1998 Order between the effective date of the plan and the date of BellSouth's empowerment.

If BellSouth's contends that the agency can validly decide in December 1998 that the company's June 20, 1995 application for a price regulation plan became effective[5] on October 1, 1995 when in fact no order or agency decision prior to December 1998 made its plan effective, then the agency can similarly decide that the February 3, 1995 agreement between BellSouth and the Consumer Advocate Division became effective on October 1, 1995. Indeed, the decision to approve the price regulation application retroactively is also an approval for BellSouth to make DA charges whenever the company was ready to implement them, if DA charges are implementable at all. As a result there is no untimeliness.

Most parties do not deny that they are bound by a contract. Instead, they argue over the interpretation of the contract. With respect to this agreement BellSouth does not make arguments of interpretation, it makes the same types of arguments it made in the MCI case, i.e., it is not bound by its agreement.

Moreover, BellSouth somehow believes that CAD's petition and complaint was filed pursuant to Tenn. Code Ann. § 65-5-203 (a). The case it cited also involved a situation in which the agency failed to act at all. BellSouth's reliance upon Consumer Advocate Division v. Greer, is misplaced. In that case, the Consumer Advocate Division filed a Petition to Intervene and *the agency failed to take any action.* The Supreme Court analyzed the case under an abuse of

[5] Tenn. Code Ann. § 65-5-209(a).

discretion standard, holding that CAD had not complied with the UAPA or agency rules for initiating a contested case. Even though Tenn. Code Ann. § 65-5-203 (a) is not applicable here we further note that the finding that the TRA did not have a mandatory duty to convene a rate setting contested case in "every case" is correct. A mere one sentence written complaint from someone who states that they are "complaining that the rate is unfair", would not invoke a mandatory duty to convene a contested case.

In addition, BellSouth seeks to argue that the agreement is invalid because the "proposed" effective date will not be the same as the actual effective date. Such an assertion cannot dislodge the agreement. All parties recognize that agency processes can result in an effective date which is different than that proposed by the parties. In recognition of this fact, CAD respectfully requests that Authority to note that the two year period ran from "the effective date of this tariff" not the "proposed" effective date of the tariff.

BellSouth further argues that it should receive the $21 million benefit because it did not move to recommence or implement its tariff. CAD made public statements regarding the agreement and approached the Tennessee Public Service Commission, its duty was complete.

The tariff, however, was BellSouth's and the company cannot, through non-action, escape the agreement. Furthermore, two situations should be noted, first, BellSouth argues that the agency has no choice but to permit a directory assistance plan for a price regulation plan company.[6] If true, this makes the condition of Tennessee Public Service Commission approval superfluous when approval was necessary under Regulatory Reform rule regulation. Second, as CAD stated earlier, if DA is valid under a price regulation plan the agency had already authorized

[6] See, Tenn. Code Ann. § 65-5-209 (h).

BellSouth to implement a plan on the effective date of BellSouth's choosing on March 1, 1996, in docket no. 95-02614. Third, the price regulation plan for BellSouth was stayed by the Court of Appeals. Fourth, the agency has now effectuated BellSouth's plan on October 1, 1995, a date clearly prior to the August 13, 1996 proceeding. Fifth, BellSouth did not show that an order had ever been entered. Finally, the August 13, 1996 proceeding was not a denial, it was a Motion to Dismiss without prejudice. In all forums a dismissal without prejudice is not a denial and parties can refile.

BellSouth did not deny that consumers will suffer $21 million injury if its DA request is granted without adherence to the agreement, indeed the lesser $19.6 million amount is also sufficient to establish injury. Moreover, CAD demonstrates a likelihood of success on the merits if the agency decision is consistent with a 1995 effective date. CAD also requests that the agency take official notice that consumers who use and would be charged for DA will continuously terminate service with BellSouth and will not be able to be found and will be irreparably harmed, in addition, the burden of attempting to find these consumers will shift to the public in the persona of the state unclaimed property division at great cost to the state. Indeed, the cost of finding the person may often be greater than the cost which should be refunded. If DA begins contemporaneously with the reductions the charge will balance out overall. As a result injunctive relief should be granted and the agency after, considering the evidence should find in favor of the

Consumer Advocate Division.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been mailed postage prepaid to the parties listed below this 25th day of June, 1999.

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[ ] Hand
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