IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.,	)	
Plaintiff/Appellant,	)	Public Service Commission No. 95-02615
VS.	)	Appeal No. 01A01-9512-BC-00556
H. LYNN GREER, Chairman, SARA KYLE, Director, and MELVIN J. MALONE, Director, Constituting the Tennessee Regulatory Authority,	)	
Defendants/Appellees.	)	

FILED

December 6, 1996

Cecil W. Crowson
Appellate Court Clerk

CONCURRING OPINION

The majority opinion rests on two principal holdings - first that this court lacks jurisdiction to hear this appeal and second that collateral estoppel bars AT&T's attack on the constitutionality of Tenn. Code Ann. § 65-5-209 (Supp. 1996). I have prepared this separate opinion because I disagree with the majority's jurisdictional analysis. I would hold that this court has jurisdiction over this appeal and that collateral estoppel prevents AT&T from pursuing its constitutional challenge to Tenn. Code Ann. § 65-5-209.

I.

In 1995 the General Assembly overhauled the procedure for setting rates for telephone services.[1] It replaced the cumbersome administrative rate-setting process with one in which competitive forces, rather than regulators, dictate the rates. The change required the General Assembly to provide transitional mechanisms from the former regulatory environment to the new market-driven

[1]Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts ___ (3 Tenn. Code Ann. 1995 Advance Legislative Serv., Chapter 398-414 at p. 205).

one. This appeal involves one of these mechanisms - the transition procedures in Tenn. Code Ann. § 65-5-209(c) for incumbent local exchange telephone companies.

The new legislation required incumbent telephone companies to decide whether their rates would continue to be set using the traditional "rate base - rate of return" process or whether their rates would become more responsive to market forces.[2] While incumbent companies had the right to begin operating free from the traditional regulatory oversight, their right was conditioned on a threshold determination that their initial rates would be "affordable." Thus, Tenn. Code Ann. § 65-5-209(c) required incumbent companies to apply to the commission for a "price regulation plan." The sole purpose of this proceeding was to ensure that an incumbent telephone company's initial rates would be "affordable."

The General Assembly understood that the initial rates were the most important component of any new price regulation plan. Thus, rather than simply assuming that the incumbent company's current rates were "affordable," the General Assembly decided that the commission should take one last look at a company's current rates before releasing its regulatory grip. Rather than directing the commission to commence a lengthy rate-making proceeding for every incumbent telephone company seeking to operate under a new price regulation plan, the General Assembly devised an expedited procedure for determining whether an incumbent company's current rates were affordable.

This expedited procedure involved comparing the incumbent company's current earned rate of return with its currently authorized fair rate of return. The rates that an incumbent company was charging on June 6, 1995 would become the initial rates in the company's price regulation plan, as long as the company's current earned rate of return did not exceed its currently authorized fair rate of return. If the company's current rate of return exceeded its authorized fair rate of return, the General Assembly directed the commission to commence a "contested,

[2]This choice was not difficult for incumbent telephone companies to make because their new competitors were not going to be subject to the burdensome regulatory rate-making process.

evidentiary proceeding" to set the company's initial rates - presumably at a lower level than its current rates.[3]

The General Assembly directed the commission to base its comparison of an incumbent company's earned and authorized rates of return on its staff's audit of the incumbent company's "most recent . . . 3.01 report." *See* Tenn. Code Ann. § 65-5-209(c), -209(j). The 3.01 report is a monthly financial report filed by telephone companies with more than 6,000 access lines.[4] It details the company's revenues and expenses and provides monthly, year-to-date, and twelve months-to-date information consistent with the Uniform System of Accounts as adopted and amended by the Federal Communications Commission.[5] It must reflect all rate-making adjustments to the company's operating revenues, expenses, and rate base contained in the commission's most recent order applicable to the incumbent company. *See* Tenn. Code Ann. § 65-5-209(j).

The General Assembly did not provide clear answers to two important questions concerning the expedited Tenn. Code Ann. § 65-5-209(c) procedure. First, it did not indicate whether the hearing during which the commission receives and acts on the staff audit of an incumbent company's 3.01 report would be a contested case proceeding. Second, it did not describe what role, if any, an incumbent company's customers or competitors could play with regard to the commission's consideration of the staff audit of the incumbent company's 3.01 report. This case demonstrates the problems caused by these oversights.

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[3]By the same token, the General Assembly authorized incumbent companies to seek higher initial rates if their current earned rate of return was less than their currently authorized fair rate of return.

[4]Tenn. Comp. R. & Regs. r. 1220-4-1-.10(2)(a) (1988).

[5]Tenn. Comp. R. & Regs. r. 1220-4-1-.11(1)(a) (1988).

II.

United Telephone - Southeast, Inc. applied for a price regulation plan less than two weeks after the 1995 legislation took effect. During the next two months, the commission entered a series of orders pursuant to Tenn. Code Ann. § 4-5-310 (1991) and Tenn. Code Ann. § 65-2-107 (1993) permitting the Consumer Advocate[6] and four of United Telephone's customers and competitors[7] to intervene and participate in the proceeding. On August 7, 1995, the commission published a notice that it would hold a contested case hearing on United Telephone's application for a price regulation on September 7, 1995. The notice stated that the hearing would be conducted in accordance with the Uniform Administrative Procedures Act.

On August 30, 1995, the Consumer Advocate filed a motion suggesting that the contested case proceeding scheduled for September 7, 1995 was inappropriate. The Consumer Advocate likened United Telephone's application for a price regulation plan to an audit, and argued that *National Health Corp. v. Snodgrass*, 555 S.W.2d 403, 405 (Tenn. 1977) stood for the proposition that audits were not contested cases. On September 5, 1995, the commission entered an order rescinding its August 7, 1995 notice of hearing on the ground that "there is no statutory authority for a contested proceeding at this juncture."

The commission's staff filed the report of its audit of United Telephone's most recent 3.01 report on September 15, 1995.[8] The report concluded that United Telephone's current earned rate of return was less than its authorized fair rate of

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[6]The commission entered an order on August 28, 1995, permitting the Consumer Advocate to intervene as an "official party of record."

[7]The commission permitted South Central Bell Telephone Company to intervene as a party on July 24, 1995. On August 18, 1995, it entered an order permitting AT&T Communications of the South Central States, Inc. to intervene and participate in the proceedings. Similar orders were entered on August 28 and August 30, 1995 for MCI Metro Access Transmission Services, Inc. and MCI Telecommunications Corporation respectively.

[8]The staff actually filed an audit report earlier on August 16, 1995. However, the commission rejected this audit on September 5, 1995 because it did not involve United Telephone's most recent 3.01 report.

return.[9] On September 20, 1995, the commission, without conducting a contested case hearing, "accepted" its staff report. It also determined that United Telephone's rates in effect on June 6, 1995 were affordable and would become the initial rates under United Telephone's price regulation plan effective on October 15, 1995, unless United Telephone requested a contested evidentiary hearing within ten days.

United Telephone immediately informed the commission that it did not intend to request a contested evidentiary hearing. In addition, AT&T, one of the intervening parties, requested the commission to "clarify" its September 20, 1995 order by making separate findings with regard to each of United Telephone's basic and non-basic rates. On October 13, 1995, the commission entered its final order authorizing United Telephone to begin operating under a price regulation plan based on its rates in effect on June 6, 1995. The commission also denied AT&T's request to convene a hearing because it lacked the authority to make further findings with regard to United Telephone's rates and because the other relief requested by AT&T exceeded its authority.

The proceedings took a curious turn at this point. On October 6, 1995, AT&T filed a petition pursuant to Tenn. Code Ann. § 4-5-224 (1991) in the Chancery Court for Davidson County challenging the constitutionality of Tenn. Code Ann. § 65-5-209.[10] While this proceeding was pending, AT&T also appealed the commission's October 13, 1995 order to this court in accordance with Tenn. Code Ann. § 4-5-322(b)(1) (Supp. 1996) and Tenn. R. App. P. 12. Many of AT&T's issues on this direct appeal were the same as those raised in its pending declaratory judgment proceeding.

The commission moved to dismiss AT&T's direct appeal on the ground that this court lacked subject matter jurisdiction because its October 13, 1995 order

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[9]The commission had determined in December 1994 that United Telephone's authorized fair rate of return should be between 8.85% and 10.05%. The staff audit in September 1995 concluded that United Telephone's current earned rate of return for the twelve months ending on March 31, 1995 was 8.69%.

[10]AT&T had requested a declaratory ruling from the commission concerning these issues on July 14, 1995. The commission denied the request on August 22, 1995.

was not the final order in a contested case proceeding. On April 12, 1996, this court declined to dismiss the appeal. We determined that this court, rather than the commission or the trial court, should decide legal questions concerning our own jurisdiction. *AT&T Communications of the S. Cent. States, Inc. v. Bissell*, App. No. 01A01-9512-BC-00556 (Tenn. Ct. App. April 12, 1996) (order denying motion to dismiss appeal).

Notwithstanding this court's denial of the motion to dismiss this appeal, AT&T continued to press forward with its declaratory judgment action in the chancery court. Following a hearing in mid-February 1996, the chancery court filed a memorandum and order on May 7, 1996 finding AT&T's attacks on the constitutionality of Tenn. Code Ann. § 65-5-209 to be without merit. *AT&T Communications of the S. Cent. States, Inc. v. Bissell,* No. 95-3094-II (Davidson Chan. Ct. May 7, 1996). Rather than appealing this decision, AT&T turned its attention to this appeal. However, the commission asserted that the doctrine of res judicata prevented AT&T from relitigating its constitutional issues because the chancery court had already decided them adversely to AT&T in the declaratory judgment proceeding and because the chancery court's judgment had become final without being appealed.

III.

Our authority to review the commission's decisions stems from Tenn. Code Ann. § 4-5-322(b)(1) (Supp. 1996) which provides for a direct appeal to this court from "any final decision" of the commission or its successor, the Tennessee Regulatory Authority. Even though the phrase "any final decision" is quite broad, considering it in light of both Tenn. Code Ann. § 4-5-322(a)(1) and Tenn. R. App. P. 12 indicates that it includes only final decisions in contested cases. Thus, this court has direct appellate jurisdiction over the commission's final decisions in contested cases.

The majority's jurisdictional decision in this case is based on its conclusion that the commission's decision setting the initial rates under United Telephone's price regulation plan was not a final decision in a contested case. This conclusion

ignores the existing statutes governing practice before the commission and creates a species of rate-making proceeding that is completely shielded from judicial review. I find no indication in Tenn. Code Ann. § 65-5-209's legislative history that the General Assembly desired decisions with such far-reaching financial consequences to be essentially unreviewable, or that the General Assembly decided to depart from the commission's practice of permitting interested and affected parties to intervene and participate in a rate-making proceeding.

A.

A Tenn. Code Ann. § 65-5-209 proceeding to approve a price regulation plan for an incumbent telephone company is essentially a rate-making procedure. Its primary purpose is to fix the rates that the incumbent company will charge once its price regulation plan has been approved. The proceeding is not simply an "audit" even though the evidentiary foundation for the commission's decision is the staff audit of the incumbent company's most recent 3.01 report. Thus, the holding in *National Health Corp. v. Snodgrass*, 555 S.W.2d 403, 405 (Tenn. 1977) that an audit is not a contested case has no bearing on this appeal.

Both the Uniform Administrative Procedures Act and the statutes specifically applicable to the commission's proceedings define rate-fixing proceedings as contested cases. Tenn. Code Ann. § 65-2-101(2) (Supp. 1996) states that "the fixing of rates shall be deemed a contested case rather than a rule-making proceeding."[11] Tenn. Code Ann. § 4-5-102(3) (1991) likewise states that contested case proceedings may include rate-making and price-fixing. Statutes involving the same subject matter should be construed together, *State v. Blouvett*, 904 S.W.2d 111, 113 (Tenn. 1995), in order to promote consistency and uniformity, *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 571 (Tenn. Ct. App. 1994), and to avoid placing the statutes in conflict with each other. *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995). Accordingly, we have in the past

[11]Tennessee's decision to classify rate-making as a contested case rather than as a rule-making proceeding points to a clear contrast between the State's and the federal government's understanding of the the nature of a rate-making process proceeding. The rate-making mandated by federal law is viewed as informal rule-making. *See, e.g., Consolidated Aluminum Corp. v. T.V.A.*, 462 F. Supp 464, 475 (Supp. 1978).

construed the definitions of "contested case" in Tenn. Code Ann. § 4-5-102(3) and Tenn. Code Ann. § 65-2-101(2) in pari materia. *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992).

Parties to contested case proceedings before the commission include "[a]ll persons having a right under the provisions of the laws applicable to the . . . [commission] to appear and be heard" and all "interested persons who have been permitted to intervene and become a party to any contested case." Tenn. Code Ann. § 65-2-107 (Supp. 1996). Persons who become parties to a contested case before the commission have a statutory right "to present evidence and argument in accordance with the rules of the [commission]." Tenn. Code Ann. § 65-2-108 (Supp. 1996).

The commission's criteria for intervention were not altered by the 1995 legislation providing for a new mechanism to set telephone rates. Tenn. Code Ann. § 65-2-107 requires only that an intervenor be an "interested person." In addition, Tenn. Code Ann. § 4-5-310(a)(2) (1991) requires that an intervenor demonstrate that the proceeding will affect its "legal rights, duties, privileges, immunities or other legal interest" or that "qualifies as an intervenor under any provision of law."

B.

The facts in this record demonstrate beyond peradventure that the commission itself considered AT&T and the other intervenors as parties to United Telephone's application for a price regulation plan. The commission's orders granting the petitions to intervene invoked both Tenn. Code Ann. §§ 4-5-310 and 65-2-107. Once the commission had granted these persons the right to intervene, Tenn. Code Ann. § 65-2-108 gave them the right to present evidence and argument.

The commission never fully explained its abrupt decision that "there is no statutory authority for a contested proceeding at this juncture." There are two possible explanations for this decision. First, the commission could have agreed

with the Consumer Advocate's assertion that a Tenn. Code Ann. § 65-5-209(c) proceeding was an audit, not a contested case. Second, it could have concluded that a Tenn. Code Ann. § 65-5-209(c) proceeding did not become a contested case until either the commission or the incumbent telephone company triggered a "contested evidentiary proceeding" to set the company's initial rates.

Both rationales are without merit. The Consumer Advocate's characterization of Tenn. Code Ann. § 65-5-209(c) as an audit is simply wrong and, therefore, *National Health Corp. v. Snodgrass* has no bearing. The notion that a Tenn. Code Ann. § 65-5-209(c) proceeding does not become a contested case unless either the commission or the incumbent telephone company triggers a "contested evidentiary proceeding" is equally untenable. In addition to overlooking the complimentary definitions of "contested case" in Tenn. Code Ann. §§ 4-5-102(3) and 65-2-101(2) stating that rate-making proceedings are contested cases, it ignores the participatory rights granted to intervenors in Tenn. Code Ann. § 65-2-108.

The legislative history of Tenn. Code Ann. § 65-5-209 provides no indication that the General Assembly intended to prevent interested parties from participating in Tenn. Code Ann. § 65-5-209(c) proceedings just as they can participate in any other proceeding before the commission. In addition, I am unable to indentify any policy reason to support the finding that these proceedings would be essentially closed unless either the commission or the affected incumbent telephone company triggered a full-blown "contested evidentiary proceeding" to set the initial rates. There are, however, sound policy reasons for treating the early phases of a Tenn. Code Ann. § 65-5-209(c) proceeding as a contested case.

Disputed factual and legal questions could very well arise in a Tenn. Code Ann. § 65-5-209(c) proceeding before a "contested evidentiary proceeding" to set an incumbent telephone company's initial rates is triggered. Questions could be raised about the staff's audit methodology and factual conclusions. These issues directly affect the commission's decision, and thus they should be aired and resolved before the commission determines whether an incumbent telephone

company's actual rate of return exceeds its currently authorized fair rate of return.

These disputed matters could very well be of interest, not just to an affected incumbent company, but also to other incumbent companies applying for a price regulation plan. In addition to issues concerning audit methodology, incumbent telephone companies may also have questions about the commission's decisions concerning the implementation of this new, dramatically different rate-making procedure. Recognizing and following the intervention and hearing procedures in Tenn. Code Ann. §§ 65-2-107, -108 provides the most efficient way to resolve these matters.

IV.

Having concluded that this court has jurisdiction to consider AT&T's appeal from the commission's October 13, 1995 order, I concur with the majority's conclusion that AT&T is collaterally estopped from challenging the constitutionality of Tenn. Code Ann. § 65-5-209 in this proceeding. The parties to the chancery court proceeding that resolved these issues against AT&T's position are the same. Accordingly, the chancery court's decision on these issues is conclusive on AT&T in subsequent proceedings.[12]

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WILLIAM C. KOCH, JR., JUDGE

[12]Neither the majority nor I have reached the merits of AT&T's constitutional arguments since we have invoked the doctrine of collateral estoppel.