BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

RE:	COMPLAINT OF US LEC OF TENNESSEE, INC. AGAINST ELECTRIC POWER BOARD OF CHATTANOOGA	:	Docket No. 02-00562

POST-HEARING BRIEF OF EPB

Comes now the Electric Power Board of Chattanooga ("EPB"), an independent board of the City of Chattanooga, Tennessee and, pursuant to the Hearing Officer's Order dated March 5, 2004 files this post-hearing brief in support of its request that the Hearing Officer deny the remaining claim of US LEC of Tennessee, Inc. ("US LEC").

I. INTRODUCTION

All issues in this case but one have been resolved by either agreement of the parties or by order of a prior Hearing Officer. The remaining issue is whether the Telecommunications Division of EPB – which is simply a division of EPB and not a separate legal entity – can use "EPB" as part of its name in marketing its telecommunications services. At the October 13, 1998 hearing on EPB's application for a certificate of convenience and necessity, EPB President and CEO Harold E. DePriest informed the Authority, its staff and the intervenors that EPB's telecommunications project would involve EPB's reputation as well as the EPB brand. Mr. DePriest was even more direct, saying "*I'll tell you very plainly, this will be a Power Board venture*."

Now, more than five years after that hearing and after several years of sitting on the side-lines before it filed its Complaint in May of 2002, US LEC seeks to change the name of EPB's telecommunications venture. Although the Authority, its staff and all interested parties

comprehensively addressed subsidy issues in the EPB certification proceeding, US LEC now claims that the use of the EPB brand is an improper subsidy. US LEC does not contend that, in the use of this name, EPB has shifted costs from its telecommunications operations to its electric system operations, and US LEC no longer seems to contend that a handful of EPB's advertising materials violate the Code of Conduct that EPB agreed to follow in connection with the grant of its Certificate of Convenience and Necessity. Instead, US LEC contends that there is uncaptured value in the EPB brand that impermissibly subsidizes EPB's telecommunications operation. To remedy this issue, US LEC contends that the Authority should force EPB to market its telecommunications services using another name. Even US LEC's own expert witness, however, does not agree that a name change is required.

As is discussed in greater detail below, EPB submits that this remaining claim of US LEC lacks both legal and factual support. From a legal standpoint, US LEC has not offered any case or order prohibiting an electric system from using its brand or logo in providing telecommunications services, and the empirical evidence in the market indicates that such a prohibition does not exist. In surrounding markets, investor owned and municipally owned electric utilities offer telecommunications services through affiliates that utilize the name, logo and operating experience of their parent entities. The City of Marietta has its Marietta FiberNet.[1] Southern Company has its Southern Telecom.[2] Duke Power Company has its DukeNet,[3] and US LEC even publicizes DukeNet on its own web site.[4] If these separate but affiliated entities can utilize the names and logos of their parent organizations, then surely EPB Telecom - a division

[1] Transcript, Volume I at p 63, *l* 24 – p 65, *l* 21 & Exhibit E
[2] Transcript, Volume I at p 65, *l* 25 – p 72, *l* 6 & Exhibits F & G Indeed, US LEC witness Wanda Montano indicated that the name "Southern Telecom" was an appropriate name for Southern Company's telecommunications operation Transcript, Volume I at p 68, *l* 6 – p 69, *l* 1
[3] Transcript, Volume I at p 72, *l* 17 – p 74, *l* 23 & Exhibits H & I
[4] Transcript, Volume I at p 79, *ll* 11 – 24 & Exhibit J

of a single legal entity and not a separate affiliated legal entity - can properly market itself as part of EPB.

From a factual standpoint, EPB's own actual marketing experience in the Chattanooga market undermines the factual basis of US LEC's claim as well. As EPB's own experience shows, while EPB has strong brand awareness as a power company, this brand awareness has not automatically spilled over to EPB's telecommunications operations. In fact, the strength of EPB's brand as a power company may have actually obscured EPB's branding efforts for its telecommunications operations. In January of 2003 – more than three and one-half years after EPB received its Certificate of Convenience and Necessity – EPB completed a brand awareness study and found that only 17% of potential customers surveyed mentioned EPB's Telecommunications Division as a business telecommunications provider without being prompted. As a result of this low unprompted brand awareness, EPB made the decision to alter its marketing strategy to more clearly differentiate EPB's power operations from EPB's telecommunications operations, as the following January 10, 2003 announcement indicates:

> **EPB Telecommunications**
> **Division gets revised look**
>
> We are changing the name[5] of our Telecommunications Division to EPB Telecom effective immediately. Along with this name change is a new logo. This change was made after input from our local consumers. The identifier "Telecommunications" which was positioned underneath the EPB logo was being overlooked by the consumer. They were only registering EPB - linking this in their minds directly to power. This has contributed to people being unaware that EPB is in the Telecommunications business. The logo change emphasizes Telecom. *We believe this change will help consumers instantly recognize the difference between EPB Telecom and EPB Electric Power* (emphasis added).[6]

US LEC's own witness, a former employee of EPB, verified that the goal of EPB's

[5] This is not a name change for contracting or other legal purposes Rather, as indicated in the article, it involves the adoption of a new logo and a shorter version of the "EPB Telecommunications" name that EPB has historically used for its operations EPB utilizes its legal name in customer contracts

[6] Transcript, Volume II, Exhibit L (admitted at p 238, *l* 8)

branding campaign and his instructions were to differentiate EPB Telecom from EPB, rather than "leveraging" the EPB electric brand as US LEC contends.[7] This strategy is demonstrated in EPB's present advertisements and marketing collateral, which show EPB's use of the EPB Telecom brand for its telecommunications activities.[8] Because US LEC's remaining claim lacks legal and factual support, the Hearing Officer should deny US LEC's remaining claim.

II. STATEMENT OF THE CASE

A. Background: The Certification Proceeding (1997 – 1999).

The issue of cross-subsidization and the use of EPB's reputation and goodwill is not new. Instead, US LEC's remaining claim involves an issue that was fully addressed in the course of EPB's certification proceeding from 1997 through 1999.

On October 21, 1997, EPB filed its Application for a Certificate of Convenience and Necessity with the Authority.[9] A number of intervenors participated in the case including BellSouth, the Tennessee Cable Telecommunications Association ("TCTA"), AT&T, MCI, Nextlink (now XO Communications), and ACSI.[10] Although US LEC had received its own certificate prior to the filing of EPB's application, US LEC did not choose to participate in EPB's case.[11]

Over the course of that proceeding, EPB fully disclosed the structure of EPB and its Telecommunications Division, and the participants in the proceeding knew and even acknowledged that EPB's electric service and EPB's telecommunications service would be provided by EPB as a single entity.[12] EPB relied upon the managerial, technical and financial

[7] Transcript, Volume II at p 237, *ll* 19 – 22
[8] Late Filed Exhibit to testimony of Harold E DePriest
[9] *See* Docket No 97-07488
[10] *Id* , *see* Prefiled Testimony of Harold E DePriest ("Depriest Pre-filed Testimony") at p 4, *ll* 13 – 18
[11] DePriest Pre-filed Testimony at p 4, l 20 – p 5, *l* 2
[12] DePriest Pre-filed Testimony at p 2, *l* 19 – p 3, *l* 21, *id* at p 5, *ll* 4 – 17

abilities of its electric operations in the certification proceeding,[13] and EPB was very clear with the Authority, its staff and all of the intervenors that the telecommunications operation would be an EPB operation and that EPB would take advantage of its experience in the electric business as EPB entered the telecommunications business.[14]

EPB was equally clear that the products would be EPB branded products, that the reputation of EPB would be at stake in the telecommunications venture and that EPB would do the marketing for EPB's telecommunications venture.[15] The intervenor that took the lead in opposing EPB's application even acknowledged that EPB had been in the electric business for over 60 years and that "[t]here's a substantial amount of goodwill and name recognition developed with those electric ratepayers,"[16] but neither that intervenor nor any other intervenor attempted to restrict EPB from using its own name in its telecommunications operations.

A primary concern in the certification proceeding was for EPB to address the potential for EPB's electric system to improperly cross-subsidize EPB's telecommunications operations.[17] To address the potential for cross-subsidization, EPB and TCTA negotiated and jointly submitted a document entitled "Second Revised Proposed Conditions to Certificate of Convenience and Necessity to Ensure Statutory Compliance Filed on Behalf of the Tennessee Cable Telecommunications Association and Electric Power Board of Chattanooga" ("Proposed Conditions").[18] The Proposed Conditions were designed to provide the essential methods for EPB to "provide assurance that cross-subsidization does not occur."[19] In guarding against improper cross-subsidization, the Proposed Conditions state that the regulatory goal is to

[13] DePriest Pre-filed Testimony at p 5, *ll* 19 – 23
[14] DePriest Pre-filed Testimony at p 6, *l* 2 – p 7, *l* 16
[15] *Id*
[16] DePriest Pre-filed Testimony at p 8, *ll* 8 – 22
[17] DePriest Pre-filed Testimony at p 9, *ll* 6 – 8
[18] DePriest Pre-filed Testimony at p 9, *ll* 6 – 20
[19] DePriest Pre-filed Testimony at p 9, *l* 20 – p 10, *l* 2

discourage "EPB from subsidizing the costs of the newly created telecommunications division by shifting costs to the activities of the electric system,"[20] and TCTA's own expert witness testified that the Proposed Conditions minimize the opportunity for anti-competitive cross-subsidy.[21] The Proposed Conditions even acknowledge that EPB may engage in a limited amount of joint advertising for its electric and telecommunications operations, and the Proposed Conditions provide a specific cost allocation method for allocating the costs of joint advertisements.

Other intervenors had the opportunity to participate in the development of the Proposed Conditions as well as to file testimony or post-hearing briefs, but none chose to do so.[22]

On May 10, 1999, the Authority entered its Order granting EPB a certificate of convenience and necessity. The Authority clearly understood that "EPB" would be providing telecommunications services. Throughout the May 10, 1999 Order, the Authority refers to the Applicant as "EPB," and ordering clause number 1 provides quite plainly that "The Application of the Electric Power Board of Chattanooga is approved . . . ." Because the use of the name "EPB" would be wholly consistent with the Order, EPB submits that its use of the name "EPB Telecom" is appropriate as well.

B. Travel of the Complaint

On May 15, 2002, US LEC filed a Complaint (the "Complaint") against EPB alleging (i) that the Telecommunications Division of EPB should not use "EPB" in its name (Complaint, ¶ 6); (ii) that EPB has refused an unidentified third party access to its underground facilities (Complaint ¶ 7); and (iii) that EPB has failed to issue internal audit reports and file them with the

[20] DePriest Pre-filed Testimony at p 10, *l* 23 – p 11, *l* 3 The Proposed Conditions also emphasize that electric system ratepayers should share in efficiencies generated from the joint use of facilities and shared services by the telecommunications division *Id* at p 11, *ll* 3 – 6 Mr DePriest testified that EPB's electric system operations have shared in efficiencies, including a payment of approximately $1 million for shared services this year alone . *Id* at p 12, *ll* 1 – 5

[21] DePriest Pre-filed Testimony at p 11, *ll* 11 – 16

[22] DePriest Pre-filed Testimony at p 10, *ll* 4 – 6

TRA (Complaint ¶ 8). On September 20, 2002, US LEC amended its Complaint to include a fourth general cause of action alleging that EPB has refused to interconnect with US LEC and to provide telecommunications features and services to US LEC on an unbundled and non-discriminatory basis. Since then, through the agreement of the parties[23] or by order of a prior Hearing Officer,[24] the issues have been narrowed to one: whether the Authority can and should force EPB to market its telecommunications services without reference to "EPB" in its name.

On June 26, 2003, a prior Hearing Officer entered the first of two Orders relating to this issue. In her *Order on Summary Judgment*, the Hearing Officer concluded:

> Insofar as US LEC alleges that the mere use of the name EPB, without more, constitutes a subsidy, US LEC has presented no legal or evidentiary support for its claim. The record shows that EPB applied for its CCN under that name and has been using it since 1998. Absent some evidentiary showing of a tangible benefit accruing solely from the use, for identification purposes, of a name reflecting an approved and accurate affiliation, it cannot be said that such use constituted a subsidy in violation of Tenn. Code Ann. § 7-52-402. *Accordingly, summary judgment is appropriate on the claim related to the use of the appellation "EPB."*
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> US LEC's allegation that the joint marketing of EPB's telecommunications and electric divisions constitutes a subsidy or violates the Code of Conduct to which EPB agreed to conform raises questions that require further examination. In its defense, EPB counters that it has not engaged in joint marketing in violation of the Code of Conduct. In its *Response to Motion for Summary Judgment*, US LEC presents evidence, from advertising and the EPB webpage, giving the impression that EPB's telecommunications and electric divisions are the same entity.[25] EPB did not respond to this evidence and failed to address the cross-subsidization issue in the context of this marketing activity. Thus, genuine issues of material fact remain to be tried regarding whether such marketing activity constitutes a subsidy and/or violates the Code of Conduct to which EPB agreed to conform.

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[23] By letter dated November 26, 2003, counsel for US LEC announced the withdrawal of its complaints regarding access to facilities and forced access to EPB's telecommunications network

[24] In the *Order on the Motion for Summary Judgment of the Electric Power Board of Chattanooga* (the "*Order on Summary Judgment*"), the Hearing Officer dismissed US LEC's allegation that the Telecommunications Division failed to filed its internal audit reports

[25] In fact, there is only one legal entity the Electric Power Board of Chattanooga, which is an independent board (but part of) the City of Chattanooga The Telecommunications Division of EPB is merely an operating division of EPB The legal structure of EPB's Telecommunications Division is distinguishable from Memphis Networx, LLC, which is actually a separate legal entity in which the Memphis Light, Gas and Water Division (or "MLGW") holds a membership interest *See generally* Docket No 99-00909 (describing legal structure of Memphis Networx, LLC and MLGW's participation as one of the owners of this separate entity)

Order on Summary Judgment at pp. 11-12 (internal footnotes omitted and emphasis added); *see id.* at 11 (identifying disproportionate cost allocations of joint costs and cost-shifting as examples of cross-subsidization).

Apparently concerned with the Hearing Officer's Order that summary judgment "is granted [in favor of EPB] on US LEC's claim that the use of the name EPB Telecommunications Division constitutes illegal cross-subsidization," US LEC filed a *Petition for Partial Consideration*. In the *Petition for Partial Consideration*, US LEC sought clarification of the *Order on Summary Judgment*. US LEC contended that there was a potential conflict between the grant of summary judgment on the use of the "EPB" name and the denial of summary judgment on EPB's joint marketing efforts. In her *Order Denying Petition for Partial Reconsideration of the Order on the Motion for Summary Judgment of the Electric Power Board of Chattanooga* (the "*Partial Reconsideration Order*"), the Hearing Officer concluded:

> Summary judgment was granted only on the claim that the mere use of EPB strictly for identification purposes constituted cross-subsidization. Any issues regarding the "leveraging" of the name EPB *in the context of joint marketing involving the electric and telecommunications divisions* remain to be tried. The *Order on Summary Judgment* did not address or foreclose any specific remedies related to this issue.

Partial Reconsideration Order at p. 3. (emphasis added).

EPB has interpreted the *Order on Summary Judgment* and the *Partial Reconsideration Order* as holding that the use of the EPB name is proper but finding that issues of fact remained for trial as to whether cost-shifting or violations of the Code of Conduct have occurred in connection with any joint marketing of EPB's electric and telecommunications services. By contrast, US LEC has attempted to twist and stretch the Hearing Officer's statement in the *Partial Reconsideration Order* concerning remedies in order to seek relief that has already been denied: to preclude EPB from using the "EPB" name in *any* marketing of EPB's

telecommunications services. US LEC's requested relief disregards the actual language and context of the Hearing Officer's Orders, which reserved judgment solely on questions of fact concerning the *joint* marketing of EPB's electric and telecommunications services.

Notwithstanding US LEC's coy statements that EPB can continue to use "EPB" to identify its Telecommunications Division for "identification purposes" but not in any marketing effort, US LEC's attempts to change the business name of EPB Telecom are not supported by the prior Hearing Officer's Orders, the record in this case or the applicable law.

C. The Hearing

This case came to be heard before the Hearing Officer on February 25, 2004 and was adjourned to March 16, 2004, at which time the hearing was completed.

US LEC presented four witnesses, each of whom introduced pre-filed testimony and each of whom was subject to cross examination. US LEC's witnesses failed to show that EPB is either improperly subsidizing its telecommunications operations or violating the Code of Conduct.

US LEC's first witness, Ms. Wanda Montano, characterized herself as a "policy" witness,[26] but upon cross-examination it became apparent that Ms. Montano had no personal knowledge of facts relevant to the case,[27] had not investigated matters offered in her testimony,[28] had never read the TRA's May 10, 1999 Order granting a certificate to EPB[29] and had never read the transcript of the certification hearing.[30] Ms. Montano admitted that the Proposed Conditions contemplated joint advertising of electric and telecommunications services,[31] and after reviewing

[26] Transcript, Volume I at p 38, *ll* 6 – 8
[27] Transcript, Volume I at p 33, *l* 23 – p 34, *ll* 24
[28] Transcript, Volume I at p 41, *ll* 8 – 25
[29] Transcript, Volume I at p 16, *l* 16
[30] Transcript, Volume I at p 19, *l* 19
[31] Transcript, Volume I at p 39, *ll* 3 – 9

the May 10, 1999 Order, Ms. Montano admitted that EPB could offer telecommunications services in the name of "EPB."[32]

US LEC's second witness, Mr. Michael Moeller, admitted that US LEC understood the power of the EPB brand even before EPB entered the telecommunications market and long before US LEC filed its Complaint in this case.[33] He confirmed that US LEC is a "super regional" telecommunications company that has attracted nearly one-half of a billion dollars in capital and has made investments of some $325 million.[34] He testified that US LEC is doing well in Tennessee and that Tennessee is US LEC's second best market.[35] Although Mr. Moeller testified that EPB differentiates its telecommunications operations solely on the basis of the EPB name,[36] that testimony proved incorrect, as the following comparison shows:

	US LEC[37]	**EPB Telecom**[38]
Local employees	11	Approximately 40[39]
Local customer care	No	Yes
Local billing	No	Yes
Local marketing	No	Yes
Local executives	No	Yes
Local Board	No	Yes
Trucks	No	Yes
Fiber	No	Yes
Fiber to the business	No	Yes

US LEC's third witness was Dr. Christopher C. Klein, a former TRA staff member who was at least indirectly involved in EPB's certification proceeding.[40] Dr. Klein offered testimony that was inconsistent with basic regulatory principles and was speculative at best. In his pre-filed and oral testimony, Dr. Klein overlooked the most obvious of all regulatory concerns – the

[32] Transcript, Volume I at p 19, *ll* 6 – 8.
[33] Transcript, Volume I at p 84, *l* 16 – p 85, *l* 4, *id* at p 87, *ll* 20 – 22
[34] Transcript, Volume I at p 89, *ll* 3 – 25 & Exhibit K
[35] Transcript, Volume I at p 92, *l* 21 – p 93, *l* 2
[36] Transcript, Volume I at p 95, *ll* 8 – 15
[37] Transcript, Volume I at p 94, *l* 22 – p 101, *l* 9
[38] DePriest Pre-filed Testimony at p 21, *ll* 8 – 15
[39] Transcript, Volume I at p 199, *l* 19
[40] Transcript, Volume I at p 137, *l* 10 – p 140, *l* 17

ratepayer. Dr. Klein initially contended that cross-subsidization was only a concern for municipal systems, since municipal systems do not have stockholders whose concern for their own personal wealth would prevent improper cost shifting.[41] On the witness stand, however, Dr. Klein conceded that protection of electric system ratepayers from cross-subsidization – and, for that matter, any captive ratepayer of a provider holding monopoly or market power[42] - was indeed a regulatory concern common to municipally-owned and investor-owned utilities alike.[43]

On the question of the value of EPB's "brand," Dr. Klein readily conceded that he had not taken any steps to appraise the value of that brand and had no idea of the actual value of the brand.[44] Moreover, Dr. Klein could not rule out the possibility that the entire value associated with the EPB Telecom brand was attributable to EPB's telecommunications operations in the Chattanooga community,[45] and Dr. Klein admitted that the "vast" amount of the value of the EPB brand was developed prior to the formation of EPB Telecom.[46] Separate and apart from the grossly speculative nature of his testimony, there was nothing in his testimony to suggest that either his experience or his credentials even qualify him to evaluate the value of the EPB brand.

On the question of the appropriate remedy, Dr. Klein conceded that changing EPB's name was not mandatory and offered a royalty arrangement as an alternative remedy.[47] However, on re-direct examination by US LEC counsel, Dr. Klein "threw out some numbers" but could only offer a "guess" as to an appropriate royalty rate.[48] In the end, Dr. Klein's

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[41] Transcript, Volume I at p 161, *ll* 2 – 20
[42] On cross examination, Dr Klein indicated that incumbent local exchange carriers, cable companies, and telephone cooperatives might fall within this category Transcript, Volume I at p 122, *l* 23 – p 124, *l* 14
[43] Transcript, Volume I at p 160, *l* 10 – p 168, *l* 6 , *id* at p 170, *ll* 7 – 10
[44] Transcript, Volume I at p 118, *l* 25 – p 119, *l* 1 ("We're not really exactly sure of the absolute value of the EPB brand "), *id* at p 153, *ll 1 – 10*
[45] Transcript, Volume I at p 140, *l* 18 – p 141, *l* 5
[46] Transcript, Volume I at p 149, *ll* 5 – 14. Therefore, even if the EPB name were a potential subsidy, this was a matter that the parties could have addressed within the certification proceeding in 1997 - 1999
[47] Transcript, Volume I at p 187, *l* 11 – 17
[48] Transcript, Volume I at p 173, *l* 6 – 14

testimony was speculative and unreliable and of little value.

US LEC's final witness was Mr. Jason McVay, a former employee of EPB's telecommunications operations. Although Mr. McVay's pre-filed testimony indicated that he was instructed to sell the EPB brand, upon cross-examination Mr. McVay conceded that his instructions were to sell the "EPB Telecom" brand, rather than the "EPB" brand.[49] Mr. McVay substantiated the findings of EPB's brand awareness study indicating that EPB customers only associated the name "EPB" with EPB's electric operations.[50] Mr. McVay further testified that his instructions to sell the "EPB Telecom" brand were designed to enable EPB's telecommunications operations to establish its own brand separate and apart from the "EPB" brand that customers associated with EPB's power operations.[51]

Read together, there is a substantial question as to whether US LEC has even offered sufficient testimony to carry its threshold burden of establishing standing to assert its claim.[52]

EPB presented Harold E. DePriest, the President and Chief Executive Officer of EPB as its sole witness. Mr. DePriest introduced pre-filed testimony and was subject to cross-examination. In his testimony, Mr. DePriest emphasized that the parties to the 1997 – 1999 certification proceeding were aware that the telecommunications operation would be an EPB operation involving EPB's goodwill and reputation in the community.[53] Mr. DePriest described

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[49] Transcript, Volume II at p 237, *ll* 19 – 22
[50] Transcript, Volume II at p 236, *l* 18 – p 237, *l* 22
[51] *Id*
[52] As a prior Hearing Officer indicated, the party invoking the Authority's jurisdiction bears the burden of demonstrating that "(1) it sustained a distinct and palpable injury, (2) the injury was caused by the challenged conduct, and (3) the injury may be redressed by a remedy the forum is authorized to provide "[52] Here, US LEC has not alleged or shown that it has lost any customers to EPB's telecommunications operation on account of the EPB name Given the testimony of its own expert witness, the actual experience of EPB in the Chattanooga market and the numerous differences between EPB's operations and those of US LEC discussed above, even if US LEC could show that it is somehow at a competitive disadvantage as compared to EPB Telecom, US LEC has not shown that this competitive disadvantage is in any way caused by the use of the EPB name
[53] DePriest Pre-filed Testimony at p 2, *l* 19 – p 9, *l* 2

the purpose of the Proposed Conditions[54] that establish a mechanism by which EPB pays for all of the ingredients (such as employees, equipment, office space, marketing and trucks) that have gone into developing the reputation of EPB's telecommunications operation, and Mr. DePriest explained his conclusion that the use of the EPB name is consistent with EPB's representations to the Authority, its staff and the intervenors in the certification proceeding.[55]

Mr. DePriest described several ways that EPB Telecom is different from other CLECs in the Chattanooga market,[56] and he also described four business decisions that EPB's telecommunications operation had made in an effort to further distinguish EPB Telecom from other CLECs. [57] Mr. DePriest testified that EPB has spent nearly $500,000 in marketing its telecommunications operations through June 30, 2003, and testified that EPB has spent many times that amount in compensating its sales force who are responsible for developing EPB's goodwill and reputation in the telecommunications business.[58] At the close of his summary, Mr. DePriest emphasized the damage that US LEC's requested relief would inflict on EPB Telecom[59] – a remedy that he later described as "draconian."[60]

On examination by the Hearing Officer, Mr. DePriest suggested that the significance of the EPB brand in the telecommunications market resulted from EPB's efforts to successfully build a telecommunications company and to work hard at making it a reputable company.[61] Mr. DePriest conceded that the name "EPB" may have some value in the market, but Mr. DePriest

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[54] DePriest Pre-filed Testimony at p 9 *l* 4 – p 12, *l* 9
[55] DePriest Pre-filed Testimony at p 9, *ll 12 – 21*
[56] DePriest Pre-filed Testimony at p 21, *ll* 8 – 15
[57] Transcript, Volume I at p 193, *l* 1 – p 194, *l* 24
[58] DePriest Pre-filed Testimony at p 20, *ll* 5 – 8
[59] Transcript, Volume I at p 197, *ll* 4 – 13, *see* DePriest Pre-filed Testimony at p 21, *l* 17 – p 23, *l* 17 (providing greater detail of harm associated with US LEC's requested remedy)
[60] Transcript, Volume I at p 221, *l* 19
[61] Transcript, Volume I at p 221, *ll* 9 – 18

also suggested that the telecommunications brand adds value to the electric system[62] for which the telecommunications division is not compensated either. He assured the Hearing Officer that EPB Telecom is standing on its own merits.[63]

Separate and apart from the legal issues discussed below, US LEC has failed to provide any factual basis for its requested relief.

III. ARGUMENT

US LEC's remaining claim lacks merit from a legal standpoint and should be denied. There is no evidence that EPB has engaged in improper cost shifting nor any evidence that EPB has violated the Code of Conduct. There is no legal support for the contention that the use of the "EPB" name or brand is a subsidy, and the doctrine of laches should preclude US LEC from raising this issue at this late date in the life of EPB's telecommunications operations.

A. There is no evidence that EPB has engaged in improper cost-shifting from its electric system operations to its telecommunications operations nor is there any evidence that EPB has violated the Code of Conduct.

At the outset, US LEC has not offered any proof suggesting violations of the two issues left open by the prior Hearing Officer's *Order on Summary Judgment* and *Partial Reconsideration Order*. US LEC apparently does not contend that EPB has engaged in improper cost-shifting in connection with any joint marketing of electric and telecommunications services. US LEC also seems to have abandoned its claim that EPB violated the "bundling" provision of the Code of Conduct

With respect to cost-shifting, US LEC's own witnesses admitted that US LEC does not contend that EPB has failed to properly allocate costs under the Proposed Conditions and that the

[62] Transcript, Volume I at p 223, // 10 – 24
[63] Transcript, Volume I at p 224, // 17 – 21

use of the name did not result in any cost-shifting.[64]

With respect to alleged violations of the "joint marketing" section of the Code of Conduct, EPB witness Harold DePriest explained that EPB interprets that section as regulating any efforts of EPB to sell bundled telecommunications and electric services "to customers."[65] Mr. DePriest further explained why, from EPB's standpoint, MGM Exhibits 2-9 did not violate the Code of Conduct, because none of those exhibits involved joint or bundled offerings of electric and telecommunications services "to customers" in a customer sales context.[66]

At the hearing, US LEC did not cross examine Mr. DePriest on his interpretation of this "bundling" provision of the Code of Conduct. US LEC stipulated that it does not contend that EPB engages in the bundled sales of electric and telecommunications services,[67] and US LEC witness Moeller failed to identify any joint sales offering of electric and telecommunications services "to customers" in MGM Exhibits 2-9.[68]

US LEC has failed to offer any evidence on the issue of cost-shifting and has failed to offer any contrary interpretation of the Code of Conduct or any facts supporting a violation of the "bundling" provision of the Code of Conduct. Because US LEC has not made any showing on the items left for hearing under the prior Hearing Officer's *Order on Summary Judgment* and *Partial Reconsideration Order*, the remaining claim of US LEC should be dismissed.

B. There is no legal basis for finding that the use of "EPB" in the name of EPB Telecom is an improper cross-subsidy.

[64] Transcript, Volume I at p 54, *ll* 11 – 13 (admission of Wanda Montano that there is no cash flow impact – i e , no subsidy – from the use of "EPB" in the name EPB Telecom), *id* at p 118, *ll* 3 – 5 (same, including admission of Chris Klein that "[it] isn't something you write a check for") While Dr Klein later testified that the use of the brand resulted in the shifting of costs, upon closer inspection, his testimony actually was not that costs had been shifted to the electric system ratepayers, but instead that these ratepayers were "missing out on some potential revenue that they could have " *Id* at p 171, *l* 15 – p 172, *l* 5

[65] DePriest Pre-filed Testimony at p 12, *l* 9 – p 19, *l 13*

[66] *Id*

[67] Transcript, Volume I at p 107, *ll* 11 – 14

[68] Transcript Volume I at p 103, *l* 12 – p 105, *l* 23, p 108, *ll* 11 – 22

Without waiver of EPB's contention that the prior Hearing Officer has already ruled that EPB may use "EPB" in the name of EPB Telecom, EPB further submits that there is no legal basis to support US LEC's contention that the use of "EPB" in the name of EPB Telecom is an improper cross-subsidy. US LEC incorrectly takes the word "subsidies" in T.C.A. § 7-52-402 out of the context of the entire municipal telecommunications statutes. US LEC's incorrect interpretation is inconsistent with the Authority's grant of a certificate to EPB, as well as the structure of the municipal telecommunications statutes and other applicable law.

1. The General Assembly and the Authority clearly understood that municipal electric systems (here, EPB) would provide telecommunications services.

In 1997, the Tennessee General Assembly passed Public Chapter 531 (now codified at T.C.A. §§ 7-52-401 – 407) and authorized municipal electric systems to provide telecommunications services. A fundamental rule of statutory construction is that the legislative intent or purpose of a statute is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language. *Worrall v. Kroger*, 545 S.W.2d 736, 738 (Tenn. 1977).

In the enactment of Public Chapter 531, the General Assembly made it abundantly clear that municipal electric systems – and not municipal electric systems operating in a different name or municipal electric systems that pretend that they are not municipal electric systems – are authorized to provide telecommunications services. For example, the primary authorization for municipal electric systems such as EPB[69] to provide telecommunications services arises from T.C.A. § 7-52-401. There, the General Assembly authorized

[69] In 1999, the Tennessee General Assembly passed Public Chapter 481 and authorized municipal electric systems to enter into, among other things, joint ventures and any other business relationships with one or more third parties for the provision of telecommunications services Memphis Networx, LLC was created under this separate statute

> Every municipality operating an electric plant . . . acting through the authorization of the board or supervisory body having responsibility for the electric plant [to provide telecommunications services] . . . . A municipality shall only be authorized to provide telephone, telegraph, or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant.

T.C.A. § 7-52-401.

This authorization of municipal electric systems is equally clear under the remaining provisions of Public Chapter 531. Those provisions demonstrate that the General Assembly fully understood that municipal electric systems would be the ones providing telecommunications services. Of particular importance to this case, T.C.A. § 7-52-402 prohibits a "municipality" from providing "subsidies." T.C.A. § 7-52-403(a) grants a "municipality" all the powers of other entities that provide telecommunications services. T.C.A.§ 7-52-404 requires a "municipality" to make certain tax equivalent payments for its telecommunications operations. T.C.A.§ 7-52-405 requires a "municipality" to allocate certain costs to its telecommunications services, and T.C.A § 7-52-406 limits the authorization of a "municipality" to provide certain services.

Throughout these statutes, it is obvious that the General Assembly anticipated that municipal electric systems like EPB – rather than some phantom marketing division of EPB – would be providing telecommunications service. Nowhere in these statutes is it suggested that EPB must use a different name when offering telecommunications services. It would an illogical interpretation of these statutes if the Hearing Officer were to determine that EPB – a "municipal electric plant" and a "municipality" for purposes of Public Chapter 531 – could not market its telecommunications services using its own name.

2. Avoiding cost-shifting, which is not at issue in this case, is the appropriate regulatory focus when prohibiting cross-subsidization.

In enacting the 1997 municipal telecommunications statutes, the Tennessee General Assembly very clearly indicated that municipal telecommunications systems are subject to

regulation in the same manner and to the same extent as are other providers of telecommunications services. Just as the FCC has determined that cost-shifting is the primary appropriate regulatory focus when prohibiting incumbent carriers from cross-subsidizing their competitive operations, so too should the regulatory focus be on cost-shifting in the case of EPB.

The 1997 municipal telecommunications statutes do not contemplate that the Authority will create a unique regulatory scheme for municipal systems. Rather, T.C.A. § 7-52-401, which subjects municipal telecommunications systems to the regulatory oversight of the Authority, plainly states that such municipal systems "shall be subject to regulation by the Tennessee Regulatory Authority in the same manner and to the same extent as other certificated providers of telecommunications service . . . ."

EPB is mindful of the possibility that the Proposed Conditions may go beyond the requirements that the Authority would have required of a comparable non-municipal provider, had EPB not negotiated the Proposed Conditions with TCTA.[70] However, even if EPB has subjected itself to a higher standard than would otherwise apply, the Proposed Conditions – and the focus on cost shifting – are consistent with the most stringent requirements that the Federal Communications Commission has imposed: the requirements that the FCC has imposed upon incumbent local exchange carriers.

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[70] In its Order *In the matter of Implementation of the Telecommunications Act of 1996 Accounting Safeguards under the Telecommunications Act of 1996*, 11 F C C R 17,539, 12 F C C R 2993, 11 FCC Rcd 17,539 (released December 24, 1996) at ¶ 12, the FCC observed that 47 U S C § 254(k) bars all telecommunications carriers from "us[ing] services that are not competitive to subsidize services that are subject to competition" In a subsequent Order, the FCC found it "unlikely that telecommunications carriers other than ILECs will have sufficient market power to engage in the behavior proscribed by Section 254(k) [but, we] emphasize, however that all telcommunications carriers remain subject to the statutory prohibition against cross-subsidy" *In the matter of Implementation of Section 254(k) of the Communications Act of 1934, as amended,* 12 F C C R 6415 (released May 8, 1997) at ¶ 9 EPB agreed to the Proposed Conditions and has endeavored to abide by them since its certification EPB intends to continue to abide by the Proposed Conditions With due respect to the Hearing Officer and the Authority, however, EPB would observe that even US LEC's own witness concedes that protection of electric system ratepayers is under the jurisdiction of the Board of EPB and the Tennessee Valley Authority Transcript, Volume I at p 170, *l* 11 – p , 171, *l* 5 EPB respectfully submits, therefore, that the jurisdiction of the Authority to prohibit "subsidies" is constrained by the Authority's exercise of that jurisdiction in the same manner and to the same extent as it exercises that jurisdiction over other similarly situated providers See footnote 41, *supra*

Both the Proposed Conditions and orders of the FCC concerning cross-subsidization issues conclude that the appropriate regulatory concern is the avoidance of cost-shifting. The Proposed Conditions state on page 3 that "[the] rules and regulations outlined in the following sections are intended to discourage the EPB from subsidizing the costs of the newly created telecommunications division by shifting costs to the activities of the eclectic system." Similarly, orders of the FCC have indicated that a "subsidy" involves a shifting of costs from non-regulated (or competitive) services to regulated (or non-competitive services). In its Report and Order entered in CC Docket 96-150 (which then Director Malone referenced during the EPB certification hearing), the FCC determined that "a subsidy occurs when the reasonable costs associated with a service are not covered by the revenues generated by that service, but are instead covered by the revenues of one or more other services."[71] In the Report and Order, the FCC described the mechanism by which the FCC prevents ILECs from engaging in improper subsidization – a mechanism that closely follows the approach of the Proposed Conditions:

> These accounting safeguards consist of cost allocation and affiliate transaction rules that were designed from keeping incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate telephone ratepayers, and to ensure that interstate ratepayers share in the economies of scope realized by incumbent local exchange carriers when they expand into additional enterprises. Our cost allocation and affiliate transactions rules, in combination with audits, tariff review, and the complaint process, have proven successful in protecting regulated ratepayers from bearing the risks and costs of incumbent local exchange carriers' competitive ventures. [72]

Even under the requirements applicable to incumbent telecommunications carriers, cost-shifting is the appropriate regulatory concern surrounding the potential for cross-subsidization. Because US LEC does not allege that any cost-shifting has occurred, US LEC's remaining complaint lacks merit and should be denied.

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[71] In *In the matter of Implementation of the Telecommunications Act of 1996 Accounting Safeguards under the Telecommunications Act of 1996*, 11 F C C R 17,539, 12 F C C R 2993, 11 FCC Rcd 17,539 at n 4

[72] *Id* at ¶ 20

3. Subsequent Tennessee municipal broadband statutes also indicate that cost-shifting is the appropriate regulatory focus when prohibiting cross-subsidization.

According to the Tennessee Supreme Court, "[it] is a well-established rule of statutory construction that statutes "in pari materia"--those relating to the same subject or having a common purpose--are to be construed together. Moreover, the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute." *Petition of Gant*, 937 S.W. 2d 842, 845 (Tenn. 1996).

Applying this fundamental rule of statutory construction to the "subsidy" prohibition in T.C.A. § 7-52-402, the passage of subsequent municipal broadband legislation in 1999 also demonstrates that the Tennessee General Assembly's concern surrounding cross-subsidization is to avoid cost-shifting to EPB's electric system operations. The 1997 telecommunications legislation prohibited municipal electric systems like EPB from providing cable television services, among other services. In 1999, the General Assembly enacted Public Chapter 481, which is now codified in part at T.C.A. §§ 7-52-601 – 611 and includes authorization for municipal electric systems to provide cable television and other services.

Like the 1997 telecommunications legislation, the 1999 legislation included certain provisions designed to regulate the entry of municipal electric systems into these competitive markets. Even a cursory review of the 1999 legislation reveals that more of these so called "level playing field" issues were addressed than was the case with the 1997 municipal telecommunications legislation, and the regulatory provisions under the 1999 legislation are more detailed than are those provided for telecommunications operations under the 1997 legislation.

Of particular importance to this case is the cross-subsidy prohibition under T.C.A. § 7-

52-603(a)(1)(A), which addresses the potential for cross-subsidization. That section provides:

> A municipal electric system shall establish a separate division to deliver any of the services authorized by this part. The division shall maintain its own accounting and record-keeping system. *A municipal electric system may not subsidize the operation of the division with revenues from its power or other utility operations*

T.C.A. § 7-52-603(a)(1)(A) (emphasis added).

This statute addresses the identical "subsidy" issue that the General Assembly addressed in T.C.A. § 7-52-402 in connection with municipal telecommunications projects. This later 1999 statute reveals that the appropriate regulatory concern surrounding cross-subsidization is avoiding the use of electric system revenues in EPB's telecommunications operations.

The Tennessee municipal telecommunications statutes, the Proposed Conditions, the orders of the FCC and the Tennessee municipal cable statutes all point in one direction: the regulatory concern behind prohibitions on cross-subsidization is the avoidance of cost shifting to EPB's electric system operations. Since nothing in the records suggests that such cost shifting has occurred, US LEC's remaining claim is without merit and should be denied.

C. US LEC's requested relief is further barred by the doctrines of laches and estoppel.

Separate and apart from the lack of any merit to US LEC's claims, fundamental principles of equity and fairness should preclude US LEC from asserting its claim. US LEC's own witness admitted that US LEC believed that the EPB brand would be "powerful" even before EPB entered the market.[73] Rather than participating in the certification proceeding or otherwise raising this issue in a timely manner, US LEC instead chose not to do so and sat on the sidelines as EPB built its telecommunications business at great cost and expense.

US LEC's claims are barred by the doctrine of laches. As the Tennessee Court of Appeals has recently stated, the two essential elements of a laches claim are (i) negligence and

[73] Transcript, Volume I at p 85, *ll* 1 – 2

unexcused delay on the part of the complaining party in asserting its claim; and (ii) injury to the party pleading laches.[74] Both elements are met here. US LEC has not justified its delay in waiting to raise this issue until May of 2002 – three years after the Authority granted a certificate to EPB and almost five years after EPB began the certification process – and, as EPB's Harold DePriest testified, a forced name change would be a "draconian" remedy that would greatly injure EPB.[75]

EPB spent nearly $500,000 through June 30, 2003 on marketing efforts and many times that amount in compensation to its employees in the process of building a business as the telecommunications division of EPB.[76] The doctrine of laches plainly bars US LEC from seeking to change the name of EPB's telecommunications operations at this late date.

Similarly, US LEC should be collaterally estopped from raising an issue again that was fully and fairly resolved in the prior certification proceeding. The elements of collateral estoppel are that (i) the issue sought to be precluded is identical to the issue decided in the prior case; (ii) the issue was actually litigated and decided on its merits in the prior case; (iii) the judgment in the earlier suit has become final; (iv) the party against whom estoppel is asserted must be a party or in privity with a party to the earlier suit; and (v) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue. *Beaty v. McGraw*, 15 S.W.2d 819, 824 (Tenn. Ct. App. 1998). EPB acknowledges that US LEC was not an intervenor (and, therefore, directly a party) in the prior case. However, EPB submits that US LEC is charged with notice of the certification hearing and waived its opportunity to do so. US LEC should be estopped from asserting its claim in this case at this late date.

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[74] *Brown v Ogle*, 46 S W 3d 721, 726 (Tenn Ct App 2000), *see id* ("equity aids the vigilant, not those who sleep upon their rights")

[75] *See* footnotes 58 & 59, *supra*, and accompanying text

[76] *See* footnote 57, *supra*, and accompanying text

"Clean hands, a pure heart and swift feet are required of him who seeks the aid of a Court of Conscience."[77] The Hearing Officer should require the same of US LEC in this case and deny US LEC's remaining claim.

IV. CONCLUSION

For the foregoing reasons, the Authority should deny the remaining claim in US LEC's Complaint.

Respectfully Submitted,

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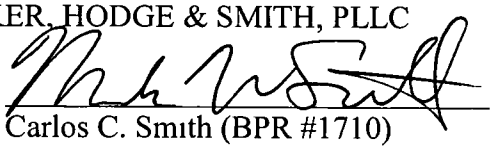
By: 

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[77] *Brown*, 46 S W 3d at 727 (quoting *Gibson's Suits in Chancery*)

CERTIFICATE OF SERVICE

I certify that a true and exact copy of this pleading has been served upon the following attorneys by delivering a true and exact copy thereof to the offices of said counsel or by placing a true and exact copy of said pleading in the United States mail addressed to said counsel at his office with sufficient postage thereupon to carry the same to its destination:

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