IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
Nos. 96-01692 & 98-00654

Nos. M1998-0987-COA-R12-CV & M1998-01012-COA-R12-CV
Filed February 16, 2001

WILLIAM C. KOCH, JR., J., concurring.

This appeal presents a relatively straightforward question of state law – whether Tenn. Comp. R. & Regs. r. 1220-4-2-.15 (1999) is broad enough to empower the Tennessee Regulatory Authority to compel BellSouth Advertising & Publishing Corporation ("BAPCO") to permit competing local exchange carriers to place their names and logos on the cover of the white pages directories that BAPCO publishes for BellSouth Telecommunications, Inc. Despite the lengthy analyses of the federal Telecommunications Act of 1996 in the opinions prepared by Judges Cain and Cottrell, the answer to this question can be found in the plain language of the state regulation. Like the TRA's chairman, I find that the regulation cannot be stretched to apply to the current competitive local telephone market. In addition, I find that the TRA's effort to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of its white pages telephone directory violates U.S. Const. amend. I and Tenn. Const. art. I, § 19.

I.
CHANGES IN FEDERAL TELECOMMUNICATIONS POLICY

For almost two decades after telephone service was first offered in 1877, the Bell System[1] enjoyed a monopoly in both the interstate and intrastate telephone markets. However, this market dominance began to evaporate when several key patents controlled by the Bell System expired in 1893 and 1894. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 403, 119 S. Ct. 721, 741 (1999) (Thomas, J., concurring in part and dissenting in part). During the ensuing years, many independent telephone companies entered the telephone market and built rival networks to compete with the Bell System.

---

[1] For the purposes of this opinion, the "Bell System" refers to the Alexander Graham Bell's telephone company which came to be known as American Telephone & Telegraph Company ("AT & T"), as well as to its later created subsidiary and affiliated companies, including Bell Telephone Laboratories, Inc., Western Electric Company, and the twenty-two operating companies providing local telephone service.

The Bell System responded to this competition by advocating the need for centralized governmental regulation of telephone markets. It argued that telephone service was inherently monopolistic and that competition was wasteful because it would lead to the unwarranted duplication of expensive physical facilities. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 389, 119 S. Ct. at 735 (Thomas, J., concurring in part and dissenting in part). These arguments proved persuasive, and the federal government, as well as many state governments, established commissions to regulate telephone service.[2] Thus, there arose a dual system of governmental regulation for telephone service. The federal government, first through the Interstate Commerce Commission and later through the Federal Communications Commission, regulated the interstate and international aspects of telephone service, and the various states regulated intrastate local telephone service. These federal and state regulatory schemes were considered to be distinctly separate. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148, 51 S. Ct. 65, 68 (1930).

State regulation of intrastate telephone service reflected the Bell System's belief that telephone service was essentially monopolistic. Typically, states granted one telephone service provider an exclusive franchise in each local service area and then prohibited other competitors from entering the market. Over time, the Bell System again assumed a commanding position in both the interstate and intrastate telephone markets as a result of its policy to buy out competitors and the state governments' practice of prohibiting competitive entry into local telephone markets. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part). It controlled virtually all interstate long-distance telephone service, most local telephone service, a substantial amount of telephone equipment manufacturing, and one of the leading communications research and development facilities in the world. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 413, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 222 (D.D.C. 1982).

The Bell System's dominance of the telecommunications industry ended in 1982 when the United States District Court for the District of Columbia issued a decree settling a series of antitrust actions brought by the United States against various Bell System companies. The District Court concluded that the key to the Bell System's ability to maintain its market dominance was its control over local telephone service. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 223. Accordingly, the central remedy approved by the District Court required AT & T to divest itself of the twenty-two operating companies that were providing local telephone service. The decree prohibited these operating companies from providing long distance telephone service or manufacturing telephone equipment but permitted them to market customer premises equipment and to produce, publish, and distribute yellow pages directories.

---

[2]The Mann-Elkins Act of 1910 extended the jurisdiction of the Interstate Commerce Commission to cover the interstate and international aspects of telephone service. By 1915, most states had created public utilities commissions and had empowered these commissions to regulate telephone service. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 403, 119 S. Ct. at 741 (Thomas, J., concurring in part and dissenting in part).

In apparent recognition of the monopolies over local telephone service permitted by the states, the decree stated explicitly that the twenty-two operating companies "will possess monopoly power over local telephone service." *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 224. Thus, the antitrust consent decree did not introduce competition into the local telecommunications market but rather left each market in the hands of a single state-regulated local telephone service provider. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 413-14, 119 S. Ct. at 746 (Breyer, J., concurring in part and dissenting in part).

Competition was not reintroduced to the local telecommunications markets until the Congress enacted the Telecommunications Act of 1996.[3] The Act fundamentally restructured local telephone markets by preempting state laws that had protected the existing local telephone service providers from competition. It also encouraged competition in these markets by requiring existing local telephone service providers to share their existing networks with their competitors rather than requiring these competitors to construct their own networks. The Act also provided a legal process through which local telephone service providers could enter the long distance market from which they had been excluded since 1982.

Despite these fundamental changes in the federal telecommunications policy, the Congress did not displace the role played by the states in the regulation of local telephone service providers. The Telecommunications Act of 1996 itself clearly gives the state regulatory commissions a pivotal role in implementing telecommunications policy. *BellSouth Telecomms., Inc. v. Greer*, 972 S.W.2d 663, 672 (Tenn. Ct. App. 1997). State commissions are required to assure that existing local telephone service providers comply with 47 U.S.C.A. § 251 and the pricing standards in 47 U.S.C.A. § 252(d) and to provide a forum for resolving disputes between existing local telephone service providers and their competitors seeking access to an existing telephone network.

II.
CHANGES IN TENNESSEE'S TELECOMMUNICATIONS REGULATORY POLICY

Tennessee's statutes regulating local telephone service providers were undergoing a similar transformation at the same time the Congress was considering the Telecommunications Act of 1996. Because the Congress had been working to bring competition to local telephone markets for several years, the Tennessee General Assembly was aware of the impending changes in the federal regulatory policies regarding local telephone service. Demonstrating remarkable legislative prescience, the General Assembly enacted sweeping reforms to Tennessee's regulation of local telephone service providers in 1995. First, it replaced the Tennessee Public Service Commission with the Tennessee Regulatory Authority.[4] Second, the General Assembly replaced the statutes granting monopolies to existing local telephone service providers with statutes designed to permit

[3] Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 251 *et seq.*).

[4] Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.

competition in all telecommunications markets.[5] Tenn. Code Ann. § 65-4-123 (Supp. 2000). Anticipating the Telecommunications Act of 1996, Tenn. Code Ann. § 65-4-124(a) (Supp. 2000) requires existing local telephone service providers to furnish other providers nondiscriminatory interconnection to their public networks.

III.
WHITE PAGES DIRECTORY LISTINGS

Printed white pages telephone directories have traditionally been an integral part of local telephone service. These directories, which contain the names, addresses, and telephone numbers of the persons living in a particular local calling area, provide a convenient, inexpensive means for obtaining telephone numbers. Without these directories, or some other similarly convenient means for obtaining the same information, a local telephone network cannot provide ubiquitous telecommunications services in its calling area because the public will not have ready access to the telephone numbers needed to use the service.

Because of the importance of providing convenient access to subscribers' telephone listings, the Tennessee Public Service Commission and now the TRA has, at least since 1968, required local telephone service providers to publish a telephone directory listing the name, address, and telephone number of all their customers, except for the customers who have requested an unlisted number. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(1) (1999). When the General Assembly opened up the local telephone markets to competition in 1995, it directed the TRA to promulgate rules ensuring that all local telephone service providers providing "basic local exchange telephone service" must supply each customer with a "basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c).[6]

The Telecommunications Act of 1996 likewise reflects the Congress's awareness of the importance of white pages directory listings. The Act requires local telephone service providers desiring to furnish long distance telephone service to provide white pages directory listings for customers of the other local telephone service providers serving the same area. 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp. 2000). Similarly, 47 U.S.C.A. § 222(e) (West Supp. 2000) requires telephone service providers to make subscriber information available to directory publishers on a nondiscriminatory basis, and 47 U.S.C.A. § 251(b)(3) (West Supp. 2000) requires telephone service providers to provide "dialing parity" to their local competitors by giving nondiscriminatory access to telephone numbers and directory listings with no unreasonable delay.

In implementing the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") promulgated rules relating to nondiscriminatory access to telephone numbers and directory listings. These rules also require local telephone companies to permit their competitors access to telephone numbers and directory listings on a nondiscriminatory basis. 47 C.F.R. §

---

[5] Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703.

[6] Rather than promulgating a new rule, the TRA has apparently relied on Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to discharge this responsibility.

51.217(c)(1), (3) (1999). Accordingly, the FCC has emphasized the local telephone service providers must provide their competitors with the same access to directory information and listings that they have. 47 C.F.R. § 51.271(a)(2)(ii); *In re Implementation of the Telecommunications Act of 1996, Third Report and Rule in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273* (Sept. 9, 1999). Construing the FCC's rules and orders, one United States District Court has held that an exiting local telephone service provider that publishes a white pages telephone directory must place the listings of its competitors' subscribers in its directory in a nondiscriminatory manner. *U. S. West Communications, Inc. v. Hix*, 93 F. Supp. 2d 1115, 1132 (D. Colo. 2000).

All these authorities establish beyond question that white pages directory listings are network elements subject to state and federal regulatory oversight. The term "network elements" includes more than simply the physical facilities and equipment of a local telephone service provider. *AT & T v. Iowa Utils. Bd.*, 525 U.S. at 388, 119 S. Ct. at 734. While there is a point where a particular feature is too remote to be considered a network element, *MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1180-81 (D. Or. 1999), the directory listings necessary to provide telephone service to local customers are integral parts of a local telephone network and are, therefore, network elements. *AT & T of Va. v. Bell-Atlantic Va., Inc.*, 197 F.3d 663, 674 (4th Cir. 1999).

In clear contrast to the state and federal treatment of the listings in white pages telephone directories, there has been very little regulatory attention paid to the covers of white pages telephone directories. This is understandable because a telephone directory's cover is far less important than its contents. I can find no federal statute or regulation touching on white pages directory covers or any other federal precedent relating to the content of white pages directory covers. There is a similar dearth of state authority regarding white pages directory covers. The only mention of the covers of white pages telephone directories appears in Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3) which directs that "[t]he name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover." As discussed in Section V of this opinion, this regulation is outmoded because it was promulgated at a time when local telephone service providers in Tennessee monopolized the local markets they served.

Unlike the entries in a white pages telephone directory, the cover does not significantly assist the public's use of a local telephone network. Accordingly, I would conclude that the cover of a white pages telephone directory is a feature that is too remote to be considered a network element.

IV.
BELLSOUTH'S WHITE PAGES TELEPHONE DIRECTORIES

In February 1996, contemporaneous with the effective date of the Telecommunications Act of 1996, BAPCO and AT & T began negotiating for directory publishing services. There was no dispute about the terms and conditions for including the listings for AT & T's customers in the white pages telephone directories. However, virtually from the outset of the negotiations, AT & T insisted that its logo appear somewhere on the cover of these directories and offered to pay for this service.

Even though BAPCO was concerned about possible confusion regarding the authorship of its directories, it decided to accommodate AT & T's request as long as (1) BAPCO retained control of the size, appearance, and location of the logo and (2) AT & T agreed not to use its logo on the covers of other white pages directories published by BAPCO's competitors.

BAPCO sent AT & T several mock-ups of covers showing possible ways that AT & T's logo could be incorporated. AT & T responded to these proposals by suggesting that BAPCO remove its own logo from the cover. Eventually, the negotiations reached an impasse because AT & T refused to refrain from placing its logo on the covers of directories published by BAPCO's competitors. At this juncture, AT & T, invoking the arbitration provisions in the Telecommunications Act of 1996, requested the Tennessee Regulatory Authority ("TRA") to arbitrate its demand that its name and logo be placed on the cover of the white pages directories published by BAPCO for BellSouth Telecommunications, Inc. On October 21, 1996, the TRA rejected this petition on the ground that the contents of the cover of white pages directories was not arbitrable under 47 U.S.C. § 252.[7]

Not to be deterred, AT & T filed a petition with the TRA on December 16, 1996, seeking a declaratory order that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 (1999) required that its name and logo be placed on the cover of the white pages directories prepared for BellSouth Telecommunications, Inc. by BAPCO. The TRA later permitted three other new local telephone service providers, MCI Telecommunications Corporation, NEXTLINK Tennessee, LLC ("NEXTLINK"), and American Communications Services, Inc., to intervene in the proceeding. Following a July 1997 hearing, the TRA issued an order on March 19, 1998. Invoking Tenn. Comp. R. & Regs. r. 1220-4-2-.15, the TRA directed BAPCO to provide AT & T with the opportunity "to contract with BAPCO for the appearance of AT & T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT & T in a just and reasonable manner."

BAPCO perfected a timely appeal to this court. While this appeal was pending, NEXTLINK, relying on the TRA's March 19, 1998 order, requested BAPCO to include its name and logo on the directories BAPCO prepared for BellSouth Telecommunications, Inc. When BAPCO refused its request, NEXTLINK sought relief from the TRA. Following a hearing in October 1998, the TRA entered an order on November 12, 1998, concluding that its interpretation of Tenn. Comp. R. & Regs. r. 1220-4-2-.15 in its March 19, 1998 order required BAPCO to include NEXTLINK'S name and logo on its directories. BAPCO again appealed. We have consolidated the appeals involving AT & T and NEXTLINK because they share common questions of law and fact.

[7] The TRA's conclusion regarding arbitrability is similar to conclusions reached by its counterparts in Alabama, Florida, Georgia, Kentucky, Illinois, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Oregon, Rhode Island, South Carolina, and Vermont.

V.
THE APPLICABILITY OF TENN. COMP. R. & REGS. R. 1120-4-2-.15

The majority of the TRA based its decision to order BAPCO to include AT & T's name and logo on the covers of the white pages telephone directories it was preparing for BellSouth Telecommunications, Inc. on Tenn. Comp. R. & Regs. r. 1120-4-2-.15. Accordingly, this appeal requires us to determine whether that regulation applies to the current dispute between BAPCO and AT & T.

The rules and principles of statutory construction also guide the courts in the task of interpreting administrative rules and regulations. *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993); *Rice v. Arizona Dep't of Econ. Sec.*, 901 P.2d 1242, 1246 (Ariz. Ct. App. 1993); *Board of Trustees of Univ. of Ill. v. Illinois Educ. Labor Relations Bd.*, 653 N.E.2d 882, 886-87 (Ill. Ct. App. 1995); 2 Charles H. Koch, *Administrative Law & Practice* § 11.26[2] (2d ed. 1997). Accordingly, our search for the meaning of a regulation begins with its words. *See Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 3 (Tenn. 1986). These words draw their meaning from the context of the entire regulation, *see Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn. 1994), and from the regulation's general purpose. *See City of Lenoir City v. State ex rel. City of Loudon*, 571 S.W.2d 297, 299 (Tenn. 1978). Unless the context requires otherwise, we read a regulation's works with an eye toward their straightforward and common sense meaning. *Henry Ford Health Sys. v. Shalala*, 233 F.3d 907, 910 (6th Cir. 2000); *Westland West Cmty. Ass'n v. Knox County*, 948 S.W.2d 281, 283 (Tenn. 1997); *Wilson World, Inc. v. Tennessee Dep't of Transp.*, No. 01A01-9001-CH-00031, 1990 WL 150034, at *3 (Tenn. Ct. App. Oct. 10, 1990) (No Tenn. R. App. P. 11 application filed).

The courts must give effect to unambiguous administrative regulations. *See Spencer v. Towson Moving & Storage, Inc.*, 922 S.W.2d 508, 510 (Tenn. 1996). Accordingly, there is no room for applying the rules of construction if the language of the regulation is plain and clear. *See Pursell v. First Am. Nat'l Bank*, 937 S.W.2d 838, 842 (Tenn. 1996). Thus, when the words of a regulation plainly mean one thing, we cannot give them another meaning under the guise of construing them. *See Henry v. White*, 194 Tenn. 192, 198, 250 S.W.2d 70, 72 (1952); *State ex rel. Barksdale v. Wilson*, 194 Tenn. 140, 144-45, 250 S.W.2d 49, 51 (1952).

Administrative regulations cannot be inconsistent with statutes covering the same subject. *Tasco Dev. & Bldg. Corp. v. Long*, 212 Tenn. 96, 102, 368 S.W.2d 65, 67 (1963); *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995). When there is congruence between a regulation and applicable statutes, the courts must defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the plain language of the regulation. *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 356, 120 S. Ct. 1467, 1476 (2000); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994).

Tenn. Comp. R. & Regs. r. 1220-4-2-.15 was enacted at a time when local telephone service providers monopolized their service areas. They had no competition from other local telephone service providers, and thus all residents of the area obtained telephone service from the same local telephone service provider. When viewed in this context, Tenn. Comp. R. & Regs. r. 1220-4-2-.15 makes perfect sense. The local service provider was required to publish a white pages directory containing the names, addresses, and telephone numbers of its customers, Tenn. Comp. R. & Regs. r. 1220-4-2-.15(1); it was also required to provide each of its customers with a copy of its directory, Tenn. Comp. R. & Regs. r. 1220-4-2-.15(2); and it was required to place its name, the area covered by the directory, and the date the directory was issued on the cover of the directory. Tenn. Comp. R. & Regs. r. 1220-4-2-.15(3).

These regulatory provisions make far less sense and, in fact, prompt some absurd results when they are superimposed on a local calling area served by more than one local telephone service provider. As TRA Director Melvin Malone pointed out, the rule would require each local telephone service provider to produce a directory containing the listings of its subscribers. Thus, rather than prompting a single directory containing the listings for all telephone customers in a local calling area, the rule would precipitate the proliferation of many telephone directories. Not only would this cause great public inconvenience, it would also be inconsistent with the federal and state policy favoring a single white pages directory for each calling area. To avoid these results, I would agree with Judge Cain and Director Malone that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 is inapplicable to current circumstances where more than one telephone service provider serves a local telephone market.

No amount of administrative or judicial construction can provide the additional substance needed for Tenn. Comp. R. & Regs. r. 1220-4-2-.15 to operate sensibly in a multi-provider market. The courts cannot graft onto the current rule provisions regarding the choice of the entity or entities responsible for preparing a single white pages directory, the determination of the costs to each local telephone service provider for including its subscribers in the directory, or the format of the content or the cover of the directory. The TRA is likewise unable to remedy the regulation's deficiency without following the UAPA's rulemaking procedures. In the absence of these necessary provisions, regulatory prudence cautions against placing the sort of reliance on Tenn. Comp. R. & Regs. r. 1220-4-2-.15 that the majority of the TRA placed on it.

Like Judge Cain and Director Malone, I find that Tenn. Comp. R. & Regs. r. 1220-4-2-.15 cannot be reasonably construed to apply to the current local telephone market in Tennessee. Thus, we are not required to defer to the TRA's interpretation of the rule because it is plainly erroneous and inconsistent with the plain meaning of the rule's language.[8] If the regulation is inapplicable to the current competitive environment in Tennessee, then the TRA's order must be set aside because

[8] Additional reasons exist for declining to defer to the TRA's interpretation of this rule. The record contains no evidence of long-standing history of either the TRA's or its predecessor's interpretation of this rule. In fact, such history is non-existent because this case provided the TRA with its first opportunity to consider the rule in the multi-provider context. Moreover, the TRA can lay claim to no special expertise in applying the rules of construction or to marketing or intellectual property issues.

the rule forms the legal foundation for the TRA's decision. I would set aside the TRA's March 19, 1998 order because it lacks legal support.

VI.
CONSTITUTIONAL LIMITS ON THE TRA'S AUTHORITY TO COMPEL COMMERCIAL SPEECH

Rather than grappling with the interpretative morass created by attempting to rely on Tenn. Comp. R. & Regs. r. 1220-4-2-.15, Judge Cottrell undertakes to salvage the TRA's decision by asserting that Tenn. Code Ann. §§ 65-4-123, -124(a) supply sufficient authority for the TRA's order in this case. I agree that the General Assembly has given the TRA authority to enter orders and promulgate rules to promote competition in Tennessee's local telephone markets. I also agree that these rules and orders may, to some extent, be directed at mitigating the effects of former monopolistic practices of the incumbent local telephone service providers. I do not agree, however, that the TRA has the authority to compel BAPCO to place the names and logos of BellSouth Telecommunications, Inc.'s competitors on the cover of BellSouth's white page directories. Neither BAPCO nor BellSouth Telecommunications, Inc. can be compelled to use their facilities to promote the commercial interests of their competitors.

Purely commercial speech is no longer considered to be unprotected by the federal and state constitutions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 & n.24, 96 S. Ct. 1817, 1830 & n.24 (1976); *Horner-Rausch Optical Co. v. Ashley*, 547 S.W.2d 577, 578-79 (Tenn. Ct. App. 1976). As long as the commercial speech is truthful and does not propose an illegal transaction, it is entitled to constitutional protection from unwarranted governmental interference. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 1930 (1999); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980); *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 444-45 (Tenn. Ct. App. 1999).

The scope of the constitutional protection that commercial speech receives is another question. Truthful commercial speech currently does not receive the same level of constitutional protection as political or ideological expression. While the constitutional protection for non-broadcast political speech is near absolute, *United Foods, Inc. v. United States*, 197 F.3d 221, 223 (6th Cir. 1999), *cert. granted* ___ U.S. ___, 121 S. Ct. 562 (2000), commercial speech receives what the Tennessee Supreme Court has called "qualified" constitutional protection. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 451 (Tenn. 1979). Thus, governmental restrictions on commercial speech receive only "intermediate" scrutiny, as opposed to the strict scrutiny to which governmental restrictions on political or ideological speech are subjected. *Douglas v. State*, 921 S.W.2d 180, 184 (Tenn. 1996). Currently, the intermediate scrutiny test employed by the United States Supreme Court and the Tennessee Supreme Court is found in the *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* opinion. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. at 183, 119 S. Ct. at 1930 (declining requests to reexamine the *Central Hudson* test); *Douglas v. State*, 921 S.W.2d at 184.

The freedom of speech protected by U.S. Const. amend. I and Tenn. Const. art. I, § 19 includes the freedom to speak and the freedom to refrain from speaking. This principle has been applied not only in cases involving political or ideological speech, *Miami Herald v. Tornillo*, 418 U.S. 241, 254-58, 94 S. Ct. 2831, 2838-40 (1974) (holding that a newspaper may not be compelled to publish replies to stories by political candidates); *West Virginia v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943) (holding that school children may not be compelled to participate in a flag salute ceremony), but also financial activities such as charitable fund-raising. *Riley v. National Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 2677 (1988) (holding that professional fund-raisers may not be required to disclose the percentage of funds turned over to charity).

In light of the freedom to refrain from speaking, the United States Supreme Court has recognized that individuals and corporations may not be compelled to use their property or resources to advance the ideological views of others. *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20, 106 S. Ct. 903, 914 (1986) (holding that a regulatory commission may not compel a utility to include its environmental opponents' statements in its customer newsletter); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977) (holding that a person could not be compelled to display an objectionable state motto on their license plate).

The United States Supreme Court has departed from these principles in only one case involving compelled commercial speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130 (1997), involved a challenge to a marketing order promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937. The order required all California growers of nectarines, plums, and peaches to make financial contributions to a common fund used to produce generic advertising extolling the benefits of "California Summer Fruits." The advertising was intended to promote the common interest of all producers of these fruits, and the Court "presumed" that all the producers agreed with the central message conveyed by the generic advertising. Rather than employing the *Central Hudson* test as the United States Court of Appeals for the Ninth Circuit had done, the *Glickman* Court determined that the challenged marketing order did not infringe the grower's First Amendment rights because (1) it was part of a pervasive governmental regulatory scheme that had replaced competition with collectivization for the benefit of the producers, *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 475-76, 117 S. Ct. at 2141, (2) it did not prevent the producers from doing their own advertising, (3) it did not require the producer to engage in any actual or symbolic speech, and (4) it did not compel the producer to endorse or to finance any political or ideological speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 469-70, 117 S. Ct. at 2138.

The *Glickman* Court considered the entire agricultural program as an economic regulation established by Congress that enabled competing agricultural producers to participate in joint ventures for their common benefit. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. at 476, 117 S. Ct. at 2141-42. Thus, it viewed the financial assessments for common advertising simply as the price the competing producers had to pay for the benefit of being protected from free competition in the marketplace.

The majority's decision in *Glickman v. Wileman Bros. & Elliott, Inc.* has not been without its critics, including four members of the United States Supreme Court. *Leading Case, Commercial Speech–Compelled Advertising*, 111 Harv. L. Rev. 319 (1997). The United States Court of Appeals for the Sixth Circuit has held that the *Glickman* holding applies only when the industry involved is no longer part of the free market because it has been "fully collectivized" by the government and the challenged regulation does not compel political or ideological speech. *United Foods, Inc. v. United States*, 197 F.3d at 224. Accordingly, the United States Court of Appeals for the Sixth Circuit invalidated a federal program requiring mushroom producers to contribute funds to a regional advertising program because no other part of the mushroom business was collectivized or regulated. *United Foods, Inc. v. United States*, 197 F.3d at 224-25.

Following the reasoning of the United States Court of Appeals for the Sixth Circuit in *United Foods, Inc. v. United States*, I would find that the *Glickman* decision does not apply to the local telephone markets in Tennessee because the government is no longer protecting the local telephone service providers from competition. To the contrary, both the state and the federal governments are marching in the opposite direction – to return free competition to the local telephone market. In addition, nothing in the current state or federal regulatory scheme smacks of the sort of "collectivization" that is the earmark of the marketing program upheld in *Glickman*. Accordingly, the TRA's order must be tested against the constitutional standards normally applicable to compelled speech cases.

There is no question that BAPCO and BellSouth Telecommunications, Inc. have a constitutionally protected interest in not being forced to use their own resources, property, or funds to promote the financial interests of their competitors. Thus, the TRA's March 19, 1998 order can be upheld only if the TRA has some compelling justification for its order. I find no such justification in this case. Even if promoting competition in accordance with Tenn. Code Ann. § 65-4-123 could be considered a compelling justification, the TRA's order is more extensive than necessary to advance that interest.[9]

What purpose does placing the names and logos of BellSouth's competitors on the cover of the white pages telephone directory serve? Does it promote the ability of the public to identify the local telephone service providers who serve the calling area covered by the directory? There is little direct evidence in this record that it does. What the record does demonstrate is that providing this information on the cover of the directory would simply be redundant because similar information in much more detail is already included in the directory itself. For example, the cover of the current white pages directory for Greater Nashville contains a statement that the directory contains customer listings for all local telecommunications companies. The "Customer Guides" section at the beginning of the directory contains the names of all the local telephone service providers, as well as their telephone numbers to establish service, to arrange for repairs, or to obtain billing information.

[9]The *Central Hudson* test is generally applied when the government is attempting to regulate or prohibit commercial speech. It has not been used in compelled speech cases. However, I would reach the same result using that *Central Hudson* test because the TRA's order is more extensive than necessary to promote competition in the local telephone markets.

Thus, even without the names and logos on their covers, BellSouth's white pages directories provide material assistance to anyone attempting to identify local telephone service providers in the particular local calling area covered by the directory.

Based on the record, I conclude that AT & T's demand that its name and logo appear on the cover of the white pages directory prepared by BAPCO for BellSouth Telecommunications, Inc. was motivated by a desire to increase the public awareness of its brand without incurring the expense of a marketing campaign. By forcing BAPCO to place its name and logo on the cover of BellSouth's white pages directories, AT & T can take advantage of the wide distribution of the BellSouth directories without bearing the expense associated with their distribution. Permitting AT & T to be a free rider in the name of promoting competition goes too far for constitutional purposes.

_____

WILLIAM C. KOCH, JR., JUDGE