IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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TN REGULATORY AUTHORITY
DOCKET ROOM

IN RE:	)	
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PETITION TO REQUIRE ATMOS ENERGY CORP. TO APPEAR AND SHOW CAUSE THAT ITS RATES ARE JUST AND REASONABLE AND THAT IT IS NOT OVEREARNING IN VIOLATION OF TENNESSEE LAW	)	**DOCKET NO. 04-00356**

REPLY OF CONSUMER ADVOCATE TO ATMOS ENERGY CORPORATION'S RESPONSE TO PETITION

Comes Paul G. Summers, the Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General (hereinafter "Consumer Advocate"), and respectfully submits this reply brief to the response of Atmos Energy Corporation (hereinafter "Atmos") to the petition in this case.

Statutory Basis for Petition

The Tennessee Regulatory Authority (hereinafter "TRA") has the authority, pursuant to Tenn. Code Ann. § 65-2-106, to conduct an investigation and to issue show cause orders. The TRA also has the authority, pursuant to Tenn. Code Ann. § 65-5-101(a), to determine whether a public utility's existing rates are "excessive" rather than "just and reasonable." The Consumer Advocate has the right, pursuant to Tenn. Code Ann. § 65-4-118(b)(1), to initiate a proceeding in the TRA with respect to something that is within the authority of the TRA to do. Therefore, the statutory basis for the Consumer Advocate's petition in this case is simple, straightforward and solid.

Atmos admits that the Consumer Advocate has the right, pursuant to Tenn. Code Ann. § 65-4-117, to petition the TRA to open an investigation. (Response, p. 4). Atmos also admits that the

Consumer Advocate has the right, pursuant to Rule 1220-1-2-.02, to petition the TRA to convene a contested case. (Response, p. 4). Atmos argues that the Consumer Advocate has failed to pursue these rights. (Response, p. 4). However, both the introductory paragraph of the petition and the concluding paragraph of the petition ask the TRA to investigate the rates at issue. Also, numbered paragraph 1 of the petition cites the right of the Consumer Advocate to petition to initiate a contested case. Therefore, the allegation of Atmos that the Consumer Advocate has not requested these avenues of relief is merely a hyper-technical argument that the statute and the rule were not cited in the petition. Although the Consumer Advocate contends that the statutory authority cited in its petition is clearly sufficient, any failure to cite the additional and cumulative legal authority found in Tenn. Code Ann. § 65-4-117 and Rule 1220-1-2-.02 can be cured by an amended petition, if the TRA deems it necessary. Judicial economy weighs against Atmos' argument that the petition should be dismissed and a new petition filed.

Atmos argues that only the TRA can initiate show cause proceedings. In support of this argument, Atmos relies on *Builders Transportation Company v. Bissell*, 1991 WL 169692, *2 (Tenn.Ct.App.) (copy attached), allegedly "holding show cause proceedings may be initiated only by the TRA." (Response, p. 5). Atmos' representation of the Court's holding is incorrect. The actual holding of the case is that the Public Service Commission lacked the power to grant a temporary right to a company to continue its intrastate trucking operations in the absence of a Certificate of Convenience and Necessity. *Id.* at *8.

Atmos also relies on *Illinois Central Gulf Railroad v Tennessee Public Service Commission*, 736 S.W.2d 112, 118 (Tenn Ct. App. 1987), allegedly "holding that PSC's show cause order complied with statutory requirements because order was based on PSC's own investigation, rather

than on a presumed violation." (Response, pp. 5-6). Atmos' representation of the Court's holding is incorrect. The actual holding of the case is that federal law does not preempt state regulation of walkways at railroad cites, that the Public Service Commission's issuance of a show cause order did not result solely from its misinterpretation of its own regulation, and that the findings of the Public Service Commission were supported by substantial and material evidence, except for the holding that the walkway regulation creates a presumption that walkways not in compliance with it are unsafe. *Id.* at 117-19.

Atmos also relies on an order in TRA Docket No. 01-00808, allegedly "holding that because Tenn. Code Ann. § 65-2-106 requires the TRA complete an investigation before initiating show cause proceedings, the TRA may not initiate show cause proceedings on the motion of a complaining party." (Response, p. 6). Atmos' representation of the order is incorrect. This can be seen in the order itself, which Atmos filed as Exhibit B to its Response. The order says, "The language of this section indicates that an investigation must precede the issuance of a show cause order. Thus, the actual remedy available as a result of the filing of the complaints and the *Motion to Open a Show Cause Proceeding* must be the opening of an investigation." (Order, p. 11; *see also* Order, p. 14). In other words, the order granted precisely what the Consumer Advocate requests in the case at bar, i.e., an investigation. Because Atmos misinterpreted the order, its Exhibit C to its Response also is incorrect.

Atmos cites *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991), in support of the following proposition: "Because show cause proceedings are not among the actions the CAPD is permitted to bring under the UAPA or the TRA rules, it must be presumed that show cause proceedings are excluded from the legislature's statutory grant of power to the CAPD." (Response, p. 6). The cited case does not support the stated proposition. The case actually is a criminal case in which the Court

decided that an abuse of discretion standard, rather than a *de novo* standard, is the appropriate standard of review in the context of the revocation of a community correction sentence. *Id.* at 82.

Atmos cites *BellSouth Advertising and Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506, 512 (Tenn. 2002), for the following proposition: "The TRA is the sole entity empowered to initiate show cause proceedings for matters within its discretion, and the only way the TRA may exercise that extraordinary power is by complying with the mandatory requirements of the show cause statute." (Response, p. 7). The cited case does not support the stated proposition. The Court actually decided that the TRA had the authority to require BellSouth Advertising and Publishing Corporation to include the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc., on the cover of telephone directories published on behalf of BellSouth Telecommunications, Inc., and that such requirement did not violate the First Amendment. *Id.* at 508.

Thus, Atmos' argument that the Consumer Advocate does not have the statutory authority to petition the TRA for a show cause investigation lacks support in the law. All of the cases cited by Atmos for this argument have been easily distinguished. The Consumer Advocate is merely asking the TRA to do something that it clearly has the right to do. The argument that the Consumer Advocate cannot even file a petition requesting the TRA to act is unfair and incorrect.

Shifting of Burden of Proof

Atmos argues that the Consumer Advocate is attempting to shift the burden of proof improperly to Atmos. Atmos argues that the Consumer Advocate should have to make a prima facie case before the burden of proof shifts to Atmos. (Response, p. 7). First, the Consumer Advocate has made a preliminary prima facie case in its petition. Also, the Consumer Advocate has not made its entire case, because it has not yet had an opportunity to conduct discovery. Furthermore, the TRA

has not conducted an investigation in this case yet. Therefore, the argument about improper burden shifting is premature.

In its argument about burden shifting, Atmos reiterates its misinterpretation of the order in TRA Docket No. 01-00808. (Response, pp. 9-10). Atmos says, "In the second case, the hearing officer denied AIN's motion for a show cause order, finding that the TRA lacked the authority to initiate show cause proceedings in response to a motion by a third party, because Tenn. Code Ann. § 65-2-106 requires that the TRA initiate show cause proceedings only after completing its own investigation." (Response, pp. 9-10). The order simply does not say that or anything like it. The hearing officer ordered the following: "The remedy available as a result of the filing of the *Complaint of Access Integrated, Inc.*, *Complaint of XO Tennessee, Inc.* and the *Motion to Open a Show Cause Proceeding* is the opening of an investigation." (Order, p. 14).

Atmos argues that the Consumer Advocate is attempting to challenge the TRA's decision in its last Atmos rate case. (Response, p. 10). Atmos notes that there are orders from 1992 and 1996. (Response, p.1, n. 1). This argument is incorrect. 1992 was 13 years ago, and 1996 was 9 years ago. The facts and circumstances have changed in the past several years. If Atmos' argument is correct, every rate case filed by a utility to increase its rates is a challenge to the decision in the utility's previous rate case.

Sufficiency of Petition

Atmos argues that the Consumer Advocate's petition does not meet the requirement of specificity in pleadings filed in the TRA. This argument is factually incorrect. The Consumer Advocate filed an eleven-paragraph affidavit of an economist in support of its petition. Included in the affidavit is the following statement: "AEC is annually earning $6.6 million more from its natural gas service provided to Tennessee's consumers than AEC will earn when its tariffs incorporate a fair-

rate-of-return equal to 7.42 percent." (Affidavit of Stephen N. Brown, ¶ 9). Clearly, an allegation by an economist of $6.6 million in excess earnings by the utility at the expense of Tennessee consumers is a sufficient allegation, in the context of the petition, affidavit and attachments, to satisfy the specificity requirements as contemplated by the cited case, *Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (Tenn. 1998).

Atmos argues that the Consumer Advocate has not proven that the rate of return of 7.42 percent is the appropriate rate of return for Atmos. (Response, p. 14). This argument is unfair and incorrect, because the Consumer Advocate has not had an opportunity to conduct discovery and make its full case. There is no requirement that a party must prove its entire case in every detail in the initial petition.

Atmos argues that the filing by Chattanooga Gas Company of a motion for reconsideration is a reason to dismiss the petition. (Response, p. 17). This argument is unfair and incorrect. Not only does Atmos argue that the Consumer Advocate must prove that it would win the rate case in every detail in its initial petition; it also argues that the Consumer Advocate must prove that it can win a potential motion to reconsider at some point in the future. The burdens on the Consumer Advocate as advocated by Atmos are unfair, incorrect, and unsupported by law.

RESPECTFULLY SUBMITTED,

Vance L. Broemel, by Steve Butler with permission

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S.Mail, postage prepaid, on January 14, 2005.

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Middle Section, at Nashville

BUILDERS TRANSPORTATION CO and Venture Systems, Inc , Petitioners/Appellants,
v.
Keith BISSELL, Chairman, Frank D Cochran, Commissioner and Steve D. Hewlett, Commissioner, Constituting the Tennessee Public Service Commission, L & L Trucking, Inc and Southern Trucking Corporation, Respondents/Appellees

No. 01-A-01-9008-BC00275

Sept. 4, 1991.

Appeal from the Tennessee Public Service Commission at Nashville, Keith Bissell, Chairman, Stephen Hewlett and Frank D Cochran, Commissioners

E Clifton Knowles, Bass, Berry & Sims, Roland M. Lowell, Leitner, Warner, Moffitt, Williams, Carpenter & Napolitan, Nashville, for petitioners/ appellants

David W. Yates, Assistant General Counsel, Tennessee Public Service Commission, Nashville, for respondent/appellee Tennessee Public Service Commission

Robert L. Baker, Buck & Baker, Nashville, for respondents/appellees L & L Trucking, Inc., and Southern Trucking Corporation

OPINION

TODD, Presiding Judge

*1 The captioned petitioners (hereinafter appellants) have petitioned this Court for review of an order entered by the Public Service Commission on July 19, 1990, stating

This matter is before the Commission upon the motion of L & L Trucking to extend the permitted operations of L & L Trucking, Inc under the authority of the certificates of Southern Trucking Company pending the commencement of a transfer or application proceeding

The Commission considered this matter at its regularly scheduled conference on July 3, 1990. It was determined first, that L & L Trucking, Inc should be permitted to continue its operations until final disposition of the transfer and application proceedings and, second, that the Commission would determine a deadline for an expedited disposition of these cases The hearing was set for July 18, 19 and 20, 1990.

IT IS THEREFORE ORDERED:

1 That L & L Trucking, Inc may continue its intrastate operations until final disposition of the transfer case, ..

The sole issue presented to this Court by petitioners is

Whether the July 19, 1990 Order of the Tennessee Public Service Commission permitting L & L to continue operations is void, because the PSC has no authority to allow such operations under the circumstances present.

In their separate briefs, the Commission and L & L Trucking, Inc contend that the issue presented by petitioners was rendered moot by subsequent actions of the Commission in granting a permanent franchise to L & L Trucking, Inc.

-The Facts-

This Court is handicapped in formulating a comprehensive statement of the background of this controversy because the parties have neglected to conform with Rule 6 of the Rules of this Court which requires citation of the part of the record where evidence may be found to support allegations of fact, and asserts that no allegation will be considered which is not so supported by proper citation The record contains sixteen volumes averaging 100 pages each This Court is not under a duty to minutely search the record for evidence to support factual allegations of the parties *Pearman v Pearman,* Tenn App 1989, 781 S W 2d 585 and authorities cited therein

Fortunately, however, the disposition of this appeal does not depend upon facts, but upon the legality of

action taken by the Commission

Some of the facts are recited in the initial order entered by the Administrative Law Judge on January 10, 1990, as follows

The complaint was filed by Venture and Builders against the Respondents on April 20, 1989... The Respondents have consistently maintained that the Complainants have no standing by which to bring their complaints.

. The Complainants desire that the Commission find the authority of Southern to be dormant and revoke that authority pursuant to T C A. Section 65-15-112 accordingly. The means by which the Commission might accomplish this objective would be T C A Section 65-15-106 through a show cause proceeding The Respondents correctly note that these orders must issue by the Commission "on its own motion " While there was a Commission investigation as regards the original complaint, the Commission never proceeded to a process of making certain findings to which Respondents must respond through a Show Cause proceeding

*2 However, that is not to say that there is no basis for this proceeding Indeed, this proceeding can be correctly viewed as a proceeding leading to a declaratory order pursuant to T C A. Section 4-5-223 The Complainants maintained that L & L operated Southern authority without obtaining a transfer of authority pursuant to T C A Section 65-15-107 The Complainants have similar motor carrier authority in the territory in question. In a transfer or certificate application case, these carriers would be protestants Thus, the Complainants are "affected persons" within the context of the statute and they implicitly desire a finding as to the applicability of T.C A. Section 65-15-107(d) concerning the business relationship between L & L and Southern . Since L & L is currently operating pursuant to Southern authority, it should be ascertained whether these operations can be viewed as legal

The Respondents further claim benefit of a Commission Order on March 20, 1989, wherein the name of their company was changed It is contended that the name change has a bearing on the dispute in question Respondents contend that the proper remedy for the Complainants was to appeal the Commission's Order in the time provided to the Court of Appeals for the Middle Section of Tennessee

CHRONOLOGY OF FACTS

The following sequence of events led to the filing of the petition.

1 L & L was incorporated in November, 1988. It obtained interstate authority. It began to operate out of its Bolivar headquarters.

2. L & L determined that intrastate authority would be advantageous It was determined that Southern Trucking Corporation did have the authority desired. Thus, the decision was made to acquire the stock of the corporation from the shareholder who owned all of the stock in December, 1988 *See* Exhibit 1. The agreement between L & L and Southern was signed December 29, 1988.

3. The contract noted that Southern had no assets except for the authority to operate in Tennessee from this Commission. Furthermore, the corporation had no liabilities to be assumed *See* Exhibit 4.

4 Documentation was provided from Commission records which showed that Southern originally ceased operations on or about January, 1985. Indeed, its corporate charter had been revoked by the Secretary of State's office No ad valorem taxes were paid or assessed in response to the company vice-president's assertion that no assets nor operations existed *See* the Late Filed Exhibit

5 L & L began Intrastate operations in December, 1988 according to Lyn Thomas, Vice-President of L & L, who testified on behalf of the Respondents

6 An application to reinstate the Charter of Southern Trucking was made to the Secretary of State on January 16, 1989 in the name of Bob McAdams, the former owner *See* Exhibit 3

7 On February 17, 1989, the Respondents requested that the name of Southern be changed to L & L In the petition, the representation was made that the stock purchase had taken place and that Southern would be merged into L & L . The petition represented that a Plan of Merger would subsequently be filed with the office of the Secretary of State.

*3 8. On March 20, 1989, the Commission issued an Order wherein the name change was granted premised upon the fact that no transfer or merger had taken place The form order attributed representations to the Respondents contrary to the actual representations

made in the name change petition *See* Exhibit 6

9 An investigation into the operation of the Respondents was made in March, 1989, however, this investigation did not lead to further proceedings *See* Exhibit 16 The Commission representatives apparently did not advise the Respondents either to cease operations or to petition the Commission for a transfer of authority.

10. On April 3, 1989, a stock certificate was issued to L & L for the 140 shares of Southern stock. *See* Exhibit 15.

11 On April 5, 1989, a Plan of Merger of Southern and L & L was filed with the Secretary of State which indicated that L & L would be the surviving entity. *See* Exhibit 13.

. ..

The central issue relates to whether the Respondents should have obtained a transfer pursuant to T C A Section 65-15-107(d) At the time, the Respondents were under the assumption that it was a stock purchase and not a transfer Thus, L & L reasoned that no Commission action was required

. There were no assets other than the certificate of convenience and necessity to operate within Tennessee.... In exchange for $35,000, the purchaser received only a single asset--the Tennessee operating authority. Normally, contracts for sale like the one in question make reference to the transfer of authority being contingent upon Commission approval This contract contained no such provision though it affirmatively represented that the intrastate authority was the only asset possessed.

. .

The Plan of Merger filed with the Secretary of State is revealing as a statement of fact and as a statement of legal conclusions which flow from those facts. The Plan includes the following recitation of facts and conclusions

The only asset of Southern Trucking Corporation is Tennessee Intrastate Certificates of Convenience and Necessity issued by the Tennessee Public Service Commission No cash or stocks will be exchanged The intrastate Certificates of Convenience and Necessity will be transferred to L & L Trucking, Inc and the exchange will be treated on the books of account of L & L Trucking, Inc as exchanging an asset for an asset. The 140 shares of stock, valued on the basis of cost at $35,000 will be exchanged for intrastate motor carrier authority with a book value of $35,000. *See* Exhibit 13

In other words, this transaction involved the sale of intrastate authority as an asset. The $35,000 was the price paid to Southern for that asset and represents the total value of Southern. Thus, there was no stock purchase as such. More importantly, the Respondents represented to the Secretary of State as a part of the Merger Plan that the certificates of convenience and necessity *will* be transferred to L & L. Yet, the Respondents have never sought such a transfer though they made that representation in the Plan of Merger.

*4 ...

It also appears that the Respondents have never followed through upon the representation made in the Plan of Merger to the effect that they would facilitate a transfer of authority.

The Respondents maintain that the Commission implicitly ratified the transaction through the name change order .

. .

Actually, the Commission has no authority to change the names of companies. Such authority could only come from a statute or a regulation premised upon a statute..

In this case, the Respondents got the cart before the proverbial horse They obtained Commission approval before the name was changed The merger plan filed with the Secretary of State would have had the effect of changing the name This came in April, not prior to the Commission's action in March. The name change for the corporate entity should have happened before the Commission was requested to recognize the name change. Indeed, there was evidence such as the issuance of the stock certificate which suggested that the actual purchase of stock was not fully consummated until April

Second, the name change process means that potential parties are not effectively put on notice as to other intentions Obtaining a name change is a ministerial process, it is not a contested case proceeding . Thus, potentially interested parties such as the Venture and Builders were not put on notice as to any other ramifications. The Complainants cared not whether a name change was effected as such Their only concern related to a

transfer of authority Since the name change order reflected that the name change would not effect a transfer, there were no grounds for appeal as far as Complainants were concerned.

The name change was conditioned upon the Plan of Merger. But in the Plan of Merger, the Respondents state that a transfer will take place As T.C.A. Section 65-15-107(d) clearly states, transfers must be approved by the Commission.

Thus, a name change cannot be used as another device to effect a transfer. It cannot be used to circumvent the law....

. L & L is operating pursuant to the Southern authority today It has operated this authority since December, 1988 It has been found that the Respondents must seek a transfer .

. .

. There is simply no means available to excuse continued operation of the authority since the Respondents failed to seek a transfer in the first place. The Commission Staff maintains that the public has come to depend upon L & L by virtue of the traffic it already hauls. If there is no other option, the Respondents can seek emergency temporary authority pursuant to T.C.A Section 65-15-107(e) However, the evidence before me suggests that both Venture and Builders have similar authority As far as is known, they are ready, willing and able to serve these shippers There is nothing in the record to indicate that the shippers in this area will be inconvenienced in any way

***5** .

In the instant case, L & L has supplied all of the personnel and equipment. The supervisors are L & L officers. The revenue all flows to the L & L accounts There has never been a separate Southern account. Southern has no insurance apart from that of L & L There has never been any Southern stationary There were never any separate Southern books of account Mr Lane acknowledged that both companies were operated as one company

...

In other words, Southern has not operated its authority since December, 1988. L & L has operated that authority As far as is known from the evidence presented at this hearing, Southern has not been operational since 1985.

In this case, apparently no merger took place since L & L and Southern never pursued the transfer which they represented to the Secretary of State would take place The Respondents appear to want their cake and eat it too They wish to tell the Secretary of State that they will pursue a transfer and tell the Commission no transfer need take place.

-The Proceedings before the Commission-

On April 29, 1989, appellants filed with the Commission a complaint seeking revocation of the operating authority of Southern Trucking Corporation and/or L & L Trucking, Inc. on the ground that the certificates of Southern had been unused since January 1985 and had been improperly transferred to L & L without approval of the Commission as required by T C.A. § 65-15-107(d).

On January 10, 1990, the above quoted order of the Administrative Judge ruled that all operations of L & L under the authority of the Certificate of Southern were illegal and must cease

On March 21, 1990, the Commission approved the January 10, 1990 order of the Administrative Judge and directed Southern and L & L to file a transfer petition within 30 days. The Commission order also stated·

That L & L Trucking, Inc. is authorized to operate pursuant to the Certificates of Convenience and Necessity granted to Southern Trucking Corporation until the hearing is commenced and the transfer petition [proceeding], or for 90 days from the date of this Order, whichever comes first

That all intrastate operations of L & L Trucking, Inc operated pursuant to the Certificates of Convenience and Necessity granted to Southern Trucking Corporation must cease the day the hearing in the transfer proceeding . commences, or within 90 days from the date of this Order, whichever comes first

In an order dated March 13, 1990, the Commission undertook to amend its subsequent order of March 21, 1990.

On April 20, 1990, Southern and L & L filed a joint petition for transfer of operating authority, and L & L filed a separate petition for an original certificate of authority

On June 12, 1990, Southern and L & L filed a "Motion to Extend Permitted Operations" until the final order in the transfer case

On July 19, 1990, the Commission entered the order quoted at the beginning of this opinion and which is the subject of this appeal.

-The Law-

***6** T C A § 65-15-107 provides in pertinent part as follows:

Certificates of convenience and necessity--Interstate permits.--(a) It is declared unlawful for any motor carrier to operate or furnish service as a common carrier between points within this state without first having obtained from the public service commission a certificate declaring that public convenience and necessity will be promoted by such operation .

.

(d) When any certificate of convenience and necessity, or interstate permit, such as provided in subsections (a) and (b) of this section shall have been issued, and thereafter the motor carrier holding such certificates shall sell, transfer, assign or lease the same or part thereof, then in that event, upon application to the commission, and if the commission shall be of the opinion that the purchaser thereof is in all respects qualified under the provisions of this chapter, to conduct the business of a motor carrier within the meaning thereof, the said certificate or permit originally issued to such motor carrier, or part thereof, shall be by the commission transferred to the purchaser, and be effective in like manner as though originally issued to such purchaser, provided, however, that it is hereby declared to be unlawful to trip-lease, for either single or multiple individual trips, a certificate of convenience and necessity without the prior approval of the commission, after notice and hearing

(e) If the commission should decide that an emergency exists at any time, said commission is hereby authorized and empowered to issue a temporary certificate of convenience and necessity to fit applicants, subject to such rules and regulations as the commission may legally prescribe Upon issuance of the temporary certificate, inspection fees shall be assessed and the motor carrier shall be issued temporary identification credentials. No such temporary certificate of convenience and necessity shall be issued for a period of time less than one month or longer than six (6) months, but reissue is authorized if, in the opinion of the commission, such is justified. [Acts 1933, ch 119, § 5, C Supp.1950, § 5501 5, impl am Acts 1955, ch 69, § 1, Acts 1959, ch. 317, § 1, 1977, ch. 425, § 1; T C A (orig ed), § 65-1507]

T C.A. § 65-15-112 provides in pertinent part

Abandonment of service--Suspension, revocation or amendment of certificates or permits --(a)(1) No motor carrier authorized under the provisions of this part to operate between points within this state shall abandon or discontinue any service established under the provisions of this part without an order of the commission therefor, which order shall be granted by the commission only after hearing upon due notice

.

(3) On finding of the commission that any motor carrier operating between points within this state does not give convenient efficient service in accordance with the orders of the commission, such motor carrier shall be given a reasonable time, not more than sixty (60) days, to provide such service before any existing certificate is cancelled or revoked or a new certificate granted to some other motor carrier over the same route or routes . .

***7** Certificates of Convenience and Necessity may be lost by abandonment. *Continental Tenn Lines v Fowler,* 199 Tenn. 365, 287 S.W.2d 22 (1956).

Whatever view may be taken of the application of L & L (petition for transfer or for new certificate) it was and is an admission of lack of authority to exercise the desired privilege until granted by the Commission. This being true, the Commission exceeded its powers and authority when it undertook to confer upon L & L the authority to operate without statutory procedure by entry of the order of July 19, 1990, permitting illegal operation until final disposition of the applications for transfer and/or for a certificate of authority.

-The Position of the Commission-

The brief of the Commission insists first that appellants' issue on appeal is moot because, on April 2, 1991, the Commission granted a Certificate of Convenience and Necessity to L & L, denying the transfer of the certificate of Southern This Court does not agree. The issue is not the present authority of L & L to operate, but the validity of the temporary authority granted on July 19, 1990.

There is a general rule that appellate courts will not consider issues which have become moot or academic, but, as stated, the authority of the Commission to take the action taken on July 19, 1990, is not moot or academic because it involves a matter of great public interest and is capable of repetition without opportunity of timely review. *LaRouche v Crowell,* Tenn App.1985, 709 S.W 2d 585, and authorities cited therein

The exception is especially applicable "when interests of a public character and of importance in the administration of justice are involved" *McCanless v Klein,* 182 Tenn 631, 188 S.W 2d 745 (1945).

The other argument of the Commission is that it has the authority to stay its orders Such authority is unquestioned where there has been an affirmative order of the Commission However, the authority to stay cannot be converted into the authority to peremptorily and *ex parte* grant a privilege without the notice and hearing required by statute.

Moreover, neither the word "stay" nor any equivalent is found in the questioned order

If the proceeding had been one to cancel an existing authority, the "stay" of cancellation would have been a valid exercise of the authority. In the present situation, an order permitting the exercise of a privilege which had never existed cannot be validated by calling it a "stay".

-The Position of L & L-

The brief of L & L relies upon its "Motion to Extend Permitted Operations" filed on June 12, 1990. The infirmity of this reliance is that there were no "permitted operations" to continue If Southern had a valid authority (after abandoning it) and if its authority had been validly transferred to L & L, such transfer could not authorize operations by L & L until ratified by the Commission after due notice and hearing

In short, the Commission was misled by the tactics of L & L in ignoring and neglecting the lawful approach to the situation in favor of the devious measures recited above

***8** In summary, from December, 1988, to April 2, 1991, L & L exercised the privilege of intrastate transportation in Tennessee without a Certificate of Convenience and Necessity, and, from March 21, 1990, until April 2, 1991, this unauthorized operation was expressly countenanced by the Commission without legal authority to do so

The Public Service Commission is an administrative agency *Blue Ridge Transp Co v Pentecost,* 208 Tenn 94, 343 S.W 2d 903 (1961), *Associated Transport, Inc v Fowler,* 206 Tenn. 642, 337 S W 2d 5 (1960). Its actions must be harmonious with the statutes which created and govern it. *Tenn Pub Serv Comm v Southern Ry,* Tenn.1977, 554 S W 2d 612, *Pharr v N C & St L Ry.* 186 Tenn 154, 208 S W.2d 1013 (1948) It has no power or authority except that conferred by statute *Tennessee-Carolina Transp Inc v Pentecost,* 206 Tenn 551, 334 S W 2d 950 (1960)

T.C A § 65-15-107 prohibits a motor carrier from operating in Tennessee without a certificate from the Public Service Commission.

T.C.A §§ 65-4-201 and 65-15-107(a) and (d) prescribe the prerequisite proceedings before issuance of a certificate, including notice to interested parties and hearings.

After the Commission had determined that Southern/ L & L were operating illegally and after ordering them to make due application for authority and after L & L had applied for authority, but before notice of hearing or grant of authority, the Commission in effect granted the authority without notice or hearing in its July 19, 1990, order

No statutory authority is cited or found for such action. It was taken without authority and is invalid and void.

The order entered by the Commission on July 19, 1990, authorizing L & L Trucking, Inc to continue its intrastate operations until final disposition of "the transfer case" (i e until April 2, 1991), is reversed, vacated and nullified

The disposition of this appeal does not in any way reflect upon the merits of subsequent actions of the Commission which are not before this Court in this appeal

Costs of this appeal are taxed against L & L Trucking, Inc , and Southern Trucking Corporation.

Reversed

CANTRELL, J., concurs

KOCH, J , concurs in separate opinion

KOCH, Judge, concurring

I concur in the results of the majority's opinion for the reasons stated in my dissent to this court's August 8, 1990 order denying Builders Transportation Company's motion for stay pending appeal Tenn Code Ann. § 4-5-316 (1985) does not empower the Public Service Commission to permit motor carriers to operate over routes in violation of Tenn.Code Ann. § 65-15-107 (1982). [FN1]

FN1 The PSC could have granted a temporary certificate to L & L Trucking Co pursuant to Tenn Code Ann § 65-15-107(e) had an emergency existed The facts in this record do not support the finding of an existence of an emergency

I do not share the majority's dissatisfaction with the parties' briefs and, in fact, find them to be a cut above most of the briefs filed in this court.

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