

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	6
A. Standard of Review.....	6
B. The Commission's Construction of Section 77-3-35(4) That the Legislature Imposed a Cap on How High the Commission May Allow Rates to be Increased Each Year If the Commission Finds the Rate Increase to be Just and Reasonable Follows the Plain Meaning of the Statute.....	7
C. The Commission's Denial of the Proposed Rate Increase as not Being Just and Reasonable is Supported by Substantial Evidence Due to the Fact That AT&T Mississippi Provided No Data to Support or Justify the Proposed Rate Increase .	10
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

CASES

<i>His Way Homes, Inc. v. Mississippi Gaming Commission</i> , 733 So.2d 764 (Miss. 1999)	7
<i>State ex rel Pittman v. Mississippi Public Service Commission</i> , 538 So.2d 387 (Miss. 1989)	10,12
<i>Masters v. Hart</i> , 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949)	9

STATUTES

Miss. Code Ann. § 77-2-3	8
Miss. Code Ann. § 77-3-33	4,8
Miss. Code Ann. § 77-3-35	1,2,3,7
Miss. Code Ann. § 77-3-39	8
Miss. Code Ann. § 77-3-67	6
Miss. Laws Ch. 313	1,2

STATEMENT OF THE ISSUES

In 2006, the Legislature determined that the public interest for all telecommunications services currently regulated by the Commission except switched access service and single-line flat rate voice communication service were adequately protected by competition and other market forces. Miss. Code Ann. § 77-3-35(4); *See also* Miss Laws Ch. 313 (2006). Thus, the Commission now only regulates the rates, terms and conditions of switched access service and single-line flat rate voice communication services. *Id.* The Legislature also provided that single-line flat rate voice communication service “may only be increased during the calendar year by an amount that does not exceed the rates for such service on January 1 of the previous year, plus the increase in the Consumer Price Index for all Urban Consumers.” *Id.* The Commission interpreted the section as stating that the Commission may approve a yearly rate increase on single-line flat rate voice communication service if it finds the increase to be just and reasonable, but the Commission may not allow the rate increase to exceed the CPI-U. After a hearing regarding AT&T Mississippi’s proposed rate increase to its single-line flat rate voice communication service, the Commission found the proposed rate increase to not be just and reasonable. Therefore, there are two issues on appeal:

1. Whether the Mississippi Public Service Commission’s construction of Section 77-3-35(4) is contrary to the plain meaning thereof?
2. Whether the Mississippi Public Service Commission’s denial of AT&T Mississippi’s proposed rate increase is supported by substantial evidence?

STATEMENT OF THE CASE

In 2006, the Legislature determined that the public interest for all telecommunications services currently regulated by the Commission except switched access service and single-line flat rate voice communication service were adequately protected by competition and other market forces. Miss. Code Ann. § 77-3-35(4); *See also* Miss Laws Ch. 313 (2006). Thus, the Commission now only regulates the rates, terms and conditions of switched access service and single-line flat rate voice communication services. *Id.* The Legislature also provided that single-line flat rate voice communication service “may only be increased during the calendar year by an amount that does not exceed the rates for such service on January 1 of the previous year, plus the increase in the Consumer Price Index for all Urban Consumers.” *Id.* Thus, the Legislature placed a price cap on any proposed rate increase for single-line flat rate service which may be approved by the Commission.

AT&T Mississippi submitted a filing to increase rates for single-line flat rate voice communication residential (“1FR”) and business (“1FB”) service on May 13, 2008. (R. at 1-16). The tariff stated that the proposed rate adjustment would change the rate for this service by the percentage increase in the Consumer Price Index for all Urban Consumers (“CPI-U”) in 2007 as reported by the United States Department of Labor, Bureau of Labor Statistics. *Id.* On June 10, 2008, the Commission issued a Suspension Order suspending the filing for 120 days from the date of the filing of the Notice of Intent and requested a comprehensive investigation of the Notice of Intent by the Mississippi Public Utilities Staff (“Staff”). (R. at 17). The Commission set the matter to be heard on November 7, 2008. (R. 80-81).

At the hearing it was established that AT&T Mississippi’s current rates for 1FR service were as follows:

Rate Group 1-5	\$16.20
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Rate Group 6-9 \$17.60

Rate Group 10-13 \$19.01

The current rate for 1FB service in Rate Group 1 was \$34.61, Rate Group 2 was \$35.78 and Rate Groups 3-13 were \$36.95. (Ex. 4 at pp.3). AT&T sought to increase the rates for 1FR service in Rate Groups 1-9 and 1FB service for Rate Groups 1-13. (R. at 4) AT&T asserted that the purpose of increasing rates for 1FR Rate Groups 1-9 and 1FB Rate Groups 1-13 were because the rates were no longer at the market rate. (Tr. at 28, 31). However, AT&T provided no evidence in support of the proposed rate increase except data that purports to show the proposed rate increase does not exceed the statutory cap. (Tr. at 30-32). For that reason, the Commission found the proposed rate increase to not be just and reasonable. (R. at 107-109). The Commission did not use cost based "rate of return" ratemaking analysis in its denial of the proposed rate increase. The Commission clearly stated the purpose behind the denial of the proposed rate increase was AT&T's failure to provide any study or data to indicate that the current 1FR market rate for Rate Groups 1-9 is \$19.01 or to indicate what the current 1FB market rate is for Rate Groups 1-13. (R. at 108-109).

SUMMARY OF THE ARGUMENT

In 2006, the Legislature reformed which telecommunications services were to be regulated by the Commission. Miss. Code Ann. § 77-3-35(4). The Legislature determined that competition and other market forces adequately protected the public interest for all services except switched access service and single-line flat rate voice communication service. The Legislature also authorized the Commission to continue to regulate the "rates, terms and conditions of switched access service and single-line flat rate voice communication service." A cap was also placed on rates for single-line flat rate voice communication service which stated that rates may only be increased during the calendar year by an amount that does not exceed the

rates for such service on January 1 of the previous year, plus the increase in the Consume Price Index for all Urban Consumers.

AT&T Mississippi asserted that the cap the Legislature has imposed upon the Commission requires the “nondiscretionary, ministerial act of determining whether a proposed rate change for the regulated single-line flat rate service exceeds the CPI-U as reported by the Bureau of Labor Statistics.” (Tr. at 16). According to AT&T Mississippi, the only information the Commission should consider regarding a proposed rate increase to single line flat rate voice communication service is “(1) the rate in effect during the prior year, (ii) the proposed rate, (iii) the CPI-U for the prior year and (iv) whether the proposed rate increase is in excess of the CPI-U for the prior year.” The Commission asserts that AT&T Mississippi’s interpretation of Miss. Code Ann. § 77-3-35(4) is clearly not within the plain meaning of the statute.

The statute clearly states that the Commission is authorized to regulate the “rates” for single-line flat rate voice communication service. In regulating rates, the Commission is charged with the duty to determine whether rates are just and reasonable and in the public interest pursuant to Miss Code Ann. § 77-3-33. AT&T Mississippi’s position was that the Commission only has the authority to collect information directly related to the Consumer Price Index and “rubber stamp” the proposed rate increase. This interpretation would not allow the Commission to regulate rates and would only leave the Commission with the perfunctory duty of checking the math. Further, the sentence which places a cap on single-line flat rate service states that the rates “may” be increased not “shall” be increased. The word “may” clearly implies discretion while “shall” clearly implies a nondiscretionary, ministerial act. Therefore, the Commission interprets the section as stating that the Commission may approve a yearly rate increase on single-line flat rate voice communication service if it finds the increase to be just and reasonable, but the Commission may not allow the rate increase to exceed the CPI-U.

In the current proceeding, the Commission found the proposed rate increase to not be just and reasonable. (R. at 109). However, the Commission did not say in its order that the reason the proposed rate increase was found to not be just and reasonable was because the proposed rates were not cost based. AT&T Mississippi's assertion that the Commission used cost based rate of return ratemaking as the reason for denial of the proposed rate increase is erroneous. AT&T Mississippi took words from the Order out of context in order to support its assertion.

As can be read in the Order, AT&T Mississippi's single line flat rate voice communication service for both residential and business is broken into Rate Groups 1-13. (R. at 105). For its 1FR service, AT&T Mississippi sought to increase the rates of Rate Groups 1-9. *Id.* For its 1FB service, AT&T Mississippi sought to increase the rates of Rate Groups 1-13. *Id.* According to AT&T Mississippi's expert witness, the purpose of the proposed rate increase was to get 1FR rates in Rate Groups 1-9 closer to the market rate of \$19.01 and 1FB rates in Rate Groups 1-13 closer to an undisclosed market rate. (Tr. at 28-32). However, AT&T Mississippi provided no study or data to support its contention that the 1FR market rate was \$19.01 or indicate the current market rate for 1FB service. (Tr. 30-32). This lack of evidence was the reason for the denial of the proposed rate increase. (R. at 107-109).

AT&T Mississippi takes the phrase "cost of service study" and an accompanying footnote out of context to imply the Commission denied the proposed rate increase because the proposed rate increase was not cost based. However, the sentence AT&T Mississippi cites for this implication should be read in its entirety as well as in context with the preceding sentences and the two paragraphs following that sentence. The sentence states as follows: "However, AT&T Mississippi has provided no cost of service study, cost justification data or any other type of study or data to indicate that the 1FR market rate for Rate Groups 1-9 is \$19.01 and that those rates in Rate Groups 1-9 should be increased in order to be moved closer to \$19.01." (R. at 108).

The Commission did not deny the proposed rate increase because a cost of service study was not performed to indicate that the proposed rate increase was cost-based. The key is that AT&T Mississippi had provided nothing other than oral testimony regarding what the appropriate market rate is for 1FR and 1FB service. (R. at 107-109). The Commission was simply concerned about accepting AT&T Mississippi's assertion that the current 1FR market rate for Rate Groups 1-9 was \$19.01 and the current 1FB market rate was an undisclosed amount without any type of supporting data. This concern is reasonable considering residential customers in Rate Groups 1-9 would experience a rate increase while residential customers in Rate Groups 10-13 would not receive a rate increase. The Commission did not return to rate of return ratemaking or adopt previously unannounced standards in this proceeding. The Commission simply found the oral testimony regarding the appropriate market rate for 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 to be unpersuasive and unsupported by the evidence presented by AT&T Mississippi.

ARGUMENT AND AUTHORITIES

A. Standard for Review

The Mississippi Legislature provides the standard of review that must be followed when hearing a case on appeal from a final order of the Mississippi Public Service Commission ("Commission"). The relevant part states as follows:

The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violate constitutional rights.

Miss. Code Ann. § 77-3-67 (2006). With regard to the interpretation of statutes by state agencies, the Court has stated that "unless the Department's interpretation is repugnant to the plain meaning thereof, the court is to defer to the agency's interpretation. Further, the

interpretation given the statute by the agency chosen to administer it should be accorded deference.” *His Way Homes, Inc. v. Mississippi Gaming Commission*, 733 So.2d 764, 769 (Miss. 1999).

B. The Commission’s Construction of Section 77-3-35(4) that the Legislature imposed a cap on how high the Commission may allow rates to be increased each year if the Commission finds the rate increase to be just and reasonable follows the plain meaning of the statute

The Commission interprets Miss. Code Ann. § 77-3-35(4)(a) as giving the Commission authority to approve a yearly rate increase on single-line flat rate voice communication service if it finds the increase to be just and reasonable, but the Commission may not allow the rate increase to exceed the CPI-U. Miss. Code Ann. § 77-3-35(4)(a) states:

[T]he Legislature has determined that, in the provision of all services other than switched access service and single-line flat rate voice communication service, competition or other market forces adequately protect the public interest. The Commission is only authorized to regulate the rates, terms and conditions of switched access service and single-line flat rate voice communication service within a traditional calling area, with access to 911, with touch tone dialing and with access to long distance, so long as such single-line flat rate service is not combined with any other service, feature or product. The retail rates for such single-line flat rate voice communication service beginning January 1, 2007, and every succeeding January 1, may only be increased during the calendar year by an amount that does not exceed the rates for such service on January 1 of the previous year, plus the increase in the Consumer Price Index for all Urban Consumers as reported by the United States Department of Labor, Bureau of Labor Statistics.

The Commission interprets this section to state that it has the authority to regulate the rates for single-line flat rate voice communication service and that the Legislature imposed a cap on how high the Commission may allow rates to be increased each year if the Commission finds the rate increase to be just and reasonable.¹

¹ AT&T Mississippi asserts in its brief “rates” in the second sentence and “retail rates” have different meanings. The rates for switched access service and single line flat rate voice communication service are “retail rates”. Therefore, the term “rates” and “retail rates” have the same meaning.

The Commission's interpretation is supported when the price cap sentence is read in conjunction with the other sentences in section (4)(a). The first sentence states that the Legislature has determined that competition and market forces protect the public interest except for switched access service and single-line flat rate voice communication service.

In the next sentence, the Legislature states that the Commission is authorized to regulate the rates of single-line flat rate voice communication service which necessarily implies the Commission must still protect the public interest for those services. Part of the Commission's statutory duty in regulating rates and protecting the public interest is to ensure that rates charged by public utilities are just and reasonable. Miss. Code Ann. § 77-3-33. In performing this duty, the Commission may request the Staff to investigate a proposed rate increase to see if it is just and reasonable and advise the Commission of its findings. Miss. Code Ann. § 77-2-3. The Commission may also hold hearings to determine the reasonableness and lawfulness of the proposed rate increase. Miss. Code Ann. § 77-3-39.

According to AT&T Mississippi, the only information the Commission should consider regarding a proposed rate increase to single line flat rate voice communication service is "(1) the rate in effect during the prior year, (ii) the proposed rate, (iii) the CPI-U for the prior year and (iv) whether the proposed rate increase is in excess of the CPI-U for the prior year." AT&T Mississippi's interpretation of the statute would take away the Commission's ability to regulate the rates for single-line flat rate voice communication service and protect the public interest. AT&T Mississippi has admitted that its interpretation of the statute envisions nothing more than a mere "rubber stamp" of its proposed rate increase.

AT&T Mississippi's interpretation of the price cap sentence is flawed when interpreted both "on its face" and in the context of the rest of the section. AT&T Mississippi is of the opinion that the Legislature has imposed upon the Commission the "nondiscretionary, ministerial

act of determining whether a proposed rate change for the regulated single-line flat rate service exceeds the CPI-U as reported by the Bureau of Labor Statistics.” However, the statute reads that rates “**may**” be increased not “**shall**” be increased. The Commission believes this distinction to be extremely important. The use of the word “may” inherently implies the use of discretion in approving a rate increase.² Conversely, the word “shall” inherently implies a non-discretionary, ministerial act.³ Further, the Commission is not able to protect the public interest in regulating single-line flat rate voice communication service rates if the Commission is limited to the administrative act of merely ensuring that a rate increase does not exceed the CPI-U for the prior year.

As stated earlier, AT&T Mississippi’s position is that the Commission only has the authority to collect information directly related to the Consumer Price Index and “rubber stamp” the proposed rate increase. Such an interpretation is clearly not the plain meaning of the statute considering the statute states, in effect, that competition and market forces do not protect the public interest for single-line flat rate service and expressly authorizes the Commission to regulate rates for single-line flat rate service. Thus, the Commission interprets the section as stating that the Commission may approve a yearly rate increase on single-line flat rate voice communication service if it finds the increase to be just and reasonable, but the Commission may not allow the rate increase to exceed the CPI-U.

The Commission’s interpretation simply follows the plain meaning of the statute. The Commission is to regulate the rates for single-line flat rate service in order to protect the public

² The term “may,” as used in a statute, should be given its ordinary meaning intended by the General Assembly-permission, importing discretion. *Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949).

³ The use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. See *Andrews v. Shepherd*, 201 Va. 412, 111 S.E.2d 279 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965)

interest which necessarily implies that in regulating the rates the Commission must ensure that the rates are just and reasonable. The Legislature included an additional caveat that placed a cap on how high the rates may be increased by the Commission each year if a rate increase is found to be just and reasonable. This interpretation is clearly not repugnant to the plain meaning of the statute. Therefore, the Commission respectfully requests the Court to defer to this agency's interpretation of the statute.

C. The Commission's Denial of the Proposed Rate Increase as not being Just and Reasonable is Supported by Substantial Evidence Due to the Fact AT&T Mississippi Provided No Data to Support or Justify the Proposed Rate Increase.

The Commission's denial of AT&T Mississippi's proposed rate increase was not hinged on cost based rate of return ratemaking analysis nor did the Commission create and adopt previously unannounced standards of when it may approve a rate increase. In any rate proceeding, the burden of proof is on the utility to provide that the proposed rate increase is just and reasonable. *State ex rel. Pittman v. Mississippi Pub. Ser. Comm'n*, 538 So.2d 387, 394 (1989). The Commission found that AT&T Mississippi failed to produce such proof.

AT&T Mississippi's witness testified that the purpose of the proposed rate increase was for 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 to be moved closer to the market rate. (Tr. at 28, 31). For 1FR service, the market rate was \$19.01 which was the current rate for 1FR rates in Rate Groups 10-13. (Tr. at 28). AT&T Mississippi's witness did not provide what the market rate was for 1FB rates in Rate Groups 1-13. Rather, the witness merely stated that 1FB rates were currently below the market rate. (Tr. at 31).

However, AT&T Mississippi provided no study or data to indicate the current 1FR market rate for Rate Groups was \$19.01 or to indicate the current 1FB market rate for Rate Groups 1-13. (Tr. 30-32). Thus, the only evidence that 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 are no longer at the appropriate market rate is the oral testimony of

AT&T Mississippi's witness at the hearing of this matter. It was for that reason the Commission denied the proposed rate increase. The Commission Order states as follows: "The Commission finds the oral testimony regarding the appropriate market rate for 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 to be unpersuasive and unsupported." (R. at 108).

AT&T Mississippi contends that the Commission performed a cost-based rate of return ratemaking regulation in this proceeding and that it adopted previously unannounced standards for approval of the proposed rate increase. The Commission did no such analysis. The Order never mentions rate of return regulation nor does it create new standards for approval. AT&T Mississippi took the phrase "cost of service study" and the accompanying footnote completely out of context in order to arrive at the conclusion the Commission instituted cost-based rate of return regulation.

The sentences at issue state as follows:

However, AT&T Mississippi has provided no cost of service study, cost justification data or any other type of study or data to indicate that the 1FR market rate for Rate Groups 1-9 is \$19.01 and that those rates in Rate Groups 1-9 should be increased in order to be moved closer to \$19.01 . . . However, AT&T Mississippi has provided no cost of service study, cost justification data or any other type of study or data to indicate the current 1FB market rate for Rate Groups 1-13 and that those rates in Rate Groups 1-13 should be increased in order to be moved closer to the market rate. (R. at 108).

When these sentences are read in context with the rest of Section 10 of the Order, it is apparent that the Commission is simply concerned about accepting AT&T Mississippi's assertion that the current 1FR market rate for Rate Groups 1-9 was \$19.01 and accepting the undisclosed 1FB market rate for Rate Groups 1-13 without any type of supporting data. (R. at 107-109). This concern is reasonable considering residential customers in Rate Groups 1-9 would experience a rate increase while residential customers in Rate Groups 10-13 would not receive a rate increase. The Commission is charged with ensuring that rates are just and reasonable and in the public

interest. It would be irresponsible for the Commission to approve a rate increase where there is no data to indicate what the actual market rate is for 1FR service in Rate Groups 1-9 and 1FB service in Rate Groups 1-13.

It is evident that the Commission did not return to rate of return ratemaking or adopt previously unannounced standards in this proceeding. AT&T Mississippi provided no data to support its contention that the proposed rate increase was to get certain rates closer to the market rate. The Commission Order did not deny the proposed rate increase because a cost of service study was not performed to indicate that the proposed rate increase was cost based. The Commission denied the proposed rate increase because nothing was given to show that 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 were below the market rate. The Court has stated that "so long as the Public Service Commission examines and considers evidence and testimony of each expert witness at a rate increase hearing, the Commission is within its statutory authority in accepting or rejecting all or any portion of any experts opinion." *State ex rel. Pittman v. Mississippi Pub. Ser. Comm'n*, 538 So.2d 387, 394 (1989). The Court has also stated that "the Commission must not ignore salient and substantial factors offered into evidence, but it is the trier of fact and is free to accept or reject recommendations of any witness." *Id.* The Commission was completely "in-bounds" in finding that the oral testimony regarding the appropriate market rate for 1FR rates in Rate Groups 1-9 and 1FB rates in Rate Groups 1-13 to be unpersuasive and unsupported and for that reason denying the proposed rate increase.

CONCLUSION

Based on the reasons set forth above, the Mississippi Public Service Commission respectfully requests this Court to affirm the Commission's Order denying AT&T Mississippi's proposed rate increase.

Respectfully submitted,



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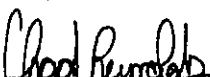
COMMISSION

CERTIFICATE OF SERVICE

I, Chad J. Reynolds, Counsel for the Mississippi Public Service Commission, hereby certify that a true and correct copy of the foregoing Brief of Appellee, this the 30th of March, 2009, has been served upon the parties via First Class, U.S. Mail, postage prepaid to the following persons:

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