

BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 1999-178-C – ORDER NO. 2000-030

FEBRUARY 21, 2000

IN RE: Petition to Review the Earnings of BellSouth Telecommunications, Inc. for Calendar Years 1996, 1997, and 1998) ORDER DENYING) PETITION OF THE) CONSUMER) ADVOCATE AND) GRANTING MOTION OF) BELLSOUTH
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I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the “Commission”) as a result of a Petition filed by Philip Porter, Consumer Advocate for the State of South Carolina (“Consumer Advocate”). The Consumer Advocate requested that the Commission create a new docket to review the earnings of BellSouth Telecommunications, Inc. (“BellSouth”) for the calendar years 1996, 1997, and 1998. The purpose of the requested review was to determine “appropriate refunds for earnings in excess of a lawful rate of return and rate reductions going forward.”¹

The Petition was filed on April 19, 1999, subsequent to, but on the same day the Supreme Court issued an opinion reversing the Commission’s approval of BellSouth’s Consumer Price Protection Plan (hereinafter referred to as the “Plan”). Porter v. South Carolina Public Service

¹ Petition of Philip S. Porter, Consumer Advocate for the State of South Carolina, p. 1. (hereinafter referred to as “Petition”)

Commission 335 S.C. 157, 515 S.E. 2d 923 (1999) (“Porter II”). The Commission had approved the Plan pursuant to S.C. Code Ann. § 58-9-575 (Supp. 1998) on January 30, 1996. See Docket No. 95-720-C, Order Nos. 96-19, 96-78, and 96-136.

On June 21, 1999, the Commission issued Order No. 1999-411 which approved a Stipulation between the Consumer Advocate and BellSouth and ordered that BellSouth reduce all prices which had previously been increased by BellSouth under the terms of the Plan and eliminate the related revenues collected by virtue of those increases. On July 9, 1999, BellSouth filed its tariffs to reduce its prices to the level it had charged as authorized by the Commission prior to the Commission’s approval of the Plan. All reductions in rates by BellSouth were effective retroactively to June 21, 1999, the date required by the Order.

The Supreme Court’s Order reversing the Commission’s approval of the Plan was returned to the Commission by the Circuit Court on July 14, 1999. (Order of the Honorable J. Ernest Kinard, Jr.)

Thereafter, on that same day and after the Circuit Court’s Order transferring jurisdiction to the Commission had been filed with the Commission, BellSouth filed its notice electing to have its rates, terms, and conditions for its services regulated under the alternative form of regulation set forth in S.C. Code Ann. § 58-9-576. The notice reflected that BellSouth was qualified under the statute to elect alternative regulation and that such regulation would take effect thirty days after the filing of the notice.

On July 20, 1999, BellSouth filed its Response and Motion to Dismiss the Consumer Advocate’s Petition asserting that any Commission Order mandating refunds would amount to

retroactive ratemaking and that prospective rate reductions were precluded by BellSouth's election of alternative regulation under S.C. Code Ann. § 58-9-576 (Supp. 1998).

On July 29, 1999, the Consumer Advocate filed a Return to BellSouth's Response requesting that the Commission defer any decision on the legal issues raised by BellSouth until after a full investigation and hearing has been held regarding BellSouth's earnings during the years 1996, 1997, and 1998.

On August 13, 1999, BellSouth's election to have its rates, terms and conditions regulated under S. C. Code Ann. § 58-9-576 became effective pursuant to the terms of the statute.

The instant docket was opened on April 20, 1999, for the purpose of considering the Consumer Advocate's Petition. Petitions to Intervene in the docket were filed by AT&T Communications of the Southern States, Inc. ("AT&T") on July 15, 1999, the South Carolina Public Communications Association ("SCPCA") and State Communications, Inc. ("State")(later known as "TriVergent Communications") on July 19, 1999, the South Carolina Cable Television Association ("SCCTA") on July 22, 1999, and MCI Telecommunications Corporation and WorldCom Technologies, Inc. ("MCI WorldCom") on July 30, 1999.

A public notice was issued by the Commission on August 11, 1999, inviting any person wishing to present his views to the Commission to do so in writing by September 9, 1999. The Commission also invited any person wishing to participate in the matter to do so by Petition to Intervene to be filed on or before September 9, 1999.

On September 13, 1999, the Commission scheduled oral arguments for October 12, 1999, and ordered that pre-hearing briefs from each of the parties be filed by September 28, 1999. (Order No. 1999-634) Pre-hearing briefs were filed by the below-referenced parties.

Oral arguments were held on the Consumer Advocate's Petition on October 12, 1999, in the Commission's hearing room with the Honorable Philip T. Bradley, Chairman, presiding. The Consumer Advocate, Petitioner, was represented by Elliott F. Elam, Jr. and Nancy Vaughn Coombs; AT&T Communications of the Southern States, Inc. was represented by Francis P. Mood, Steve A. Matthews and Roxanne Douglas; S.C. Public Communications Association was represented by John F. Beach; TriVergent Communications, Inc., f/k/a State Communications, Inc. was represented by John J. Pringle, Jr. and Hamilton E. Russell, III; S. C. Cable Television Association was represented by Frank R. Ellerbe, III; MCI WorldCom, Inc. was represented by Darra W. Cothran, Marsha A. Ward and Ken Woods; BellSouth Telecommunications, Inc. was represented by Caroline N. Watson, William F. Austin and R. Douglas Lackey; and the Commission Staff was represented by F. David Butler.

At issue is whether the Commission has the authority to grant the relief sought by ordering refunds and/or rate reductions as requested by the Consumer Advocate. The Commission finds that, as a matter of law, it does not have such authority and thus, BellSouth's Motion to Dismiss must be granted and the Consumer Advocate's Petition must be dismissed.

II. REGULATORY HISTORY

There has been tremendous change in the telecommunications industry in the past few years. This change has been driven by many factors, including the passage by the U.S. Congress of the Telecommunications Act of 1996 ("1996 Act"). Although intended to open all telecommunications markets to competition, the 1996 Act "fundamentally restructures local telephone markets." AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721, 723, 142 L. Ed. 2d 834 (1999). The 1996 Act imposes a host of duties upon incumbent local exchange carriers

(“LECs”) such as BellSouth, including the obligation “to share its network” through resale, interconnection, and unbundled network elements. Id. In discharging this obligation, the 1996 Act requires that incumbent LECs negotiate “interconnection” agreements to connect new entrants to their already-established networks. See 47 U.S.C. §§ 251(c)(1) and 252(a).

As a result of these changes, South Carolina, as well as almost every other state, has been selected by dozens of new entrants in the telecommunications market, including established as well as non-traditional competitors. At the same time that the Commission has been attempting to transition BellSouth and other incumbent LECs to prepare for the competitive marketplace, the Commission has granted certificates to 84 local exchange carriers to compete against BellSouth in South Carolina.²

As competition began to emerge in the telecommunications industry, the General Assembly shifted the focus of regulation of telecommunications companies from earnings to prices and addressed the continuing commitment to universally available local exchange service. It did this by the enactment of § 58-9-585 and § 58-9-575 in 1994, and in 1996 by the enactment of § 58-9-576 and § 58-9-280. Sections 58-9-575 and 58-9-576 authorized the Commission to regulate incumbent LECs differently than would have been allowed under traditional rate of return regulation. Section 58-9-575 provides the Commission with the discretion to approve a LEC’s application for alternative regulation. Section 58-9-576 does not provide for Commission approval, but instead, allows qualifying LECs to elect alternative regulation. Section 58-9-280 provides for the creation of a universal service fund so as to continue South Carolina’s commitment to universally available basic local exchange service at affordable rates and to assist

² As reflected by Commission records as of the date of oral arguments.

with the alignment of prices and/or cost recovery as subsidies to basic local exchange service are eroded or eliminated.

After the passage of Section 58-9-575, BellSouth filed an application with the Commission seeking approval of an alternative form of regulation pursuant to that code section. Unlike Section 58-9-576 (Supp. 1998), where a qualifying LEC's election does not require Commission approval, Section 58-9-575 required that BellSouth obtain specific approval of its application for alternative regulation by the Commission.

The Commission established Docket No. 95-720-C to review BellSouth's proposed Plan under Section 58-9-575. The Commission concluded its assessment of BellSouth's proposed plan for alternative regulation with the issuance on January 30, 1996, of Order No. 96-19 in Docket No. 95-720-C, which approved BellSouth's application for an alternative regulation plan (the alternative regulation Order).

The Order approving BellSouth's alternative regulation plan was appealed to the courts and was reversed by the Supreme Court because the Commission's assessment of BellSouth's Plan did not conform to statutory requirements. Specifically, the Court concluded that:

The PSC possesses only the authority given it by the legislature. Cable Television, supra. Section 58-9-575 does not authorize the PSC to approve an alternative regulatory plan without identifying competitive and noncompetitive services. Because the PSC failed to make the requisite findings regarding competitive and noncompetitive services, the circuit court order affirming the PSC's order is REVERSED.

Porter II, 515 S.E.2d at 926.

Prior to addressing BellSouth's application for alternative regulation, which was considered in Docket No. 95-720-C, the Commission also undertook to review BellSouth's then current rates and tariffs in an earnings review under Docket No. 95-862-C. In September 1995,

hearings were held to review BellSouth's earnings in order to set appropriate rates. The new rates ordered by the Commission were established using a traditional rate-of-return methodology, and the proceeding was conducted as a traditional rate-of-return proceeding.

As a result of this traditional rate of return proceeding, the Commission ordered a prospective \$42.2 million rate reduction in BellSouth's rates. This decision was reflected in the December 29, 1995 Order No. 95-1757. This Order approving rates, effective January 1, 1996, was appealed to the courts, and in October, 1998, the Supreme Court of South Carolina, determined that the Commission's Order was deficient in certain specific matters. Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E.2d 328 (1998) ("Porter I"). The Court held that portions of the Commission's decision were not adequately "documented" or "explained" and returned the case to the Commission with instructions. "We remand this case to PSC for it to reconsider those issues solely on the basis of the record on appeal in this case." Porter I, 507 S.E.2d at 338.

The Commission complied with the Supreme Court's instructions and entered an Order on February 18, 1999, which explained in greater detail its earlier decision and made additional adjustments to BellSouth's rate base. As a result, the Commission ordered an additional \$5.8 million reduction in BellSouth's rates.³

³ Although the Consumer Advocate appealed this subsequent order of the Commission, BellSouth and the Consumer Advocate thereafter entered into a settlement agreement that was approved by the Commission, with modifications, on June 21, 1999. Pursuant to the Commission's June 21, 1999, Order, BellSouth must: (1) implement prospective reductions in intrastate switched access rates of \$10 million; (2) reduce rates for specified residential and business services by \$1.00 per month beginning on January 1, 2000, for at least sixty (60) months; and (3) adjust prospectively its rates for specified services to the rates in effect on January 30, 1996. The June 21, 1999, Order resolved all other outstanding issues in connection with the rates ordered in Docket No. 95-862-C. That Order has not been appealed and now represents a final Order in that proceeding.

III. DISCUSSION

The Consumer Advocate has filed a petition with the Commission asking that BellSouth's earnings be reviewed for 1996-1998. The Consumer Advocate has further requested that if BellSouth is found to have earned in excess of its authorized return, refunds and prospective rate reductions be ordered. BellSouth has requested that the Consumer Advocate's Petition be dismissed. BellSouth's position is that, as a matter of law, the Commission cannot grant the relief sought by the Consumer Advocate. We agree with BellSouth, as is explained more fully below.

In 1995, this Commission opened Docket No. 95-862-C, for the express purpose of reviewing BellSouth's earnings and, as appropriate, setting its rates so that they were just and reasonable. The Commission conducted a proceeding and on December 29, 1995, issued its Order in Docket No. 95-862-C, establishing BellSouth's rates in South Carolina, to be effective January 1, 1996 (the first earnings Order).

The Consumer Advocate and others appealed that Order. The appeal did not involve any specific rates approved by the Commission, but rather challenged portions of the Commission's decision that determined the revenue requirement that the approved rates were established to generate.

After the appeal process, the courts eventually returned four items to this Commission. There was one revenue item involving Area Calling Plans that the courts directed the Commission to adjust. Three other items, involving cost of capital, certain test year expenses for BAPCO, BellSouth's directory publishing sister company, and the amount of the test year cash working capital adjustment, were returned to the Commission for further findings and action.

After considering the matter on remand, this Commission entered Order No. 1999-135 (the earnings Order on remand), in which it determined to maintain the cost of capital previously established for BellSouth in South Carolina, but adjusted its previous findings to include fewer expenses for BAPCO, and less cash working capital. Although the Consumer Advocate initially appealed the earnings Order on remand, that appeal has been withdrawn. There is no pending challenge to the Order; therefore, Order No. 1999-135 is final, is not subject to any appeal, and is the final Order of the case.

In 1995, BellSouth also filed an Application with this Commission to approve an alternative regulation plan for it under S.C. Code § 58-9-575. The Commission opened Docket No. 95-720-C for this purpose, and on January 30, 1996, approved an alternative regulation plan for BellSouth. That Order was appealed by the Consumer Advocate and was reversed by the Supreme Court of South Carolina in April 1999.

The two dockets, 95-862-C (which established BellSouth's rates) and 95-720-C (which approved BellSouth's application for alternative regulation under § 58-9-575), were opened separately, heard separately, and decided separately by the Commission. There were two different final Orders, one in each docket. Each Order was appealed to the courts separately, heard separately, and decided separately by the various courts that heard the appeals.

The alternative regulation Plan approved by this Commission specifically allowed BellSouth to make certain changes, upward and downward, in the rates that it charged its subscribers. Any increases or decreases in rates were required to conform to the terms of the Plan.

Neither the terms of the Plan approved by the Commission nor the Order issued by the Commission approving the Plan addressed BellSouth's level of earnings. The alternative regulation Order allowed rates to be adjusted under the Plan's terms and conditions, but, did not approve new rates or order rate changes unlike the earnings Order on remand, which approved new rates.

During the 1996-98 period, BellSouth charged the rates approved by this Commission in the earnings docket. BellSouth did, however, change, under the authority of the Plan approved by this Commission, certain prices from those levels approved in the earnings docket. By changing those rates while the Order approving the Plan was under appeal, BellSouth was subject to adjustment of its rates back to the level approved in the earnings docket. When the Order approving the Plan was reversed by the Supreme Court, the Commission ordered that BellSouth reduce its rates that had been previously increased to the levels approved in the final Order in the earnings docket, as well as ordered that BellSouth eliminate the related revenue collected by virtue of those increases. Those changes were approved by this Commission, and this Commission acknowledged at that time that this action returned BellSouth's rates that had been increased under the Plan to their previous level as approved in the earnings docket. (Order No. 1999-411)

After this Commission approved BellSouth's Plan, the General Assembly enacted S.C. Code Section 58-9-576, which allows any company not already operating under an alternative regulation plan to elect to be regulated under such a plan by notifying the Commission of its intent to do so. S.C. Code § 58-9-576(b). Unlike S.C. Code § 58-9-575, moving to this regulatory framework does not require Commission approval. S.C. Code § 58-9-576 (b)(1). The

only requirement is that the electing company must have entered into an interconnection agreement with another non-affiliated company, and that agreement must have been approved by this Commission. S.C. Code Ann. § 58-9-576(A).

On July 14, 1999, the day that the Circuit Court Order transferring the jurisdiction of this matter was returned to the Commission, BellSouth filed its notice of election under Section 58-9-576, to be effective 30 days hence or on August 13, 1999. BellSouth had entered into interconnection agreement with non-affiliated companies, and this Commission had approved those agreements.⁴

IV. CONCLUSIONS OF LAW

A. The Commission may not lawfully grant refunds under the circumstances of this case.

South Carolina case law is quite specific with regard to the circumstances in which the Commission is allowed to “look backwards” and order refunds. In South Carolina Elec. & Gas Co. v. Public Service Commission of South Carolina, et al, *supra*, the Supreme Court stated:

Here, appellant’s retail customers were paying rates, which had been previously approved by the Commission. “[N]o order for the payment of reparation upon the ground of unreasonableness shall be made by the Commission in any instance wherein the rate has been authorized by law.” (citation omitted). The Commission simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute.

The Court continued on to say:

Semantics aside, the Commission’s action constituted retroactive ratemaking. The rates for 1976 and 1977 were set and approved as reasonable by the Commission, yet in its refund order, the Commission sought to reduce those past-approved rates. Ratemaking is a prospective rather than a retroactive process. *Id.*, 275 S.C. at 490, 272 S.E.2d at 795.

⁴ BellSouth has met the Section 58-9-576 election requirements, having its first qualifying local interconnection agreement with another carrier approved by the Commission on August 1, 1996. As of July 14, 1999, the date of election, BellSouth had 72 approved interconnection agreements with other carriers.

The Court even addressed the equity of this situation saying:

The result reached here may initially appear unjust to the retail customer and unduly generous to SCE&G. This is not the case. The crux of this issue is the firm principle that ratemaking is prospective rather than retroactive. The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility. Id., 275 S.C. at 491, 272 S.E.2d at 795.

Therefore, it is only when a utility charges a rate that has not been approved by the Commission or if approved by the Commission, is appealed and declared unlawful, that a refund may be authorized. Absent these circumstances, no refund can be ordered. See Parker v. South Carolina Public Service Commission, et al., 280 S.C. 310, 313 S.E.2d 290 (1984); Parker v. South Carolina Public Service Commission, 285 S.C. 231, 328 S.E.2d 909 (1985); and Hamm v. Central States Health and Life Company of Omaha, 299 S.C. 500, 505, 386 S.E.2d 250 (1989).

The Hamm case is particularly helpful in analyzing the instant case. In Hamm, supra, the Court distinguished the SCE&G case, saying:

SCE&G (citation omitted) is easily distinguished from the present case. In SCE&G, we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in SCE&G, would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful*. As such, a refund in this instance would not be considered retroactive ratemaking. Hamm v. Central States Health and Life Company of Omaha, 299 S.C. 500, 505, 386 S.E.2d 250, 253.

In addition, the Hamm Court made the following pronouncement:

When a regulated company requests a rate increase which is approved by the regulating authority, but is timely appealed and found to be unlawfully established, that company cannot keep funds to which it was never entitled. This is a matter of public policy and such reasoning would apply no matter what regulated industry is involved. Hamm, 299 S.C. at 506, 386 S.E.2d at 254.

Therefore, the law on retroactive ratemaking in South Carolina is clear. If a utility is charging lawful rates approved by this Commission as a result of an order from which no appeal was taken, there is no basis for ordering refunds.

Applying the foregoing law to the instant case, in order for this Commission to order a refund of any portion of BellSouth's earnings during the period in question, the Commission must conclude that the rates BellSouth charged during the three years in question were unlawful in the context of an original "rate increase" request.

During the period 1996-1998, BellSouth charged the lawful rates approved by this Commission in the earnings docket. While the Consumer Advocate appealed the Commission's decision in that proceeding, the Consumer Advocate did not challenge any specific rates as being unlawful, but only challenged certain assumptions used by the Commission to establish the revenue requirement that those rates were set to meet. That appeal has been heard and finally resolved by this Commission, and BellSouth's rates have been adjusted to account for the result of those challenges. Prospective rate reductions have been ordered where necessary, and related revenues collected by virtue of those increases have been eliminated. The Commission's Order on these subjects is final, and no appeal has been taken. Therefore, the Order approving BellSouth rates in the earnings docket is now a final Order and any objections with regard to those specific rates arising at the time the Commission set the rates in December 1995 have been resolved. Further, no "rate increase request" occurred during the entire process. Therefore, no refunds are proper under the present circumstances.

B. BellSouth's Election of Alternative Regulation under Section 58-9-576 for is Lawful and Prospective Rate Reductions Are Precluded by the Election.

As referenced above, no refunds can be ordered for the period 1996-1998. The next question is whether this Commission has the authority to order BellSouth's current rates, which were previously approved by this Commission, and which are not the subject of any appeal, changed on a prospective basis. This question must be considered in light of the fact that BellSouth has now elected alternative regulation under S.C. Code § 58-9-576. The Commission concludes that the rates can only be changed pursuant to S. C. Code Ann. § 58-9-576.

The South Carolina General Assembly in 1996 enacted Section 58-9-576.⁵ That statute provides for alternative forms of regulating telephone utilities. It provides the local exchange carriers the authority and flexibility to set rates, subject to a complaint process, in response to the changing conditions of the telecommunications market.

Based on the relevant facts in this proceeding, the Commission finds that BellSouth has properly satisfied the statutory requirements and has legally elected to be regulated under this law. See, Commission's Order No. 1999-578. The plain language of the law states:

On the date a LEC notifies the commission of its intent to elect the plan described in this section, existing rates, terms, and conditions for the services provided by the electing LEC contained in the then-existing tariffs and contracts are considered just and reasonable.

See Section 58-9-576(B)(2). The Commission has not been authorized to make changes to the current rates charged by BellSouth except as provided by that statute. The plain language enacted in Section 58-9-576 must be followed by this Commission.

⁵ The state statute was passed subsequent to passage of the Telecommunications Act of 1996 at the federal level, which also intended to open all telecommunications markets to competition.

The question then becomes a matter of determining what authority the Commission has to change BellSouth's rates, the Company having lawfully elected to be regulated under the provisions of Section 58-9-576.

Of course, the General Assembly's intent is binding here. The pertinent standards can be set forth succinctly. Specifically, the courts will not presume that the General Assembly intended a meaningless result in enacting new legislation. Shealy v. South Carolina Dept. of Social Services, Opinion No. 2932, 1999 WL 31460 (S.C. App. 1999) (the Court must presume that the legislature intended to accomplish something with each statute and not to engage in a futile action); Home Health Services, Inc. v. South Carolina Department of Revenue and Taxation, 333 S.C. 691, 511 S.E.2d 404 (1998) (statutes enacted by the legislature must receive practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers); TNS Mills, Inc. v. S. C. Department of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998); Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 288, 403 S.E.2d 662, 666 (Ct. App. 1991); Charleston Television, Inc. v. South Carolina Budget and Control Board, 296 S.C. 444, 373 S.E.2d 892 (S.C. App. 1988); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964)(legislative enactments are presumed to accomplish something and not to be a futile act).

In addition, the Courts will not expand a statute's meaning when the statute is clear on its face. Paschal v. State of South Carolina Election Commission, 317 S.C. 434, 454 S.E.2d 890 (1995) (a Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's meaning); Lester v. S.C. Worker Comp. Commission, 334 S.C. 557, 514 S.E.2d 751 (1999) (a Court may not engraft extra requirements to legislation which is clear on its face);

Estate of Guide v. Spooner, 318 S.C. 335, 457 S.E.2d 623 (Ct. App. 1995) (the words of a statute should be accorded their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operations).

Furthermore, Subsection (B)(2) of Section 58-9-576 provides that existing rates, terms and conditions contained in then-existing tariffs and contracts are considered just and reasonable as a matter of law, as follows:

On the date a LEC notifies the Commission of its intent to elect the plan described in this Section, existing rates, terms and conditions for the services provided by the electing LEC contained in the then existing tariffs and contracts are considered *just and reasonable*. (emphasis added)

The statute makes absolutely no provision for a review of the existing rates. Some parties alleged that the statute states that the rates are only "considered" just and reasonable. The General Assembly made no provision in Section 58-9-576 to review the rates of an electing telephone company at the time of the election nor did the General Assembly provide for any type of earnings review at the time of the election.

The Commission is mindful of the rule of statutory interpretation that dictates that words used by the General Assembly are to be given their ordinary meaning. The General Assembly provided no statutory provision, either within S.C. Code Ann. § 58-9-576 or by separate statute, for a review of the electing company's rates at the time of election. Clearly, without specific authority to this Commission to review rates, the General Assembly intended no review to be conducted at the time of election. The Commission simply has no legal basis to review BellSouth's rates at this point, except as specifically delineated in the statute.⁶ It is clear that

⁶ S.C. Code Ann. Section 58-9-576(B)(5) all such rates set under Section 58-9-576 are subject to a complaint process for abuse of market position in accordance with guidelines to be adopted by the Commission.

with the election of alternative regulation under Section 58-9-576, the Commission has no authority to examine the electing company's rates based on earnings, nor to grant going-forward rate adjustments.

V. CONCLUSIONS AND HOLDINGS

Based upon analysis and examination of this matter, the Commission makes the following determinations:

1. The Commission has determined that it has no authority as a matter of law to grant the refunds and rate reductions sought by the Consumer Advocate.
2. The rates currently charged by BellSouth to its customers are the lawful rates approved by this Commission by Order No. 1999-411.
3. Those rates are not subject to any appeals and are final.
4. Under the statutes and case law in South Carolina, the Consumer Advocate's request for refunds must be denied because granting such relief would constitute unlawful retroactive ratemaking.
5. BellSouth has elected to be regulated under S. C. Code Ann. § 58-9-576 (Supp. 1998).
6. Pursuant to that election, BellSouth's current rates, which were reviewed and approved by the Commission were determined to be just and reasonable by operation of law. Therefore, no going-forward rate adjustments may be granted.

IT IS THEREFORE ORDERED:

1. That the Consumer Advocate's Petition to Review the Earnings of BellSouth Telecommunications, Inc. for Calendar Years 1996, 1997 and 1998 is herewith denied.

2. That BellSouth's Motion to Dismiss the Petition of the Consumer Advocate is granted.

3. That this Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

Commissioner Scott Elliott, dissenting:

I respectfully dissent from the majority of the Commission holding that the Commission is precluded from examining the rate of return of BellSouth with the possibility of adjusting rates on a going forward basis.

When the Supreme Court reversed the Commission's decision approving BellSouth's alternative regulation plan (referred to in this dissent as the "Plan"), the Supreme Court's reversal returned the case to the Commission to correct the deficiencies which the Supreme

Court found in the original orders of the Commission. In reversing the Commission, the Supreme Court found that the “PSC failed to make the requisite findings regarding competitive and noncompetitive services.” After the reversal by the Supreme Court, BellSouth’s application under S.C. Code Ann. Section 58-9-575 was still pending before the Commission, and the Commission was obligated to schedule another hearing on that application and to rule on the Application in accordance with the Supreme Court’s instructions.

However, as noted by the majority in the instant Order, much had transpired during the time that BellSouth had operated under the unlawful Plan. One important event was the appeal of the Commission’s Order concerning the review of BellSouth’s rates and tariffs in Docket No. 95-862-C. This review was conducted as a traditional rate of return proceeding and resulted in establishing a new rate of return for BellSouth as well as a prospective rate reduction of \$42.2 million in BellSouth’s rates. *See, Porter v. South Carolina Public Service Commission*, 333 S.C. 12, 507 S.E.2d 328 (1998) (referred to in this dissent as the “1995 rate case” but referred to in the majority opinion as the “earnings docket” or “Docket No. 95-862-C”). The Commission’s 1995 rate case order was appealed and subsequently determined to be deficient with respect to certain issues by the Supreme Court. The Supreme Court reversed the 1995 rate case order in part and remanded the case to the Commission to reconsider those issues on the basis of the record of the case. On remand the Commission ordered further adjustments to BellSouth’s rate base. (*See*, Docket No. 95-862-C, Order No. 1999-135, dated February 18, 1999, “Order on Remand”) Thereafter, the Consumer Advocate appealed this 1995 rate case “Order on Remand.” However, before the court could hear that appeal, the Consumer Advocate and BellSouth entered into an agreement settling all issues with regard to the 1995 rate case. The Commission in June of 1999

subsequently approved this settlement agreement, and as a result, all issues concerning BellSouth's rates arising from the 1995 rate case were resolved.

The procedural history outlined in the preceding paragraph regarding the 1995 rate case is important. When the Commission approved the parties' settlement, from which no appeal was taken, all issues raised in the 1995 rate case were concluded with finality. Rates cannot be adjusted from a proceeding with a final order from which no appeal is taken. The law is clear that ratemaking must be prospective, not retroactive. To attempt to adjust rates from the 1995 rate case would constitute retroactive ratemaking. Thus, I concur with the majority, and the authorities cited in the majority opinion, that under the factual situation presented in this case the Commission is powerless to examine once again BellSouth's rates during the period the 1995 rate case was in litigation and thereafter to order refunds.

While refunds cannot be ordered in this matter, I believe that the Commission is obligated to examine the rate base and rates of BellSouth before the Commission grants BellSouth's request to withdraw its 575 application and before BellSouth is permitted to become regulated under S.C. Code Ann. Section 58-9-576. The effect of the reversal of the Plan established under the 575 application and the subsequent abandonment of the Plan by BellSouth rendered as void all aspects of alternative regulation established by the Commission's Orders approving the Plan. During that time period when BellSouth operated under the Plan, BellSouth was not the subject of or under the scrutiny of traditional rate of return regulation. Thus, I believe that BellSouth enjoyed a period where it escaped the regulatory oversight that this Commission is charged with providing. After the Supreme Court's reversal of the Plan and after the 1995 rate case was concluded with finality, BellSouth became subject to traditional rate of return

regulation and was subject to this Commission's inspection and regulation of its operations. Allowing BellSouth to proceed under alternative regulation pursuant to S.C. Code Ann. Section 58-9-576 prior to any review of earnings during the period when BellSouth operated under the now reversed Plan pursuant to 58-9-575, grants BellSouth a period of unregulated operation not permitted under state law.

S.C. Code Ann. Section 58-9-576(B)(7) provides that "any incumbent LEC operating under an alternative regulatory plan approved by the commission before the effective date of this section must adhere to such plan until such plan expires or is terminated by the commission, whichever is sooner." Accordingly where, as here, an incumbent LEC was operating under an alternative regulation plan approved by the Commission, which by its terms had no expiration date, the incumbent LEC may not abandon its plan without applying to the Commission for an order permitting it to do so. While the Supreme Court overturned BellSouth's Plan, it did not permit BellSouth to abandon its Plan. Indeed, BellSouth did not attempt to proceed with alternative regulation pursuant to Section 58-9-576 until July of 1999. A Commission order was required to permit BellSouth to go from alternative regulation under S.C. Code Ann. Section 58-9-575 to alternative regulation under S.C. Code Ann. Section 58-9-576.

This Commission is charged with the responsibility of overseeing the regulation of telephone companies operating within this state. In executing this responsibility, this Commission, pursuant to statutory authority as well as established case law, attempts to set rates at a level which will produce a rate of return appropriate for the company. This rate of return is also established by the Commission after giving due regard to the circumstances and evidence presented during a rate proceeding. Once a rate of return is established for a regulated utility

under rate of return regulation, a company is subject to regulatory oversight. Here BellSouth was permitted a rate of return of 12.75% by virtue of the 1995 rate case. One of the functions of the Commission's regulatory oversight is to ensure that the rates established in the proceeding do not produce a rate of return greater than the rate of return authorized. Should the authorized rates produce a rate of return greater than the approved rate of return, rates may be adjusted prospectively to produce the authorized rate of return. It should be noted that a regulated utility is not guaranteed any particular rate of return, but rather, a regulated utility is entitled to rates which will allow it the opportunity to earn an authorized rate of return. Further, should the rates of a regulated utility not produce earnings sufficient for the utility to operate, the utility may institute a proceeding for new rates.

The majority holds that an earnings review is not proper in this case because BellSouth's election under S.C. Code Ann Section 58-9-576 effectively freezes BellSouth's rates on the date of BellSouth's election to be regulated pursuant to 576 and that after BellSouth's election under 576, BellSouth's rates can only be changed pursuant to 58-9-576. As BellSouth has not been subject to traditional rate of return regulation or subject to a lawful alternative regulatory plan since approval of the Plan in January 1996, I believe that the Commission is obligated by law to conduct an earnings review to ascertain whether BellSouth's operations for the period in question have resulted in any over-earnings. Should over-earnings be found, then I believe it incumbent upon the Commission to make prospective rate adjustments before allowing BellSouth to proceed under alternative regulation pursuant to 58-9-576.

Accordingly, with the utmost respect for my colleagues on the Commission, I dissent.

Scott Elliott
Commissioner, Second District