

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 7, 1999 Session

**UNITED TELEPHONE-SOUTHEAST, INC., v. TENNESSEE  
REGULATORY AUTHORITY**

**Appealed from the Tennessee Regulatory Authority  
No. 97-01438 Melvin Malone, Chairman**

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**No. M1999-02801-COA-R12-CV - Filed March 20, 2001**

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United Telephone-Southeast, Inc. challenges a decision of the Tennessee Regulatory Authority denying a rate increase for residential integrated services digital network (ISDN) services on the ground that ISDN is a basic service under Tenn. Code Ann. §65-5-208(a). Because ISDN provides functionality additional to the provision of basic services, we reverse.

**Tenn. R. App. P. 12 Direct Appeal; Judgment of the Tennessee Regulatory Authority  
Reversed and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

R. Dale Grimes, Nashville, Tennessee, James B. Wright, Wake Forest, North Carolina, for the appellant, United Telephone-Southeast.

H. Edward Phillips, III, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

Paul G. Summers, State Attorney General, Michael E. Moore, Solicitor General, Vance L. Broemel, Assistant Attorney General, Nashville, Tennessee, for the appellee, Consumer Advocate.

**OPINION**

United Telephone-Southeast, Inc. (“United”) appeals from a final decision of the Tennessee Regulatory Authority (“TRA”) entered November 30, 1998, wherein the TRA denied a rate increase for integrated services digital network (ISDN) services on the ground that ISDN is a basic service under Tenn. Code Ann. §65-5-208(a).

In 1995, the General Assembly enacted sweeping changes in the regulation of the providers of telecommunications services in Tennessee. Among the changes was the creation of a new method of rate setting as an alternative to the existing “rate of return” regulation by the TRA. Under the new legislation, a provider of telecommunications services could elect the new alternative “price regulation plan” methodology. Tenn. Code Ann. § 65-5-209. United made such an election effective October 15, 1995.

After the initial qualification of a price regulation plan, a provider’s ability to increase rates for services is subject to limitations established by statute. *See* Tenn. Code Ann. § 65-5-209. Essentially, Tenn. Code Ann. § 65-5-209(e) authorizes a price regulated company to increase rates for services within a maximum annual adjustment tied to inflation. However, the legislature prohibited increases in rates for certain services for a time after implementation of the new rate setting methodology. A provider’s “initial basic local exchange telephone service rates . . . shall not increase for a period of four (4) years” from the date the provider became subject to a price regulation plan. Tenn. Code Ann. § 65-5-209(f). On the other hand, increases in non-basic services are not so limited. Tenn. Code Ann. § 65-5-209(h).

The designation of a particular service as either basic or non-basic also has effects beyond the first few years. A provider’s rate changes are limited by an overall maximum annual adjustment, and a provider “may adjust its rates for basic local exchange telephone services or non-basic services only so long as its aggregate revenues for [such] services generated by such changes do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan.” Tenn. Code Ann. § 65-5-209(e). While this approach provides flexibility in the percentage increases or decreases for specific services within the aggregate revenues limitation, that flexibility is limited with regard to basic services by the four-year prohibition on increases. In addition,

[a]t the expiration of the four-year period, an incumbent local exchange telephone company<sup>1</sup> is permitted to adjust annually its rates for basic local exchange telephone services in accordance with the method set forth in subsection (e) provided 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.

Tenn. Code Ann. § 65-5-209(f).

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<sup>1</sup>“Incumbent local exchange telephone company” is a term defined in Tenn. Code Ann. § 65-4-101(d) and is distinguished from a “competing telecommunications service provider” by whether the company was providing local services before June 6, 1995, or was certified to provide such services after that date. *See* Tenn. Code Ann. § 65-4-101(e). Because all the parties to this action agree that United is subject to the four-year freeze on basic services in Tenn. Code Ann. § 65-5-209(f), we presume it is an “incumbent local exchange telephone company” for purposes of application of all provisions in Tenn. Code Ann. § 65-5-209(f).

Thus, a service classified as basic is subject to limitations on increases in rates beyond the first four years, and those limitations are not applicable to services which are non-basic.

United filed a tariff in September of 1997 in which it proposed rate increases for a number of services, including residential ISDN.<sup>2</sup> A contested case proceeding was held, with the Consumer Advocate intervening. From the beginning of the proceedings below, the primary issue in dispute was whether ISDN services are basic services, the rates for which could not be increased at that time. In November of 1998, the TRA issued its order classifying ISDN service as basic service under the statutory definition of “basic local exchange telephone services” found in Tenn. Code Ann. § 65-5-208(a)(1). That definition reads:

“Basic local exchange telephone services” are telecommunication services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.

Tenn. Code Ann. § 65-5-208(a)(1).

## I.

The standard for reviewing administrative agency decisions in contested case hearings under the Administrative Procedures Act is set out in Tenn. Code Ann. § 4-5-322 . Generally, a court may reverse or modify an agency decision if that decision is arbitrary or capricious, characterized by an abuse or a clearly unwarranted exercise of discretion, unsupported by substantial and material evidence, or if the decision exceeds the statutory authority of the agency. Tenn. Code Ann. § 4-5-322(h)(2); *Sanifill of Tennessee Inc., v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn. 1995), *Tennessee Cable Television Ass’n. v. Tennessee Pub. Serv. Comm’n.*, 844 S.W.2d 151, 163 (Tenn. Ct. App. 1992).

This is not a broad, *de novo* review; it is restricted to the record, and courts should not substitute their judgment for that of an agency as to the weight of the evidence on factual issues.

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<sup>2</sup>Residential ISDN rates would increase from approximately \$25 per month to either \$65 or \$85 per month, depending on the type of contract the consumer chose. There is no dispute that the remainder of the increases and decreases in rates for specific services complied with the overall maximum annual adjustments allowed under Tenn. Code Ann. § 65-5-209(e).

*Sanifill of Tennessee Inc.*, 907 S.W.2d at 810. However, it is the role of the courts to interpret statutes. *Id.* The construction of a statute and the application of the law to the facts are questions of law and, thus, properly the province of the judiciary. *Id.* “The search for the meaning of statutory language is a judicial function.” *Bellsouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 672 (Tenn. Ct. App. 1997).

In reviewing the TRA’s interpretation of Tenn. Code Ann. § 65-5-208(a)(1), we are guided by familiar principles of statutory construction.

The role of this Court in construing statutes is to ascertain and give effect to legislative intent. Whenever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. We must avoid strained constructions which would render portions of the statute inoperative or void. Instead, we must apply a reasonable construction in light of the purposes and objectives of the statutory provision. Finally, a state agency’s interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent.

*Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998) (citations omitted).

## II.

We begin with the purpose underlying the legislature’s limitations on rate increases for basic services. The legislature has given us a statement of its intent in enacting the broad changes in telecommunications regulation in 1995.

The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123.

The final two provisions establish the guiding principles applicable to our analysis: that universal service be maintained and that residential rates for essential services remain affordable. We interpret the limitations on rate increases for basic services as fulfilling the goal of maintaining affordable rates for residential essential services. Thus, we conclude that the legislature intended that “basic” services have some correlation to “essential” services.

We also interpret the legislature’s declaration of state telecommunications policy as reflecting a relationship between universal service and basic services. In addition, the General Assembly has specifically related the two concepts:

Universal service, consisting of residential basic local exchange telephone service at affordable rates and carrier-of-last-resort obligations must be maintained after the local telecommunications markets are opened to competition. In order to ensure the availability of affordable residential basic local exchange telephone service, the authority shall formulate policies, promulgate rules and issue orders which require all telecommunications service providers to contribute to the support of universal service.

Tenn. Code Ann. § 65-5-207(a).<sup>3</sup>

Universal service refers to the national policy underlying the creation of the Federal Communications Commission, “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide . . . wire and radio communication service with adequate facilities and at reasonable charges.” 47 U.S.C. § 151. The Universal Service Fund<sup>4</sup> was designed to further the objective of making communications services available to all Americans at reasonable charges. *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988). The FCC has the responsibility of overseeing use of the Fund and has determined that its use should be restricted to ensuring that “telephone rates are within the means of the average subscriber.” *Id.* (quoting *Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, 96 F.C.C.2d 781, 795 (1984)).

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<sup>3</sup>The remaining provisions of that statute require the TRA to “determine the cost of providing universal service, determine all current sources of support for universal service and their associated amounts, identify and assess alternative universal service support mechanisms, and determine the need and timetable for modifying current universal service support mechanisms and implementing alternative universal service support mechanisms.” Tenn. Code Ann. § 65-5-207(b). In considering an alternative universal service support mechanism, the TRA must consider, at a minimum, “[t]he amount by which the embedded cost of providing residential basic local exchange telephone service exceeds the revenue received from the service, including the cost of the carrier-of-last-resort obligation, for both high and low-density service areas.” Tenn. Code Ann. § 65-5-207(c)(8)(i).

<sup>4</sup>Payments into the fund are distributed to those providers who furnish the services designated for universal service support in order to offset the cost of providing telephone service at reasonable rates in rural and high cost areas. *See* 47 U.S.C. § 254.

The FCC has been charged with designating which services should be supported by federal universal service support mechanisms. 47 U.S.C. § 254(c)(1). While the Telecommunications Act of 1996 recognizes that universal service is an evolving level of services, the Act requires the FCC, in identifying those services eligible for support, to consider the extent to which the services: (1) are essential to education, public health, or public safety; (2) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (3) are being deployed in public telecommunications networks by telecommunications carriers; and (4) are consistent with the public interest, convenience and necessity. 47 U.S.C. § 254(c)(1).

The FCC has interpreted this directive as requiring that each of the four criteria must be considered, but not necessarily met, before a service may be included within the general definition of universal service. *In Re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order (rel. May 8, 1997) at ¶ 61. In addition, the FCC has determined that defining the eligible services in a functional sense is preferred because it is technology-neutral and provides more flexibility. The “core” or “designated” services that will receive universal service support are:

Single-party service: voice grade access to the public switched network; Dual Tone Multifrequency (“DTMF”) signaling or its functional equivalent; access to emergency services including, in some circumstances, access to 911 and Enhanced 911 (“E911”); access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers, . . . In order to receive universal service support, eligible carriers must offer each of the designated services.

*Id.* at ¶ 56.

In applying the criteria it was directed to consider, the FCC discussed various services under consideration, and part of that discussion has particular relevance to the issues before us:

[W]e conclude that voice grade access includes the ability to place calls, and thus incorporates the ability to signal the network that the caller wishes to place a call. Voice grade access also includes the ability to receive calls, and thus incorporates the ability to signal the called party that an incoming call is coming. We agree that these components are necessary to make voice grade access fully beneficial to the consumer. We . . . adopt the . . . finding that . . . voice grade access to the public switched network is an essential element of telephone service, is subscribed to by a substantial majority of residential customers, and is being deployed in public telecommunications networks by telecommunications carriers. In addition, we find voice grade access to be essential to education, public health, and public safety because it allows consumers to contact essential services such as schools, health care

providers and public safety providers. For this reason, it is also consistent with the public interest, convenience, and necessity.

*Id.* at ¶63.

The FCC has also adopted a definition of voice-grade access in terms of frequency ranges.<sup>5</sup> In response to arguments that higher bandwidths should be adopted, the FCC concluded that, except with respect to schools, libraries and health care providers elsewhere covered by universal service,

voice grade access, and not high speed data transmission is the appropriate goal of universal service policies at this time because we are concerned that supporting an overly expansive definition of core services could adversely affect all consumers by increasing the expense of the universal service program and, thus, increasing the basic cost of telecommunications services for all. As discussed above, voice grade access is subscribed to by a substantial majority of residential customers, and is being deployed in public telecommunications networks by telecommunications carriers. In contrast, the record in this proceeding does not demonstrate that the higher bandwidth services and data transmission capabilities advocated are, at this time, necessary for the public health and safety and that a substantial majority of residential customers currently subscribe to these services.

*Id.* at ¶ 64.

We are of the opinion that the General Assembly's placing of stricter limitations on rate increases for basic services was, like the Universal Service Support Fund, intended to ensure that the average customer could obtain telephone service at reasonable rates. Thus, the FCC's approach to universal service is instructive.

### III.

ISDN is a network architecture involving digital communications transmission. It provides residential and business customers with two voice-grade channels and one low speed data channel over a single line. The voice and data channels can be used simultaneously.

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<sup>5</sup>In a later report and order, the FCC reconsidered its earlier specification of a bandwidth for voice grade access and changed that definition, replacing 500 Hertz to 4000 Hertz with 300 to 3000 Hertz. The FCC explained that its earlier specification was more exacting than industry standards and that it had not intended to impose more onerous standards. Adopting a narrower bandwidth definition for voice grade access was done to avoid disintitling otherwise eligible providers from support. *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration (rel. Dec. 30, 1997) at ¶ 16.

In determining that ISDN is a basic service, the TRA considered each of the criteria in the statutory definition. It found that ISDN consists of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice-grade facilities. In so finding, the TRA defined voice-grade facilities as meaning “capable of handling voice communications” and found that “ISDN provides voice communication, in fact a higher quality voice communication than non-ISDN lines.” Thus, the agency declined to adopt a more restrictive definition, such as the FCC’s definition of voice-grade facilities.

The TRA concluded that ISDN service is a technological advancement that is the logical evolution of the public switched telephone network. In essence, the TRA determined that any service which provides the basics (dial tone, two-way communication, etc.) will be considered basic service regardless of the additional features it provides. We do not agree that such was the intent of the legislature.

The parties have made various arguments about the technology involved; however, we think the issue is one of function, not technology. The requirements regarding both universal service and basic services were established to ensure access to telephone communication to average telephone consumers at reasonable costs. While we do not disagree that the developments in technology which improve the delivery or quality of telephone service may and should benefit the average telephone user, we think the legislature was primarily concerned with protecting the delivery of fundamental telephone communication capabilities when it defined basic services. We must presume that the legislature said what it meant, *Worley v. Weigel’s, Inc.*, 919 S.W.2d 589, 593 (Tenn. 1996), and must give effect to its choice of the words “basic” and “essential.”

ISDN provides more than basic or fundamental telephone communications. It allows simultaneous transmission of voice and data. Nothing in the record before us supports a conclusion that this functionality is critical to the average telephone consumer. To the contrary, at the time of the hearing, only 129 of the more than 170,000 residential customers of United subscribed to ISDN. Those consumers have chosen ISDN for their unique needs at a monthly cost which is already in excess of basic telephone services.<sup>6</sup> We see little difference between this situation and the option given to consumers who want call waiting, call forwarding, or other additional functions which are, without dispute, clearly not included in basic services. These options do not implicate the legislature’s efforts to guarantee that consumers are able to get basic services at reasonable rates which cannot increase at a greater rate than inflation.

We conclude that ISDN is not a basic service within Tenn. Code Ann. § 65-5-208(a)(1) and, consequently, not included in the limitations on rate increases in Tenn. Code Ann. § 65-5-209(f). Accordingly, we reverse the decision of the Tennessee Regulatory Authority and remand this case

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<sup>6</sup>The record indicates that ISDN cost approximately \$25 per month at the time of the hearing, and basic service cost approximately \$12 per month.



for appropriate further proceedings which may be necessary. Costs of this appeal are taxed equally to the Tennessee Regulatory Authority and the Consumer Advocate.

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PATRICIA J. COTTRELL, JUDGE