IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JUNE 15, 2000 Session

CONSUMER ADVOCATE DIVISION, on behalf of Tennessee consumers v. TENNESSEE REGULATORY AUTHORITY and UNITED TELEPHONE-SOUTHEAST, INC.

Rule 12 Petition for Review from the Tennessee Regulatory Authority
No. 98-00626; The Honorable Sara Kyle, Director

No. M1999-01699-COA-R12 CV - Filed October 12, 2000

This appeal involves price regulation of telecommunication companies pursuant to T.C.A. § 65-5-209. In September, 1998, United Telephone Southeast filed its 1998 Annual Price Regulation filing with the Tennessee Regulatory Authority. The filing proposed an increase in rates for non-basic services. In determining the amount of the increase, UTSE combined the calculations of annual maximum increases based on the rates of inflation for the three preceding years and applied this cumulative figure to UTSE's rates in effect in June 1995. The TRA approved the price regulation plan. The Consumer Advocate Division appeals that approval under Rule 12 of the Tennessee Rules of Appellate Procedure.

Tenn. R. App. P. 12; Petition for Review; Judgment of the Tennessee Regulatory Authority Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, L. Vincent Williams, Deputy Attorney General, for Appellant

J. Richard Collier, Jonathan N. Wike, for Appellee, Tennessee Regulatory Authority
R. Dale Grimes, T. G. Pappas, James B. Wright, for Appellee, United Telephone-Southeast, Inc.
Guy M. Hicks, Patrick W. Turner, for Appellee, Bellsouth Telecommunications, Inc.

OPINION

The Consumer Advocate Division appeals from the Tennessee Regulatory Authority's approval of United Telephone-Southeast's price regulation plan.

I. Facts and Procedural History

The Consumer Advocate Division of the Office of the Attorney General (hereinafter referred to as "Appellant") represents the interests of Tennessee consumers of public utility service pursuant to T.C.A. §§ 65-4-118(c)(2)(A) and 65-5-210(b). The General Assembly created the Tennessee Regulatory Authority ("TRA") and vested within it "general supervisory and regulatory power, jurisdiction and control over all public utilities." T.C.A. §§ 65-1-201 and 65-4-104. United Telephone-Southeast ("UTSE") is a public utility providing telecommunications service in the State of Tennessee.

In 1995, the Tennessee General Assembly enacted chapter 408 of the Public Acts of 1995, which significantly altered the manner in which Tennessee regulated public utilities. See T.C.A. § 65-5-201 *et seq.* Under the previous regulatory scheme, if a local exchange carrier such as UTSE wanted to increase either its rates or its rate of return, that carrier was required to file its proposed rate increase with the Tennessee Public Service Commission. See T.C.A. §65-5-203 (1993). The Commission had the power to suspend the rate change, conduct an investigation, and hold a hearing on the question of whether the increase was "just and reasonable." Id. Under the new law, the General Assembly permitted incumbent local exchange carriers to adopt a "price regulation plan" in lieu of the then existing method of setting and changing rates.

The purpose of the 1995 act was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. BellSouth Telecommunications, Inc. v. Greer, 972 S.W.2d 663, 666 (Tenn. Ct. App. 1997). A statement of this purpose is codified at T.C.A. § 65-4-123. Under the price regulation provisions of Chapter 408, "[r]ates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this section," and it is left to the TRA to "ensure that rates for all basic local exchange telephone services and non-basic services are affordable on the effective date of price regulation for each incumbent local exchange company." T.C.A. § 65-5-209(a). Once a company enters price regulation under the statutory scheme, T.C.A. § 65-5-209(e)-(g) govern the amount by which the company is permitted to change its rates. The change is determined by reference to a formula incorporating the national inflation rate.

UTSE elected to become a price regulated company pursuant to T.C.A. § 65-5-209 on June 16, 1995. UTSE submitted a price regulation plan, which the TRA approved, on September 20, 1995. Subsequent to the TRA's approval, any increase in UTSE's rates would have to follow the provisions of § 65-5-209(e), which states:

> A price regulation plan shall maintain affordable basic and non-basic rates by permitting a maximum annual adjustment that is capped at the lesser of one half (½) the percentage change in inflation for the United States using the gross domestic product-price index (GDP-PI) from the preceding year as the measure of inflation, or the GDP-PI from the preceding year minus two (2) percentage points. An incumbent local exchange telephone company may adjust its rates for basic local exchange telephone services or non-basic services only so long as its aggregate revenues for basic local exchange telephone services or non-basic services generated

by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan.

On September 15, 1998, UTSE filed its 1998 Annual Price regulation filing with the TRA. UTSE amended this filing on October 16, 1998. UTSE's filing proposed an increase in rates for non-basic services that utilized a cumulative calculation based on a stipulated methodology.[1] To calculate the 1998 rate increase, UTSE combined the calculations of annual maximum increases based on the rates of inflation for the three preceding years and applied this cumulative figure to UTSE's rates in effect in June 1995.

On September 29, 1998, the Consumer Advocate Division of the Office of the Attorney General filed a "Complaint or Petition to Intervene," bringing a contested case against UTSE with respect to the proposed rate adjustments. The Appellant contended that the price increase requested by UTSE exceeded the limits imposed by T.C.A. § 65-5-209(e). The Appellant argued that the maximum permissible rate increase is limited by the amount calculated by applying the statutory inflation-based formula only to the prior year's inflation rate, and that UTSE could not choose to defer taking one year's maximum permissible increase to a subsequent year.[2] UTSE argued that the statute permits it to accumulate unused portions of maximum rate increases that it would have been permitted to use in previous years and instead use them in a subsequent year.

The TRA held an evidentiary hearing on the matter on May 13, 1999. On October 13, 1999, the TRA issued its final order. The TRA found that methodology employed by UTSE in arriving at its 1998 rate increase complied with the requirements of T.C.A. § 65-5-209(e). The Appellant filed the present appeal seeking a reversal of the TRA's decision on the basis that § 65-5-209(e) requires a prices regulated telephone company to use the full maximum permissible increase in the year it arises or lose the opportunity to use that increase in a subsequent year. In addition, the Appellant claims that the TRA's order was technically deficient under T.C.A. § 4-5-314(c), because it did not set forth the agency's findings, conclusions, and reasoning in sufficient detail.

II. Law and Analysis

The parties to this appeal agree that our review of the TRA's decision is governed by T.C.A.§ 4-5-322(h), which provides:

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

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[1] The methodology used to compute the increase had been previously accepted by the TRA.

[2] The parties have referred to this argument as the "use it or lose it" theory.

(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.

Since the present case involves an issue of statutory interpretation, a question of law, we must review the TRA's ruling *de novo* to determine whether its decision complies with the terms of § 65-5-209(e). However, under both state and federal law, the construction of a statute by the agency charged with the enforcement or administration of that statute is afforded great weight. See Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); Nashville Mobilphone Co., Inc. v. Atkins, 536 S.W.2d 335, 340 (Tenn. 1976). As such, we recognize the respect due the TRA's decision.

The issue in the present case, simply stated, is whether § 65-5-209(e), allows a company such as UTSE to not raise rates in any particular year, but still use that year's inflation rates in a subsequent rate calculation. In this case, UTSE did not raise rates in 1996 or 1997, but then attempted to raise its rates in 1998 using the inflation figures from the years in which it did not raise rates. The Appellant argues that by not raising its rates in 1996 or 1997, UTSE waived its right to the increases from those years. UTSE, on the other hand, argues that subsection (e) does not preclude its right to a cumulative increase.

A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. Marion County Bd. of Commissioners v. Marion County Election Commission, 594 S.W.2d 681 (Tenn. 1980). When approaching statutory text, courts must presume that the legislature says in a statute what it means and means in a statute what it says there. Worley v. Weigel's, Inc., 919 S.W.2d 589, 593 (Tenn. 1996). A corollary to that statement is that the absence of certain words in a statute must also be given due notice. Accordingly, we must construe statutes as they are written, Jackson v. Jackson, 210 S.W.2d 332, 334 (1948), and our search for the meaning of statutory language must always begin with the statute itself. Neff v. Cherokee Ins. Co., 704 S.W.2d 1, 3 (Tenn. 1986). Where the parties legitimately have different interpretations of the same statutory language, an ambiguity exists, and we may consider the legislative history and the entire statutory scheme for interpretive guidance. See Carter v. State, 952 S.W.2d 417, 419 (Tenn. 1997); Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995); Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994).

The specific language of § 65-5-209(e) does not provide an "answer" to the question of whether a cumulative rate increase is allowed. Although the formula provided in the statute uses the

national inflation rate from the "preceding year," there is no indication as to whether a company such as UTSE may defer one year's rate increase to another year. In this regard, we believe that both parties have legitimate interpretations of the statutory language. The Appellant believes that the language contemplates a year-by-year increase, while the Appellees believe the language only sets the formula to be used in calculating a rate increase and does not mandate that rates be increased every year if they are to be increased at all.

T.C.A. § 65-5-209(e), by its own terms applies to both basic and non-basic services. However, subsection (f) of that statute applies to rate increases for basic services. That subsection states that "in no event shall the rate for residential basic local exchange telephone service be increased in any one (1) year by more than the percentage change in inflation for the United States using the gross domestic product-price index (GDP-PI) from the preceding year as the measure of inflation." T.C.A. § 65-5-209(f). This section clearly provides that a company such as UTSE could not, as they are attempting to do in the present case, defer the maximum allowable increases for basic services from previous years and take those increases in one year.

Even the Appellant concedes that these sections should be considered together. However, the Appellant argues that since subsection (f) references the formula provided in subsection (e), the language precluding cumulative rate increases found in subsection (f) is equally applicable to subsection (e). We do not believe that this is a proper reading of the statute. The fact that such a limitation appears in subsection (f), while not appearing in subsection (e), implies that the legislature did not intend to limit the increases for non-basic services (subsection (e)) as it did for basic services (subsection (f)).

Additionally, we find support for this position in subsection (h) of the statute, which provides: "[i]ncumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g)." This statement implies that the limitation found in subsection (f), namely the prohibition against cumulative rate changes, does not apply to a rate change for non-basic services. Subsection (h) clearly states that the only limitations on a rate change for non-basic services are found in subsections (e) and (g). Since neither of those subsections contain an express prohibition against cumulative rate changes for non-basic services, as does subsection (f), we believe the Legislative intent to be clear. In short, the Legislature did not intend to preclude the cumulative rate change contemplated in the present case.

We also find support for our decision in the purpose behind the entire statutory scheme. The stated purpose of the statutory scheme at issue in this case has been codified at T.C.A. § 65-4-123. That purpose is to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. BellSouth Telecommunications, Inc. v. Greer, 972 S.W.2d 663, 666 (Tenn. Ct. App. 1997). Clearly, the General Assembly intended to protect the consumers' interests while allowing a flexible method for companies such as UTSE to change its rates. Not allowing a company a cumulative rate increase will encourage that company to increase its rates every year. If a company knows that it will not be able to take a particular year's

increase in subsequent years, we can assume that it will take the increase each year so as not to lose the increased revenues. However, by allowing a cumulative rate increase, a company will not be so inclined to raise their rates on a yearly basis.

In short, we believe the TRA's approval of UTSE's rate increase is supported by the statutory language. The TRA has experience and authority in this area. We find its decision to be consistent with a logical reading of the statutory scheme and therefore affirm its decision.[3]

Conclusion

For the aforementioned reasons, we affirm the decision of the Tennessee Regulatory Authority which approved the price regulation plan submitted by United Telephone-Southeast. Costs of this appeal are taxed to the Appellant, Consumer Advocate Division, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE

[3] We find no merit in the Appellant's arguments that the TRA decision is invalid in any respect. The Appellant claims that the TRA failed to specify its findings of facts and conclusion. However, we are at a loss to decipher what exactly is missing. To the extent the Appellant argues the TRA exceeded its authority, we summarily reject that argument.