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November 16, 1999

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

In Re: *AT&T Communications of the South Central States, Inc. Tariff to Implement an Intrastate Directory Assistance Charge*

Docket No. 99-00757

Dear Mr. Waddell:

Enclosed for filing are the original and thirteen copies of the Memorandum Brief of AT&T Communications of the South Central States, Inc. Opposing the Petition for Information filed by the Consumer Advocate Division in the above matter.

This tariff was on the Agenda of the Directors Conference for November 2, 1999. The CAD had filed a Complaint alleging that the notice was not in the required form. AT&T had filed a reply to that showing that the CAD was mistaken. However, AT&T determined that publication of the notice had not been as extensive as it should have been. AT&T re-published the notice to assure statewide coverage, and amended the effective date of its tariff until December 6, 1999. The CAD had also filed a Petition for Information which AT&T opposed.

At the Directors Conference, Chairman Malone (Transcript, p. 20) stated:

> So what I would suggest is since AT&T's filing yesterday itself states the December 6 date, is that the Authority suspend this tariff for 45 days, and that the advocate, to the extent the advocate's office wishes to continue seeking

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information, that the advocate's office file by noon on November 9 a clarification of just what exactly it is seeking and why it is seeking it. That would place the Authority in the position at our next conference, which is before December 6, to determine whether or not the advocate ought indeed be given the opportunity to get that information.

The Consumer Advocate has filed its comments on November 9 and AT&T's response is enclosed. Accordingly, we request that this matter be placed on the Agenda for November 23, 1999.

Please let me know if you need anything further in this regard. We appreciate your cooperation.

Yours very truly,

Val Sanford

VS/ghc
Enclosures

cc: Vance Broemel, Esq.
James P. Lamoureux, Esq.
Garry Sharp

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: *AT&T Communications of the South Central States, Inc. Tariff to Implement an Intrastate Directory Assistance Charge*

Docket No. 99-00757

MEMORANDUM BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. OPPOSING THE PETITION FOR INFORMATION FILED BY THE CONSUMER ADVOCATE DIVISION

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November 16, 1999

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: ***AT&T Communications of the South Central States, Inc. Tariff to Implement an Intrastate Directory Assistance Charge***

Docket No. 99-00757

MEMORANDUM BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. OPPOSING THE PETITION FOR INFORMATION FILED BY THE CONSUMER ADVOCATE DIVISION

AT&T Communications of the South Central States, Inc. ("AT&T") respectfully urges the TRA to deny the Petition for Information filed by the Consumer Advocate Division ("CAD") on the grounds that: (1) the CAD has not demonstrated compliance with T.C.A. §65-4-118, which governs its powers to intervene in, or to institute, proceedings or to seek information to institute a proceeding; (2) the CAD has not demonstrated a legitimate purpose for seeking the information stated in its Petition; and (3) the CAD has not demonstrated the reasonableness of its Petition or the relevance of the information sought to any legitimate purpose.

I. THE CAD HAS NOT DEMONSTRATED COMPLIANCE WITH T.C.A. §65-4-118, WHICH GOVERNS ITS POWERS TO INTERVENE IN, OR TO INSTITUTE, PROCEEDINGS, OR TO SEEK INFORMATION TO INSTITUTE A PROCEEDING.

A. The Constitutional Basis For Limitations On The Powers Of The CAD.

The CAD's position is based on the assumption that it has the power to intervene in, or to institute, proceedings, or to seek information as it pleases, when it pleases and how it pleases. That assumption is unwarranted. As will be discussed, there are specific

statutory limitations on the powers of the CAD. Those statutory limitations arise out of due process rights guaranteed under Article I, Section 8 of the Tennessee Constitution and must be construed in the light of the constitutional guarantees.[1]

As the Tennessee Supreme Court held in State ex rel. Shriver v. Leech, 612 S.W.2d 454 (Tenn. 1981), at page 456, in the context of a civil investigative demand (CID) by the attorney general:

(1) "There is a due process right to refuse unreasonable and irrelevant investigative demands";

(2) "To exercise this right, the recipient of a CID must be sufficiently informed of the conduct under investigation to allow a determination of the reasonableness and relevancy of demands for inspection."

The Tennessee Supreme Court has held that these constitutional limitations apply to subpoenas issued by the Department of Revenue, or by the executive department generally; State Department of Revenue v. Moore, 722 S.W.2d 367, 373 (Tenn. 1986).

The same constitutional limitations apply to the CAD.

B. T.C.A. §65-4-118(c)(2)(A) Requires The Approval Of The Attorney General And Reporter In Order For The CAD To Take Action, And There Is No Evidence Of Such Approval Here.

T.C.A. §65-4-118(c)(2)(A) provides:

> (c) (2) (A) The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the

[1] Other constitutional provisions of the Federal and Tennessee Constitutions may be involved, e.g., Article I, Section 7 of the Tennessee Constitution and the 14th Amendment to the United States Constitution.

> approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority. (Emphasis added).

The requirement of the approval of the Attorney General and Reporter is not a mere formality, but is a non-delegable function in order protect against abuses. The interpretation of such a requirement for approval by the Attorney General and Reporter was before the Court in State ex rel. Shriver v. Leech, 612 S.W.2d 454 (Tenn. 1981). In that case, the statute authorizing CIDs, as the statute here, required approval by the Attorney General and Reporter for the issuance of the CID. In rejecting the contention of the Attorney General as to his power to delegate that responsibility, after reviewing other grounds, the Court held, at page 456:

> Finally, the power that rests in the hands of the person authorized to issue a CID and its potential for abuse if not used properly demands that the CID be issued only by the person named in the statute, the attorney general, and not the multitude of deputies and assistants employed by him in the performance of the duties of his office.

If the Legislature had intended that such approval could be given by some designee, it would have said so, as it did with respect to the powers of the Commissioner of Revenue in State Department of Revenue v. Moore, 722 S.W.2d 367, 372 (Tenn. 1986).

Approval by the Attorney General is particularly significant where, as here, the CAD is seeking extensive information having no relevance to any proceeding before the TRA. Approval by the Attorney General is the first step in assuring that the CAD does not abuse the powers given it. The taking of that first step, however, does not limit the

powers of the TRA in deciding whether to grant the CAD the relief it seeks, or the ultimate power of the courts to protect constitutional and statutory rights.

By reason of the failure of the CAD to demonstrate the approval of the Attorney General , its Complaint and Petition should be denied.

C. T.C.A. §65-4-118(c)(2)(B) Requires The CAD To State With Particularity "The Type Of Proceeding That May Be Initiated If The Information Is Obtained." – A Requirement Not Met By The CAD Here.

T.C.A. §65-4-118(c)(2)(B) provides:

> (c) (2) (B) If the consumer advocate division concludes that it is without sufficient information to initiate a proceeding, it may petition the authority, after notice to the affected utility, to obtain information from the utility. The petition shall state with particularity the information sought and the type of proceeding that may be initiated if the information is obtained. Additionally, the consumer advocate division may request information from the authority staff, and, if authority staff is in possession of the requested information, such information shall be provided within ten (10) days of the request. (Emphasis Added).

The requirement for stating "the type of proceeding that may be initiated if the information is obtained" is essential for the protection of the due process rights of the person from whom the information is sought. Without that statement, there is no sound basis for determining that the CAD's request meets the constitutional standard of reasonableness and relevancy, State ex rel. Shriver v. Leech, 612 S.W.2d 454, 456 (Tenn. 1981); nor for determining that the CAD's request meets the requirements of a legitimate purpose and relevancy to that purpose; State Department of Revenue v. Moore, 722 S.W.2d 367, 376 (Tenn. 1986). As the latter case holds, at page 376, the burden is on the

agency, here the CAD, to "make a *prima facie* case" for compliance with the request for information.

In addition, the Supreme Court has construed T.C.A. §65-4-118(c)(2)(B), in Consumer Advocate Division v. Greer, 967 S.W.2d 759 (Tenn. 1998), where the Court stated, fn 4 at page 763:

> We note that the specificity required by the Rules is supported by the statute which grants the Advocate authority to intervene. That statute provides that if the Advocate is "without sufficient information to initiate a proceeding, it may petition the [TRA[, after notice to the affected utility, to obtain information from the utility. The petition shall state with particularity the information sought and the type of proceeding that may be initiated if the information is obtained." Tenn.Code Ann. §65-4-118(c)(2)(B). The General Assembly created a procedural mechanism to allow the Advocate to obtain specific information before filing a complaint. This statutory provision illustrates the importance of specificity.

Here the CAD, neither in its original Petition, nor in its "Comments on Petition for Information," has stated with particularity what type of proceeding it might initiate if the information sought is obtained.

The closest the CAD comes to stating any type of proceeding is in the conclusion to its comments, where the CAD states that:

> If the responses do not allow, or are insufficient to allow, the Authority to establish that the increase is just and reasonable, the Authority should deny the charge. Alternatively, the Consumer Advocate Division of the Office of the Attorney General reserves the right to institute a proceeding to assure that all AT&T rates are just and reasonable in accordance with law.

Presumably, the CAD seeks to support its "complaint," but that complaint was based solely on AT&T's alleged failure to file a proper public notice. The information sought here has nothing to do with that complaint. Likewise, the vague reference to some proceeding to assure that all AT&T's rates are just and reasonable is clearly not a statement with particularity of the type proceeding the CAD might initiate if it obtained the information sought. Particularity means just that. The CAD has utterly failed to meet the standard for particularity and specificity required by the statute.

Therefore, the CAD's Petition for Information fails to comply with the statutory mandate, and on this ground should be denied.

II. THE CAD HAS NOT DEMONSTRATED A LEGITIMATE PURPOSE FOR SEEKING THE INFORMATION SOUGHT IN ITS PETITION

A. The Requirement Of A Legitimate Purpose

The first requirement for any state agency seeking information by any sort of compulsory process is the presence of a "legitimate purpose" for seeking that information.[2] As the Court held in State Department of Revenue v. Moore, 722 S.W.2d 367 (Tenn. 1986), at page 376, the agency seeking information must make a *prima facie* case for compliance with the request, subpoena or demand for information; and to do that must show, first, that the investigation will be conducted "pursuant to a legitimate purpose."

---

[2] The CAD included three requests to admit. In so doing, the CAD confuses the discovery procedures available in contested cases pursuant to T.C.A. §4-5-311 with the procedures applicable to the CAD's petition for information under T.C.A. §65-4-118. Unless and until a contested case is convened, neither the CAD, nor anyone else, is entitled to resort to discovery under T.C.A. §4-5-311. Under the rules governing discovery, all discovery is limited to matters "relevant to the subject matter involved in the pending action"; Rule 26.02(1) Tennessee Rules of Civil Procedure.

The crucial nature of the requirement of a "legitimate purpose" is illustrated by the decision of the Court of Appeals in BellSouth Telecommunications, Inc. v. Bissell, filed October 2, 1996, copy attached, from which no application for permission to appeal was filed. In that case, the TPSC had instituted an earnings investigation into BellSouth's rates. Subsequently, the General Assembly passed Chapter 408 of the Acts of 1995, providing for price plan regulation, and BellSouth elected to adopt such a plan. The TPSC, however, voted to go forward with the earnings investigation proceeding. BellSouth appealed to the Court of Appeals, which held that the TPSC's order going forward with the earnings investigation was arbitrary, as not having any legitimate purpose.

B. The CAD Has Not Shown Any Legitimate Purpose Here.

The CAD has not bothered to state its purpose with the requisite particularity. Apparently, the CAD's purpose in requesting the information it seeks is to show that AT&T's proposed directory assistance rates are not "just and reasonable" as that phrase is used in T.C.A. §§65-5-201 and 65-5-203; see Paragraph 1 of the CAD's Comments. However, the CAD misconstrues these statutes and the governing law. The CAD ignores the presence and effect of the regulatory reform rules pursuant to which AT&T filed its directory assistance tariff.

Rule 1220-4-2-.55(2), the regulatory reform rule for IXCs, provides for the regulation of the prices for IXC services in subsections (d) and (e):

> (d) Rate and Price Setting Requirements.
>
> 1. IXC services shall be classified as one of two categories of service. 1) direct distance dialing (DDD) and 2) All Other services.

(i) DDD rate schedules, rates for operator assisted calls (0+ and 0-) and residential Optional Calling Plans shall be included in the DDD service category.

(ii) Any new service that is not DDD or a residential calling plan shall be placed in the All Other Services category.

2. The Commission shall only establish a price cap for DDD services. The initial price cap for each IXC shall be that company's rate (less any annual access reductions) in effect on the effective date of this rule sub-section.

3. The DDD prices and price cap shall be adjusted to reflect any changes in access charges to IXCs. DDD service category rates shall be adjusted within thirty days of any access charge change and the price cap for DDD shall be adjusted on an annual basis. The amount of any access charge change for the DDD service category for each IXC shall be the per minute reduction based on total intrastate minutes of use applied to the intrastate minutes of use in the DDD category for each IXC. The minutes of use shall be those reported in the most recent annual reports under sub-section (2) (i) 6. of this rule.

4. Prices for the All Other Services category may be reviewed in accordance with the provisions of this rule sub-section by the Commission.

(e) Price Increases or Decreases

1. Price reductions shall be presumed valid and effective on the proposed price list filing date. The Commission may, however, review these reductions within thirty (30) days of the tariff filing date upon request of any aggrieved party.

2. Prices may be increased thirty (30) days after the proposed price list filing date and after approval by the Commission, provided,

however that prices for the DDD category of services shall not be increased above any Commission prescribed price cap. Affected customers shall be notified by direct mail or by publication of a notice in a newspaper of general circulation in the affected service area thirty (30) days prior to the effective date of any rate increases. A copy of such notice shall be filed with the Commission concurrent with the tariff filing.

3. Any change in the previously approved terms and conditions of a service requires thirty (30) days notice to both the Commission and the customer in order to enable the customer sufficient time to qualify for the service.

Directory assistance is not within the DDD category of service. Therefore, the prices for directory assistance services are governed by subsection (e)(2) as the TRA recognized in approving Sprint's directory assistance tariff.

None of the information sought by the CAD is relevant to the application of the governing rule; and the CAD's reliance on T.C.A. §§ 65-5-201 and 203 does not provide a legitimate purpose for the CAD's request.

Indeed, the CAD's position here is essentially the same as the contentions it made in opposing the adoption of the IXC Rules. In its comments opposing the adoption of the IXC Rules, filed on July 15, 1994, the CAD contended, as it does here:

2. The rule contains no provision to determine if rates are set at, and remain at, just and reasonable levels: thus, violating state law.

4. The rule contradicts existing statutes by permitting rate increases without approval or justification and placing the burden of proof on a complainant to show that a rate increase is unreasonable.

In effect, the CAD was contending then, as it has generally contended, in opposing all regulation based on competition rather than traditional rate base rate of return regulation, that only rates set by some form of rate base rate of return regulation could be just and reasonable.[3] In adopting the IXC Rules, the TPSC rejected the CAD's contentions. In his Initial Order, dated December 2, 1994, recommending the adoption of the IXC Rules, the Administrative Judge quoted from CF Industries v. Tennessee Public Service Commission, 599 S.W.2d 536 (Tenn. 1980):

> There is no statutory nor decisional law that specifies any particular approach that must be followed by the Commission. Fundamentally, the establishment of just and reasonable rates is a value judgment to be made by the Commission in the exercise of its sound regulatory judgment and discretion.

With respect to the provision for price increases, the Administrative Judge stated at page 6 of his Initial Order:

> The revised rule permits price increases in IXC services to be implemented thirty days after filing with the Commission and after notice to affected customers. While the IXCs have proposed a much shorter time frame for tariff and price change implementation, thirty days appears to be the minimum necessary to allow sufficient time for customers to explore and seek other competitive options for the increased IXC service. This revision in the original rule does not impede competition, but should actually enhance competition by creating opportunity for customers to seek lower prices for the increased service, and for competitors with a lower price to solicit those customers.

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[3] Rate base rate of return regulation is appropriate for a public utility having monopoly power, as a substitute for competition. However, where competition is present, there is no basis for rate base rate of return regulation. To impose such regulation on competitive services is wasteful and inefficient and of no benefit to consumers. The only persons benefited would be officials such as the CAD, whose powers are enhanced by such a regulatory system.

The CAD simply refuses to accept that T.C.A. §§65-5-201 and 203 empower, and not compel, the TRA to set specific rates; Consumer Advocate Division v. Greer, 967 S.W.2d 759, 763-64 (Tenn. 1998).

The CAD simply refuses to accept that the TRA, and the TPSC before it, had the power to recognize that competition is an effective means of providing "just and reasonable" rates; or that the General Assembly declared the policy of this State to foster competition, T.C.A. §65-4-123.

The CAD simply refuses to accept that the IXC Rules have the force and effect of law governing the conduct of those subject to them; Tennessee Cable TV Association v. Tennessee Public Service Commission, 844 S.W.2d 151, 161 (Tenn.App. 1992).

The CAD has stated no legitimate purpose to be served by obtaining the information it seeks. There is none. The CAD's purpose here is one more example of the CAD's obdurate refusal to recognize settled law, the TRA's Rules and the fact that competition is preferable to rate base rate of return regulation as an effective regulator of rates.

III. THE CAD HAS NOT DEMONSTRATED THE REASONABLENESS OF ITS REQUEST OR THE RELEVANCE OF THE INFORMATION SOUGHT TO ANY LEGITIMATE PURPOSE.

A. None Of The Information Sought Is Relevant To The Application Of The IXC Rules.

Tennessee state agency compulsory demands for information, such as the CAD seeks to have the TRA order here, must not only be based on a legitimate purpose, the demand must be reasonable and relevant to that legitimate purpose; State ex rel. Shriver v. Leech, 612 S.W.2d 454, 456 (Tenn. 1981); and State Department of Revenue v. Moore,

722 S.W.2d 367 (Tenn. 1986). The CAD's Petition is not reasonable, nor is the information sought by the CAD relevant to any legitimate purpose.

The object of the CAD is revealed in the conclusion to its comments, "to institute a proceeding to assure that all AT&T rates are just and reasonable in accordance with law." To grant the CAD's Petition here would be to lay the basis for a rate base rate of return proceeding with respect to all the intrastate rates of AT&T and any other IXC. The cost and revenue information sought, the volume of calls, the Tennessee intrastate revenues and operating expenses, the average investment used in the provision of Tennessee intrastate services, the return on investment and equity, are all relevant to rate base rate of return regulation. None of that information is relevant to the application of the IXC Rules which govern this proceeding.

The production of such information would be utterly unreasonable. The CAD cites no authority supporting its rejection of competition as an effective regulator of rates or that "just and reasonable" require some form of rate base rate of return regulation. As the Court stated in Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446 (Tenn. 1995) at page 456: "The law should not require one to perform useless and futile acts." For the TRA to grant the CAD's Petition would be to require useless and futile acts, and would be arbitrary just as the Court of Appeals held with respect to the earnings investigation in BellSouth Telecommunications v. Bissell, filed October 2, 1996, copy attached.

B. Competitive Directory Assistance Services Are Readily Available.

The baseless nature of the CAD's Petition is further demonstrated by the CAD's statement at page 6 of its comments that, "The Consumer Advocate Division was unable

to locate any guidelines for consumers wishing to get around high directory assistance charges." In fact, the most obvious access to directory assistance is the telephone directory of the local exchange carrier, to which all subscribers to telephone services have access, even the CAD. For example, the current Nashville Yellow Pages directory, under the heading "Directory Assistance & Operator Services," states:

> 1 + 411 FOR BELLSOUTH LOCAL AND NATIONAL DIRECTORY ASSISTANCE
>
> Telephone numbers for anywhere in the United States can be obtained by dialing 1 + 411.
>
> Numbers within Tennessee: no charge.
> Nationwide numbers: charges apply for numbers outside of Tennessee
> 800,877 and 888 NUMBERS
> 1 + 800 + 555-1212
> DIAL "O" FOR OPERATOR

Thus, if a person in Nashville, including the CAD, wants the number of a hotel in Memphis, say the Peabody, he or she can dial 1 + 411 and promptly be given that number, in the case of the Peabody, 901-529-4000, without charge.[4] It is inconceivable that the CAD was not familiar with the Nashville telephone directory and BellSouth's directory assistance service.

As the attached Affidavit of Carroll Wallace shows, directory assistance is readily available at varying prices:

---

[4] Since the publication of that directory, the TRA has approved the BellSouth tariff imposing a $.29 charge for directory assistance calls for listings within Tennessee after six free calls per month and with certain exemptions.

Carrier	Charge
Excel	$ .85
DeltaCom	$ .95
Cable & Wireless	$1.40
Cincinnati Bell	$ .80
Qwest	$1.40
American TeleComm	$ .70
Frontier	$ .55
Consolidated Communications	$ .80

Moreover, there are several sources on the Internet, available to and used by a substantial number of Tennesseans, which will provide detailed information as to the location and telephone number of any person with a listed telephone. For example, snap.com shows anyone, including the CAD, the telephone number and location of any such person, including a map showing how to get to that location.

AT&T's web page anywho.com provides names, addresses and telephone numbers in all states without charge. There are numerous other such sources.

The CAD's statement further demonstrates the utter unreasonableness of the CAD's Petition.

CONCLUSION

The Petition of the CAD fails to conform to the requirements of the law. It is without merit and should be denied.

Respectfully submitted,

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Attorneys for AT&T Communications of the
South Central States, Inc.

CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a copy of the foregoing Memorandum Brief of AT&T Communications of the South Central States, Inc. Opposing the Petition for Information Filed by the Consumer Advocate Division was served on the following via Hand-Delivery, this 16th day of November, 1999.

Val Sanford

Vance L. Broemel
Assistant Attorney General
Consumer Advocate Division
425 5th Avenue, North
Nashville, TN 37243

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: ***AT&T Communications of the South Central States, Inc. Tariff to Implement an Intrastate Directory Assistance Charge***

Docket No. 99-00757

AFFIDAVIT OF CARROLL WALLACE

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Carroll Wallace, after being duly sworn deposes and says that:

1. She is Regulatory Manager for AT&T and makes this affidavit on her own personal knowledge.

2. She conducted a random survey of long distance carriers to determine directory assistance charging in the State of Tennessee. The carrier's '800' number was used to reach a service representative. Over 20 carriers were randomly surveyed to determine if the carrier offered directory assistance service. The responses ranged from directions to use the local telephone company's directory assistance service to a full description of the carrier's directory assistance service.

3. She spoke with each carrier's customer service representative shown below and asked the following questions:

(1) If directory assistance was offered by the carrier; and

(2) If I could get directory assistance for Memphis, Tennessee by dialing from Nashville, Tennessee to the carrier. The following table shows the responses from the carrier's customer service representative who responded positively to these questions.

	Carrier	Telephone #	Customer Rep	Charge
1.	Excel	800 875 9235	Stacy	$ .85
2.	DeltaCom	800 239 3000	Tina	$ .95
3.	Cable & Wireless	800 486 8686	Bryan	$1.40
4.	Cincinnati Bell	800 735 3030	Anna	$ .80
5.	Qwest	800 860 1020	Jason	$1.40
6.	American TeleComm	800 775 4636	Lisa	$ .70
7.	Frontier	800 783 2020	Florenzo	$ .55
8.	Consolidated Communications	800 500 8000	Christie	$ .80

Further Deponent saith not.

Carroll Wallace
CARROLL WALLACE

Sworn to and subscribed before me,
this the 15TH day of November, 1999.

Linda H. Robertson
Notary Public

My Commission Expires: 9/23/2000

DATE OF JUDGMENT
SAME AS FILING DATE
OF COURT'S OPINION.
(T.R.A.P. 36)

BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioner/Appellant,

VS.

KEITH BISSELL, STEVE HEWLETT, SARA KYLE, Constituting the Tennessee Public Service Commission,

Respondents/Appellees.

Appeal No.
01-A-01-9509-BC-00400

Public Service Commission
No. 95-01050

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE TENNESSEE PUBLIC SERVICE COMMISSION
AT NASHVILLE, TENNESSEE

FOR APPELLANT:

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FOR INTERVENOR
AT&T COMMUNICATIONS, INC:

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Attorney General & Reporter

Michael E. Moore
Solicitor General

L. Vincent Williams
Consumer Advocate Division
Nashville, Tennessee

REVERSED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
LEWIS, J.
KOCH, J.

No Application for Permission to Appeal Filed

OPINION

The Tennessee Public Service Commission ordered the completion of a previously authorized investigation of the future earnings of BellSouth Telecommunications, despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates. BellSouth filed a petition with this court for review of the PSC's order, arguing that completion of the investigation was inconsistent with the legislative purpose. We reverse the Commission's order and remand the case for further consideration by the Tennessee Regulatory Commission.

I.

Prompted by a petition filed by the State Consumer Advocate, the Public Service Commission voted on March 28, 1995 to conduct an investigation of the intrastate earnings of South Central Bell (now BellSouth Telecommunications) for a one-year future test period. Under the statute in effect at that time, such an investigation of future earnings was a required preliminary step in the performance of the P.S.C.'s function of establishing "just and reasonable rates" for telephone service.

On May 25, 1995, the Legislature enacted the Teleommunications Reform Act, now codified at Tenn. Code Ann. § 65-5-201 et seq. The new act was expressly designed to encourage competition in the telecommunications services market, and it created an alternative to the traditional method of establishing consumer telephone rates by future rate-of-return analysis.

Under the new procedure, a telephone company could apply for price regulation, and the P.S.C. was required to implement a price regulation plan within 90 days, based on an audit of the rate of return earned by the utility within the most recent reporting period. See Tenn. Code Ann. § 65-5-209(c)and (j). Thus the statute permitted expedited decision-making based on retrospective rather than prospective financial data.

BellSouth applied on June 20, 1995 for price regulation under the new statute. Nonetheless, on July 14, 1995 the Commission voted to complete the earnings investigation, reserving the issue of "whether any use could be made of the results of this investigation under the price regulation scheme set out in the Telecommunications Act . . . ." BellSouth filed a petition under Rule 12, Tenn.R.App.P. to appeal that order. The PSC and intervenor AT&T filed a joint motion to dismiss the petition, on the ground that the order of investigation was not a final order subject to appellate review.

On October 25, 1995, this court dismissed the joint motion on the ground that "interlocutory administrative orders are reviewable where the agency has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual's rights." This court also stayed all proceedings in the Commission related to the earnings investigation, and directed that the appeal proceed.

On July 1, 1996, the PSC was replaced by a new, appointed agency called the Tennessee Regulatory Authority. See Tenn. Code Ann. § 65-1-201. On June 11, 1996, this court heard oral arguments on BellSouth's petition for review. Neither in the briefs nor in oral argument did the PSC articulate a reason why the investigation should continue. The parties all acknowledge that the information

gained through the investigation would be irrelevant to BellSouth's rates. The PSC argues only that the investigation might serve some purpose.

We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment." *See Jackson Mobilphone v. Tennessee PSC*, 876 S.W.2d 106 at 111 (Tenn. App. 1993). An agency's arbitrary decision -- even a preliminary, procedural, or intermediate one -- may be reversed by the reviewing court. Tenn. Code Ann. § 4-5-322(a)(1), (h)(4).

We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. *See* Acts 1995, ch. 408. But we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

We, therefore, reverse the PSC's order continuing the earnings investigation and remand the cause to the Tennessee Regulatory Authority for further proceedings consistent with this opinion. Tax the costs on appeal to the PSC.

Ben H. Cantrell
BEN H. CANTRELL, JUDGE

CONCUR:

Samuel L. Lewis
SAMUEL L. LEWIS, JUDGE

William C. Koch, Jr.
WILLIAM C. KOCH, JR., JUDGE