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December 1, 2005

HAND DELIVERY

Honorable Ron Jones, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: In Re: Petition of GETCO, a Tennessee General Partnership, and Isaac Luboti, Individually, for Enforcement of Operating Agreement and Sale of Financial Rights, TRA Docket No. 05-00304

Dear Chairman Jones

Enclosed please find an original and thirteen (13) copies of Memphis Light Gas & Water and Memphis Broadband LLC's Request for the Authority to Decline to Commence a Contested Case for Lack of Jurisdiction, or, in the Alternative, Motion to Dismiss the Petition Without Convening a Contested Case.

Also enclosed is an additional copy to be "File Stamped" for our records. All parties of record have been served. If you have any questions or require additional information, please let me know.

Very truly yours,

Melvin J. Malone

MJM kdn

Enclosures

cc: Parties of Record

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

PETITION OF GETCO, A TENNESSEE GENERAL PARTNERSHIP, AND ISAAC LUBOTI, INDIVIDUALLY, FOR ENFORCEMENT OF OPERATING AGREEMENT AND SALE OF FINANCIAL RIGHTS	))))))	**DOCKET NO. 05-00304**

MEMPHIS LIGHT GAS & WATER AND MEMPHIS BROADBAND LLC's REQUEST FOR THE AUTHORITY TO DECLINE TO COMMENCE A CONTESTED CASE FOR LACK OF JURISDICTION , OR, IN THE ALTERNATIVE, MOTION TO DISMISS THE PETITION WITHOUT CONVENING A CONTESTED CASE

Memphis Light Gas & Water ("MLGW") and Memphis Broadband LLC ("Broadband") submit this pleading in response to the *Petition for Enforcement of Operating Agreement and Sale of Financial Rights* (the "*Petition*") filed on behalf of GETCO Partnership and Mr Isaac Luboti (collectively "GETCO"). MLGW and Broadband appear individually, but submit this responsive pleading jointly.

For the reasons set forth below, MLGW and Broadband request the Tennessee Regulatory Authority ("TRA" or "Authority") to decline to commence a contested case for lack of jurisdiction, or, in the alternative, to grant the motion to dismiss without convening a contested case [1] In support of both the request and the motion to dismiss, MLGW and Broadband respectfully submit the following

[1] MLGW and Broadband do not waive any other affirmative defenses to the *Petition* and expressly reserve the right to assert additional affirmative defenses in an answer, supplemental motion to dismiss or other pleading, should the Authority determine to convene a contested case in this matter

I.

BACKGROUND AND SUMMARY OF ARGUMENT

On or about November 24, 1999, MLGW, A&L Networks-Tennessee, LLC ("A&L"), and Memphis Networx, LLC ("Networx") filed an Application and Joint Petition with the Authority requesting the approval of an Operating Agreement and the granting of a Certificate of Public Convenience and Necessity to Networx to provide intrastate telecommunications services.[2] An Amended Application of Memphis Networx LLC was submitted on or about May 2, 2000.[3] Prior to the conclusion of TRA Docket No.99-00909, A&L sold its interest in Networx to Broadband.[4] On or about December 21, 2000, MLGW, Broadband, and Networx filed an Amendment to the Application of Memphis Networx, LLC and Joint Petition of MLGW and A&L, along with an Amended and Restated Operating Agreement of Memphis Networx, LLC ("*Operating Agreement*").[5] In its August 9, 2001, *Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity* (the "*Final Order*"), the Authority granted the following: (1) the Joint Petition of MLGW and Broadband, as amended, for approval of the *Operating Agreement* for the creation and operation of Networx, and (2) the Application of Networx, as amended, for a Certificate of Public Convenience and Necessity.[6]

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[2] Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity, *In Re Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval of Agreement Between MLGW and A&L Regarding Joint Ownership of Memphis Networx LLC*, TRA Docket No 99-00909 at 6 (Aug 9, 2001) (the "*Final Order*") The Application itself will be referred to as the "*Application*"

[3] *Id* at 15-16

[4] *Id* at 23

[5] *Id* at 24

[6] *Id* at 39

Three (3) provisions of the *Operating Agreement* are particularly relevant to the dispute as set forth in the *Petition* Article 3, Section 3.4 of the *Operating Agreement* provides as follows:

> Community Participation. To the extent permitted by law, MLGW and Memphis Broadband **each shall negotiate in good faith** to sell a portion of its Financial Rights to one or more Minority Businesses in a single sale or multiple sales, provided. (i) each Minority Business shall submit a bona fide purchase proposal to Memphis Broadband and MLGW, (ii) **the sale or sales shall be closed within four (4) years from the approval date** (iii) the Minority Business or Minority Businesses shall not purchase, in the aggregate, more than 7.1% of Memphis Broadband's respective Financial Rights and 12 6% of MLGW's respective financial rights, and each purchase of Financial Rights from Memphis Broadband and MLGW, respectively shall be in the ratio of one third from Memphis Broadband and two-thirds from MLGW, (iv) the purchase price in each sale shall be determined by an independent appraisal and shall be payable in cash at closing, two thirds to MLGW and one third to Memphis Broadband. For purposes of this Section 3 4 the term "Minority Business" means a corporation, partnership, limited liability company or other entity, provided at least fifty-one (51%) of the governance and economic rights of the entity are owned by an individual who personally manages and controls the daily operations of the entity and who is impeded from normal entry into the economic mainstream because of race, religion, sex or national origin. (emphasis added) [7]

The second relevant provision is Article 14, Section 14.6, which provides, in full, as follows.

> Creditors and Other Third Parties. **None** of the provisions of the Operating Agreement shall be for the benefit of or enforceable by any third parties, including, without limitation, any creditors of the Company (emphasis added) [8]

[7] Amendment to the Application of Memphis Networx, LLC and Joint Petition of MLGW and A&L, *In Re Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval of Agreement Between MLGW and A&L Regarding Joint Ownership of Memphis Networx LLC*, TRA Docket No 99-00909 (Dec 21, 2000)

[8] *Id*

The third relevant provision is Article 14, Section 14.3, which provides, in full, as follows:

> Application of Law. This Operating Agreement shall be governed by the laws of the State of Tennessee. To the extent permitted by law, the courts of **Shelby County, Tennessee** shall be the **exclusive forum** for the litigation of **any** disputes under this Operating Agreement. (emphasis added) [9]

On November 1, 2005 – more than four (4) years after the Authority approved the *Operating Agreement* and after the time had expired for negotiations and a closing of a transaction under Section 3 4 - GETCO filed its *Petition* seeking to force a sale of rights in Networx under Section 3 4.

As threshold and independently dispositive matters, MLGW and Broadband respectfully submit that the requested relief is beyond the jurisdiction of the Authority under Tenn. Code Ann § 7-52-103 and is also contrary to the forum selection clause included in Section 14.3 of the *Operating Agreement*, which provides for the resolution of such disputes in the courts sitting in Shelby County, Tennessee Even if GETCO held enforceable rights under the *Operating Agreement*, which it does not, MLGW and Broadband submit that the Authority is not the appropriate forum for the resolution of that dispute.

Additionally, the *Petition* fails to state a claim on which relief can be granted for several substantive grounds. GETCO, for example, incorrectly attempts to turn the agreement between MLGW and Broadband to "negotiate in good faith" under Section 3.4 into a provision that provides GETCO an enforceable right where none was intended Contrary to GETCO's assertion, Section 14.6 of the *Operating Agreement* plainly and unambiguously states that the parties, MLGW and Broadband, did not intend to confer enforceable rights on any third parties –

[9] *Id*

including GETCO. Moreover, the untimeliness of GETCO's *Petition* provides additional, and independent, grounds for a dismissal of the *Petition*

For these reasons, as explained in greater detail below, the Authority should decline to convene a contested case or should dismiss the *Petition* for lack of jurisdiction and/or failure to state a claim upon which relief can be granted

II.

ARGUMENT

a The Authority Should Decline to Convene a Contested Case and Dismiss the Petition for Lack of Jurisdiction

Pursuant to Authority Rule 1220-1-2.02(2)(a), the Authority may commence a contested case upon the initial request of any person, unless the Authority lacks jurisdiction over the subject matter. Pursuant to Tennessee law and the *Final Order*, the *Petition* should be dismissed for lack of jurisdiction

In the *Petition*, petitioners seek to "enforce provisions of operating agreements entered into pursuant to that certain Final Order Approving Amended and Restated Operating Agreement and Granting Certificate of Public Convenience and Necessity dated August 9, 2001."[10] More specifically, the petitioners are requesting the Authority to "require the sale of the financial rights by the members of Memphis Networx to GETCO as set forth in Section 3 4 of the operating agreement therby [sic] enforcing the terms and provisions of the operating agreement."[11] Though petitioners cite the general jurisdiction of the Authority under Tenn. Code Ann. § 65-4-104 in their attempt to establish proper jurisdiction, neither MLGW nor Broadband are public

[10] Petition for Enforcement of Operating Agreement and Sale of Financial Rights, *In Re Petition of GETCO, a Tennessee General Partnership, and W Isaac Lubott, Individually, for Enforcement of Operating Agreement and Sale of Financial Rights*, TRA Docket No 05-00304 at 2 (Nov 1, 2005) (the "*Petition*")
[11] *Id* at 5

utilities subject to the general jurisdiction of the Authority over public utilities. Instead, both Broadband and MLGW joined the *Application* for the limited purpose of obtaining approval of the *Operating Agreement*. While the *Petition* does not reference the controlling jurisdictional statute with respect to the *Operating Agreement*, that statute is Tenn Code Ann. § 7-52-103(d)

As the Authority recognized in the *Final Order*, the jurisdiction of the Authority under Tenn Code Ann. § 7-52-103(d) is limited Applying Tenn Code Ann. § 7-52-103(d), the Authority specifically enumerated the statutory criteria for evaluating the *Operating Agreement* approved in the *Final Order*, which is the same operating agreement that is the subject matter of the *Petition* [12] The statutory criteria applied by the Authority are as follows: (1) whether the board or supervisory body having responsibility for the municipal electric plant authorized the joint venture, (2) whether the provisioning of the service is subject to Tenn Code Ann. § 7-52-402 through § 7-52-407, (3) whether the Authority provided interested parties notice and an opportunity to be heard on the petition for approval, (4) whether the entity created as a result of the joint venture is subject to "regulation by the [Authority] in the same manner and to the same extent as other certified providers of telecommunications services", and (5) whether the entity created through the joint venture "shall be considered as and have the duties of a public utility." With respect to its review of the *Operating Agreement*, the Authority expressly found that only the afore-referenced criteria were at issue.[13] It follows that any permitted challenge to the *Operating Agreement* before the Authority must be grounded in said criteria.[14] The matters raised in the *Petition* plainly fall outside the established criteria.

[12] *Final Order* at 29-31
[13] *Id* at 30
[14] It is noteworthy that the petitioners are not challenging the CCN granted in the *Final Order* or any failure of Networx to abide by state law or the rules and regulations of the TRA

This is not to say that the *Operating Agreement* may not be the basis of a dispute on something other than the enumerated criteria, but all matters outside the ambit of the these criteria must be brought in another forum. Pursuant to the *Final Order*, applying state law, any petition or complaint before the Authority upon the *Operating Agreement* must be based upon one (1) of the five (5) statutorily based criteria recognized by the Authority. MLGW and Broadband respectfully submit that any other attack upon the *Operating Agreement* is statutorily outside of the Authority's jurisdiction Thus, based upon § 7-52-103(d) and the *Final Order*, the Authority should decline to convene a contested case and dismiss the *Petition* for lack of jurisdiction.[15]

b. The Authority Should Dismiss the Petition Without Convening a Contested Case Based Upon the Operating Agreement's Valid and Enforceable Forum Selection Clause

Separate and apart from the jurisdictional issue addressed above and the substantive issues addressed below, pursuant to the forum selection clause set forth in Article 14, Section 14.3 of the *Operating Agreement*, and established Tennessee precedent, the Authority should decline to convene a contested case and should dismiss the *Petition*. The *Operating Agreement* expressly provides that any disputes arising under that agreement are to be exclusively resolved in the courts sitting in Shelby County, Tennessee If – as GETCO contends – it has rights under the *Operating Agreement*, and MLGW and Broadband contend that GETCO does not, then the agreed upon forum for the resolution of such disputes is in Shelby County and not before the Authority

[15] *See, e g , Tennessee Mfr'd Housing Ass'n v Metropolitan Gov't*, 798 S W 2d 254, 257 (Tenn Ct App 1990) (courts must take statutes as they find them), and *State of Tennessee v Medicine Bird Black Bear White Eagle*, 63 S W 3d 734, 754 (Tenn Ct App 2001) ("Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory test believing that the General Assembly chose its word deliberately, and that the General Assembly meant what it said ")

Article 14, Section 14.3 of the *Operating Agreement* provides, in full, as follows.

> Application of Law This Operating Agreement shall be governed by the laws of the State of Tennessee To the extent permitted by law, the courts of **Shelby County, Tennessee** shall be the **exclusive forum** for the litigation of **any** disputes under this Operating Agreement (emphasis added).

This section unequivocally establishes the exclusive jurisdiction of any disputes under the *Operating Agreement* in the courts of Shelby County, Tennessee.[16] Given that Networx operates in Shelby County, Tennessee, the contractual selection of "the courts of Shelby County, Tennessee" as the exclusive forum for any disputes arising under the *Operating Agreement* cannot be said to be unfair, unreasonable or unjust.[17]

Again, irrespective of the petitioners' apparent desire to have this matter heard before the Authority, the plain terms of the *Operating Agreement* – which GETCO incorrectly claims to have a right to enforce – must control and must be respected.[18] Hence, based upon Article 14,

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[16] *See Thomas v Costa Cruise Lines N V*, 892 S W 2d 837 (Tenn Ct App 1995) (upheld forum selection clause noted on cruise line ticket), and *Dyersburg Mach Works v Rentenbach Eng Co*, 650 S W 2d 378, 380 (Tenn 1983) (Generally, "*The Model Choice of Forum Act* provides that an unselected court must give effect to the choice of the parties and refuse to entertain the action[ ]")

[17] 17AM JUR 2D *Contracts* § 260 (2004) ("Courts generally enforce forum-selection clauses unless doing so would be unfair, unreasonable or unjust") In determining whether a forum-selection clause is reasonable, state courts consider, among other things, whether the forum selected bears a reasonable relationship to the contract *Id See also Union Planters Bank, N A v EMC Mortg Corp*, 67 F Supp 2d 915, 919 (W D Tenn 1999) (The three (3) tests for determining when a forum selection clause may be unenforceable, "considered to be a heavy burden to meet[,]" are (1) whether the clause was obtained by fraud, duress, abuse of economic power or unconscionable means, (2) whether the designated forum would be closed to the suit or it would not effectively or fairly handle the suit, and (3) whether the designated forum would be so seriously inconvenient as a forum that to require the plaintiff to bring suit there would be unjust), and *Dyersburg Mach Works* 650 S W 2d at 380 ("[T]he validity or invalidity of such forum selection clauses depends upon whether they are fair and reasonable in light of all the surrounding circumstances attending their origin and application")

[18] Initial Order of Hearing Officer, *In Re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No 98-00118 at 21 (April 21, 1998), *aff'd*, Order Affirming the Initial Order of Hearing Officer, *In Re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No 98-00118 (Aug 17, 1998) ("'The rights of the parties must be determined by what they have put into their agreement It is the duty of the courts to enforce contracts according to their plain terms'") (*citing Cookeville Gynecology & Obstetrics, P C v Southeastern Data Systems, Inc*, 884 S W 2d 458, 461-62 (Tenn Ct App 1994))

Section 14.3 of the *Operating Agreement*, coupled with well-established precedent, the Authority should decline to convene a contested case and dismiss the *Petition* for lack of jurisdiction.[19]

c The Authority Should Dismiss the Petition Without Convening a Contested Case Because GETCO is not an Intended Third Party Beneficiary of the *Operating Agreement*

Pursuant to Authority Rule 1220-1-2.03(2)(e), the Authority should decline to commence a contested case upon the *Petition*, and dismiss the same, for failure to state a claim upon which relief can be granted.[20] It is well-settled that "[t]he Authority has the discretion to decide whether to convene a contested case to consider complaints filed with the agency."[21]

In sum, the gravamen of the *Petition* is that petitioners were wrongfully refused an interest in Networx under Section 3.4 of the *Operating Agreement*. As a remedy for the foregoing, petitioners have asked the Authority to "require the sale of the financial rights by the members of Memphis Networx to GETCO[ ]"[22]

At the outset, it is important to recognize the limited scope of Section 3.4 of the *Operating Agreement*. Section 3.4 provides a limited obligation on the part of the members of Networx "to negotiate in good faith" towards the sale of financial rights in Networx, but it does not impose any obligation on either member to actually dispose of its financial rights irrespective of the circumstances. Section 3.4 – especially when read together with Section 14.6 of the *Operating Agreement* – certainly does not create any enforceable rights in third parties to "force"

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[19] Unlike the matter of *In Re Petition of US LEC Tennessee, Inc. for Declaratory Order*, TRA Docket No. 02-00890, the resolution of the issues raised in the *Petition* will not require the Authority's special competence or expertise. *See* Initial Order on Jurisdiction, *In Re Petition of US LEC Tennessee, Inc. for Declaratory Order*, TRA Docket No. 02-00890 at 9 (April 3, 2003). Moreover, a reasoned decision upon the *Petition* will not require "knowledge of the business practices of the telecommunications industry" and will not "implicate policy considerations within the TRA's particular field of expertise." *Id.* at 10.

[20] *See, e.g., Consumer Advocate Division v. TRA*, No. M1999-01170-COA-R12-CV, 2001 WL 575570, at *5 (Tenn. Ct. App. May 30, 2001) (Tennessee Court of Appeals upheld TRA's dismissal of breach of contract claim for failure to state a claim.) (copy attached hereto).

[21] *Id.* at 6. *See also Consumer Advocate Division v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) ("In our view, the clear import of the statutory language, 'the [A]uthority shall have the power,' is that the TRA has the power to convene a contested case hearing if it chooses to exercise the authority. In other words, the language used by the General Assembly implied discretion.").

[22] *Petition* at 5.

a sale of these financial rights. For these reasons, the Authority should dismiss the *Petition* for failure to state a claim upon which relief can be granted.

Indeed, the *Petition* fails to allege any enforceable right of GETCO in acquiring an interest in Networx. According to the *Petition*, there was never a meeting of the minds to create a membership interest for the petitioners in Networx Nonetheless, petitioners rely upon Section 3 4 of the *Operating Agreement* as the basis for their request. Tennessee law is clear that the creation of new membership interests in limited liability companies is a function of the agreement of all the members of the limited liability company ("LLC") and that third parties have no claims under contractual agreements unless they were intended beneficiaries.[23]

As with other agreements, non-members do not have standing to enforce the covenants of LLC operating agreements. Generally, contracts are assumed to be for the benefit of the parties thereto and not third parties [24] Traditional rules of privity provide that those who are not parties to agreements cannot sue to enforce them [25]

The traditional rule has given way to an exception where the contracting parties express an intention that the benefits of a contract flow to a third party.[26] Under the modern rule, such third parties may enforce a contract if they are the intended beneficiaries of the contract.[27] If, on the other hand, the benefit flowing to the third party is not intended, but merely incidental, the third party acquires no right to enforce the contract.[28] To maintain an action as an "intended beneficiary," a third party to an agreement, such as the petitioners herein, must show clear and

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[23] *See, generally*, Tenn Code Ann §48-232-102
[24] *Oman Constr Co v Tenn Cent Ry Co* , 370 S W 2d 563, 572 (Tenn 1963)
[25] Owner-Operator Independent Drivers' Assn v Concord EFS, Inc , 59 S W 3d 63, 69 (Tenn 2001)

[26] *Id*
[27] *Willard v Claborn*, 419 S W 2d 168, 169 (Tenn 1967)
[28] *Id*

direct evidence of the intent of the agreeing parties to confer a benefit upon said third party.[29]

> Section 14 6 of the *Operating Agreement* provides as follows.
>
> **None** of the provisions of the Operating Agreement shall be for the benefit of or enforceable by any third parties, including, without limitation, any creditors of the Company. (emphasis added).

Hence, the *Operating Agreement* expressly, and unequivocally, reserves the benefits of the agreement to MLGW and Broadband. As shown below, Tennessee law recognizes and enforces agreements where the parties limit the benefits of the covenants to themselves and restrict the ability of third parties to enforce them.

Concord EFS[30] is one of the leading Tennessee cases on the requirements for third-party beneficiary status. In *Concord EFS*, a group of independent truck drivers claimed that they were third party beneficiaries of contracts between a bank that processed credit card transactions and two truck stop operators.[31] The contracts at issue prohibited the truck stop operators from adding a surcharge to purchases of fuel made with credit cards Despite the fact that the plaintiffs were not parties to the contracts, they sued seeking damages and injunctive relief, contending they were third-party beneficiaries of the no-surcharge provision in the contracts The Tennessee Supreme Court held the plaintiffs lacked standing to sue and therefore could not pursue their claims for damages [32] Importantly, the Court articulated a three-prong test to be used in determining whether a third party is an intended beneficiary of a contract entitled to enforce the contract's terms·

1) The parties to the contract have not otherwise agreed,
2) Recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and
3) The terms of the contract or the circumstances surrounding

[29] *Concord EFS*, 59 S W 3d at 69-70
[30] *See supra* n 25
[31] *Concord EFS*, 59 S W 3d at 65
[32] *Id*

performance indicate that either:

a the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary; or

b. the promisee intends to give the beneficiary the benefit of the promised performance.[33]

According to the Court in *Concord*, the primary focus is upon the intent of the contracting parties.[34] Thus, consistent with the first prong of the test, tribunals should honor any expression of intent by the parties to reserve to themselves the benefits of the contract.[35] The contracts at issue in *Concord* contained statements that "weigh[ed] in favor of a finding that the parties intended to exclude third-party beneficiary claims."[36] The Court noted, however, that such statements do not carry the same dispositive weight that would an explicit statement in the contract that the parties intended to reserve to themselves the benefits of their agreement,[37] like Section 14.6 of the *Operating Agreement* herein.

In *AmSouth Erectors, LLC v Skaggs Iron Works, Inc.*,[38] the Tennessee Court of Appeals applied the rule articulated in *Concord* to a situation in which the parties had explicitly reserved the benefits of the contract to themselves, like the matter at hand before the Authority In *AmSouth Erectors*, a subcontractor sued a building owner and a prime contractor and consulting firm, that had contracted with the owner to build an entertainment center, for payment for its services Consistent with *Concord*, the Tennessee Court of Appeals recognized that when determining whether a party is an intended third-party beneficiary, the "primary focus is upon the intent of the contracting parties" and, accordingly, "courts should honor any expression of

[33] *Id* at 70-71
[34] *Id* at 71
[35] *Id*
[36] *Id* at 72
[37] *Id*
[38] No W2002-01944-COA-R3-CV, 2003 WL 21878540 (Tenn Ct App Aug 5, 2003) (copy attached hereto)

intent by the parties to reserve to themselves the benefits of the contract "[39] Applying the first prong of the *Concord* test, the court in *AmSouth Erectors* concluded that in order for there to be an intended third-party beneficiary of any contract "the parties to the contract must have not otherwise agreed."[40] The court found that the contracts between the owner and the management firm expressly reserved the benefits to the contracting parties and held that the subcontractor was not a third-party beneficiary entitled to enforce the contract [41]

Based on the test set forth by the Tennessee Supreme Court in *Concord*, as later applied by the decision in *AmSouth Erectors*, GETCO and Isaac Luboti are not intended third-party beneficiaries entitled to enforce the *Operating Agreement* Applying Tennessee precedent, the Authority should honor the intent of MLGW and Broadband, as plainly expressed in Section 14 6 of the *Operating Agreement*, to reserve to themselves the benefits of the agreement and deny petitioners' request, which is based, in theory, upon the terms of the *Operating Agreement.*[42]

d. The Authority Should Dismiss the *Petition* Because it is Simply too Late to Grant the Requested Relief

In addition to the reasons outlined in subsection c, above, pursuant to Authority Rule 1220-1-2.03(2)(e), the Authority should decline to commence a contested case upon the *Petition*, and dismiss the same, for failure to state a claim upon which relief can be granted.

As noted above, Article 3, Section 3.4 of the Authority-approved *Operating Agreement* provides that any sale or sales under Section 3 4 "shall be closed within four (4) years from the approval date[.]" At its June 12, 2001, Agenda Conference, the Authority approved the

[39] *Id* at 3
[40] *Id*
[41] *Id*
[42] *See, e g*, TRA Rule 1220-1-2- 02(2)(c) ("the relief which the petition seeks is on its face barred as a matter of law")

Operating Agreement, and said approval was memorialized in the *Final Order*, dated August 9, 2001 Without waiving its argument that the approval date was June 12, 2001,[43] any sale or sales under Section 3.4 must have occurred in any event no later than August 9, 2005. GETCO's attempt to force a sale with the *Petition* on November 1, 2005 is simply too late.

Even if the Authority had jurisdiction to hear the *Petition*, and MLGW and Broadband contend that it does not, the *Petition* should be dismissed pursuant to Section 3.4 for failure to state a claim upon which relief can be granted Only after the expiration of the period within which a sale must occur - June 12, 2001 to August 9, 2005 at the very latest - did petitioners file the *Petition* with the Authority. Having failed to act in accordance with the plain and unambiguous date-specific terms of the *Operating Agreement*, petitioners are, in effect, now asking the Authority to modify and re-write Section 3 4 of the *Operating Agreement* to extend the time period within which a Section 3.4 sale must take place. To say the least, it would be inappropriate, if not unlawful, for the Authority to revise the contract terms [44] Therefore, the Authority should decline to commence a contested case upon the *Petition*, and dismiss the same, for failure to state a claim upon which relief can be granted.[45]

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[43] *Consumer Advocate Division v TRA*, No 01A01-9708-BC-00301, 1998 WL 684536, at *3 (Tenn Ct App July 1, 1998) (TRA decisions may be in writing or oral) (copy attached hereto) For purposes of argument in this pleading, MLGW and Broadband will use the later approval date – August 9, 2001 – as the triggering date

[44] Initial Order of Hearing Officer, *In Re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No 98-00118 at 21 (April 21, 1998), *aff'd*, Order Affirming the Initial Order of Hearing Officer, *In Re Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No 98-00118 (Aug 17, 1998) (In respecting the contractual terms of the parties before it, the Authority declared that it "should not serve as the conduit through which [a party] is allowed to circumvent and/or modify contractual obligations[ ]") (*citing Cookeville Gynecology & Obstetrics, P C v Southeastern Data Systems, Inc* , 884 S W 2d 458, 62 (Tenn App 1994))

[45] Petitioners have not alleged, nor could they, that MLGW and/or Broadband acted in bad faith to intentionally hamper, or otherwise delay, petitioners' ability to act (i e file a complaint) within the date-specific terms of the *Operating Agreement*

e. The Authority Should Dismiss the Petition Without Convening a Contested Case Under the Doctrine of Laches

Finally, in the interest of justice, the doctrine of laches should be employed by the agency in this matter. Petitioners failed to pursue their complaints for about four (4) years. Petitioners have not alleged in the *Petition* that some entity or party prohibited or thwarted further negotiations from 2001 until August 9, 2005, nor have petitioners cited any reasons justifying a four (4) year delay in filing the complaint

Petitioners' unnecessary delay in formally complaining under Section 3.4 of the *Operating Agreement* will prejudice MLGW and Broadband and impede the Authority, if jurisdiction is found, in judiciously resolving this dispute. The law does not generally reward such delay[46] Under the whole of the circumstances, applying the doctrine of laches in this matter is both appropriate and reasonable and should result in the Authority declining to commence a contested case upon the *Petition*, and dismissing the same.

[46] *See, e g , Brown v Ogle*, 46 S W 3d 721, 726 (Tenn Ct App 2000) (Relief is generally refused by courts of equity, because of lapse of time in such cases where the loss of evidence, death of witnesses or parties, and failure of memory resulting in the obscuration of facts to the prejudice of the defendant, render uncertain the ascertainment of truth, and make it impossible for the court to pronounce a decree with confidence ")

III.

CONCLUSION

For the foregoing reasons, the Authority should decline to convene a contested case and dismiss the *Petition*.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy has been forwarded via U.S. Mail to the following on this the 15th day of December, 2005.

Paul A. Robinson, Jr..
147 Jefferson, Ste 905
Memphis, Tennessee 38103

Melvin J. Malone

Not Reported in S.W.3d, 2001 WL 575570 (Tenn.Ct.App.)
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
CONSUMER ADVOCATE DIVISION, on behalf of TENNESSEE CONSUMERS,
v.
TENNESSEE REGULATORY AUTHORITY and Bellsouth Telecommunications, Inc.
No. M1999-01170-COA-R12-CV.
May 30, 2001.

An Appeal from the Tennessee Regulatory Authority, No. 99-00391; Sara Kyle, Director.
Paul G. Summers, Attorney General & Reporter; Michael Moore, Solicitor General; and L. Vincent Williams, Assistant Attorney General, for appellant, Consumer Advocate Division.
J. Richard Collier and Julie Woodruff, Nashville, TN, for appellee, Tennessee Regulatory Authority.
Guy M. Hicks and Patrick W. Turner, Nashville, TN, for appellee, BellSouth Telecommunications, Inc.

LILLARD, J., delivered the opinion of the court, in which CRAWFORD, P.J., W.S. and HIGHERS, J., joined.

OPINION

LILLARD.
***1** This is an appeal from an order by the Tennessee Regulatory Authority. The Tennessee Regulatory Authority denied the Consumer Advocate Division's request for a declaratory order as to the applicability of Tennessee Code Annotated §§ 65-5-208(a) and 65-5-209 to a telephone company's proposed tariff. It also denied the Consumer Advocate Division's request for a declaratory order as to the applicability of a previous order by the Authority approving the telephone company's application for price regulation, dismissed its claim for breach of contract, and denied its request for injunctive relief. Consequently, the proposed tariff was approved. The Consumer Advocate Division appeals. We affirm.
This case is an appeal of an order by the Tennessee Regulatory Authority. The appellant, the Consumer Advocate Division (the "Consumer Advocate"), is a division of the Office of the Attorney General & Reporter which represents the interests of Tennessee consumers of public utilities. *See* Tenn.Code Ann. §§ 65-4-118(c), 65-5-210(b) (Supp.2000). The appellee Tennessee Regulatory Authority ("Authority")is vested with "general supervisory and regulatory power, jurisdiction, and control over all public utilities." Tenn.Code Ann. § 65-4-104. The predecessor to the Authority was the Tennessee Public Service Commission ("Commission"). BellSouth Telecommunications, Inc. ("BellSouth") is a public utility providing telecommunication services in Tennessee.
In October 1994, BellSouth filed with the Commission a proposed tariff. BellSouth sought to amend its existing tariff to include a charge for directory assistance. The Consumer Advocate filed a petition to intervene, in opposition to the tariff. The Consumer Advocate's petition to intervene was granted by the Commission. On January 5, 1995, the Commission approved BellSouth's proposed tariff, on the condition that BellSouth file an amended tariff meeting certain conditions by February 1, 1995. BellSouth failed to file the amended tariff by the required date. Consequently, the Commission voted to reconsider the January order conditionally approving the tariff.
Before the Commission reconsidered BellSouth's proposed tariff, BellSouth and the Consumer Advocate entered into a settlement agreement altering the proposed directory assistance charge so that the net effect of the charges would be as close to zero as possible The proposed settlement agreement stated that the agreement would be presented and recommended to the Commission, and recognized that the Commission had "the authority to approve or disprove tariffs, rates, and related issues." On February 3, 1995, BellSouth and the Consumer Advocate submitted to the Commission the settlement agreement and the revised tariff. They asked that the agreement be placed on the agenda for the Commission's next conference. The Commission, however, took no further action on the proposed agreement and revised tariff.
In June 1995, the Tennessee Legislature enacted new legislation, The 1995 Tennessee Telecommunications Act, which substantially altered the manner in which public utilities in Tennessee

are regulated. *See* 1995 Tenn. Pub. Acts, ch. 408; Tenn.Code Ann. § 65-5-201 *et seq.* The Act created a new procedure by which companies such as BellSouth could elect price regulation. It also terminated the Commission effective June 30, 1996 and created the Authority effective July 1, 1996. *See* 1995 Tenn. Pub Acts, ch. 305. As a result, on June 28, 1996, the Commission entered a general order terminating all pending business effective June 30, 1996. This included BellSouth's proposed settlement agreement and revised tariff.

***2** On July 18, 1996, the new Authority entered an administrative order accepting recommencement of cases pending at the sunset of the Commission. However, the Consumer Advocate did not recommence BellSouth's case. In August 1996, the Authority sent a letter to BellSouth informing BellSouth that its 1994 filing seeking approval of the directory assistance tariff was closed and "*will not* become effective." (emphasis in original).

Citing changes in the regulatory landscape, BellSouth sent a letter dated May 30, 1996 to the Consumer Advocate, informing the Consumer Advocate that its October 1994 tariff had been withdrawn. [FN1] The letter asserted that changes in the regulatory environment and the withdrawal of the tariff now made the settlement agreement between the parties "moot." The letter stated that BellSouth had no immediate plans to make a similar filing, and that before it made such a filing, it would contact the Consumer Advocate "to discuss [the] matter in a manner consistent with the negotiation procedure which produced the draft settlement agreement."

> FN1. As the Authority points out in its brief, it is unclear whether BellSouth notified the Commission of the withdrawal of the tariff. There is nothing in the record confirming the withdrawal of the tariff, and, in its complaint the Consumer Advocate alleges "[t]hat no hearing or motion withdrawing the tariff was ever held."

Meanwhile, in June 1995, BellSouth filed an application with the Commission for price regulation. Its application for price regulation was finally approved in December 1998 [FN2]. Subsequently, on June 1, 1999, BellSouth filed a proposed tariff to begin charging $0.29 for each directory assistance call. On June 15, 1999, the Consumer Advocate filed a petition with the Authority seeking declaratory orders and injunctive relief. In the petition the Consumer Advocate sought a declaratory order as to the applicability of Tennessee Code Annotated sections 65-5-208(a) [FN3] and 65-5-209 [FN4] to BellSouth's proposed tariff, as well as a declaratory order as to whether the Authority's order approving BellSouth's application for price regulation was applicable to the 1995 settlement agreement between the Consumer Advocate and BellSouth. The Consumer Advocate alleged that, under sections 65-5-208(a) and 65-5-209, directory assistance is a basic service for price regulation purposes, and, therefore, under the statutes, BellSouth was precluded from increasing its price for a period of four years after BellSouth became subject to price regulation. The petition also alleged that BellSouth breached a contract with the Consumer Advocate by failing to contact the Consumer Advocate before BellSouth filed the 1999 proposed tariff, pursuant to the 1995 settlement agreement. The complaint requested that the charge for directory assistance be enjoined until resolution of the Consumer Advocate's breach of contract claim.

> FN2. The Commission had tentatively approved BellSouth's application to elect price regulation in January 1996 with the condition that BellSouth reduce its rates by fifty-six million. BellSouth appealed. In *BellSouth*
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> *Telecommunications, Inc v. Greer*, 972 S.W.2d 663 (Tenn.Ct.App.1997) (*perm. to appeal denied* June 15, 1998), the Court of Appeals reversed the Commission and remanded the cause for approval of the application. *Id.* at 682. On remand the Authority approved the price regulation plan. The Authority's order was subsequently affirmed on appeal. *See Consumer Advocate Div. v. Tennessee Regulatory Auth.*, No. M199902151COAR12CV, 2000 WL 13794 (Tenn Ct.App Jan. 10, 2000), *reh'g denied* Feb. 11, 2000.

FN3. Section 65-5-208(a) provides:

(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:

(1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.

(2) "Non-basic services" are telecommunications services which are not defined as basic local exchange telephone services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

FN4. Section 65-5-209 states in pertinent part:

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation....

(h) Incumbent local exchange telephone companies subject to price regulation may set rates for non-basic services as the company deems appropriate, subject to the limitations set forth in subsections (e) and (g), the non-discrimination provisions of this title, any rules or orders issued by the authority pursuant to § 65-5-208(c) and upon prior notice to affected customers....

After receiving the Consumer Advocate's petition, the Authority suspended BellSouth's tariff for thirty days. The Authority then considered the Consumer Advocate's petition at its regularly scheduled July 27, 1999 conference. After hearing oral arguments, the Authority deferred action on the tariff, expressing concern about charging elderly persons for directory assistance. Subsequently, BellSouth filed an amended proposed tariff. Thereafter, on July 29, 1999, the Authority dismissed the Consumer Advocate's petition and complaint, *sua sponte,* and approved BellSouth's amended tariff.
***3** In its July 29 order, the Authority found that there was no basis for granting the declaratory relief sought by the Consumer Advocate The Authority concluded that "the classification of BellSouth's tariff to implement a charge for directory assistance as a 'non-basic' service [was] consistent with [section] 65-5-208(a)(1)" as determined in the Authority's prior decision in *United Telephone-Southeast, Inc. Tariff No. 96-201, To Reflect Annual Price Cap Adjustment,* Docket No. 96-01423 (Sept. 4, 1997). [FN5] In this prior decision, the Authority concluded that directory assistance was a non-basic service under section 65-5-208(a). In the July 29 order, the Authority also declined to a convene a contested case, asserting that the Consumer Advocate had already litigated the same issues in two cases previously decided by the Authority, and which were pending at that time before the Court of Appeals. [FN6] The Authority found that the proposed settlement agreement was not

binding on either the Consumer Advocate or BellSouth because it was never approved by the Commission, it pre-dated the 1995 Tennessee Telecommunications Act, and because the Consumer Advocate did not recommence the action regarding the proposed agreement after the Commission ceased to exist. The Authority concluded, therefore, that there was no basis for issuing a declaratory order as to the applicability of the proposed agreement to the tariff. From this order, the Consumer Advocate now appeals.

FN5. This case arose out of a tariff filed by United Telephone-Southeast, Inc. seeking to increase in rates for non-basic services. At issue was the methodology used by United Telephone-Southeast to determine the amount of the proposed increase. The Authority found that the method used by United Telephone-Southeast complied with the section 65-5-209(e) and approved the tariff. The Consumer Advocate appealed, and in *Consumer Advocate Division v. Tennessee Regulatory Authority*, No. M1999-01699-COA-R12-CV, 2000 WL 1514324 (Tenn.Ct.App. Oct. 12, 2000) (hereinafter *United Telephone*), this Court affirmed.

FN6. In both cases the Authority's decision was affirmed. *See Consumer Advocate Div.*, 2000 WL 13794 at *3; *United Telephone*, 2000 WL 1514324 at * 5 & n. 3.

Our review of this case is governed by Tennessee Code Annotated section 4- 5-322(h), which sets forth the standard of review for the decision of an agency such as the Tennessee Regulatory Authority:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn Code Ann. § 4-5-322(h)(1998).

On appeal, the Consumer Advocate argues that the Authority did not properly interpret Tennessee Code Annotated sections 65-5-208(a) and 65-5-209 as they relate to charges for directory assistance under an incumbent local exchange telephone company price regulation plan. The Consumer Advocate contends that, under the statutes, BellSouth was precluded from increasing its rate for directory assistance for four years after the company became subject to price regulation, [FN7] because directory assistance is a basic service as defined in section 65-5-208(a), and the ordinary and natural meaning of the terms "usage," "provision," and "recurring and nonrecurring charges" include directory assistance.

FN7. Section 65-5-209(f) precludes increasing rates on a basic service for four years after a local exchange telephone company becomes subject to price regulation:

(f) Notwithstanding the annual adjustments permitted in subsection (e), the initial basic local exchange telephone services rates of an incumbent local exchange telephone company subject to price regulation shall not increase for a period of four (4) years from the date the incumbent local exchange telephone company becomes subject to such regulation...

*4 In the order which is the subject of this appeal, the Authority did not reach the merits of the issues raised by the Consumer Advocate. Instead, the Authority denied the Consumer Advocate's petition seeking declaratory relief and declined to convene a contested case because it determined that the issues raised by the Consumer Advocate had been determined in previous cases. The order also dismissed the Consumer Advocate's complaint, *sua sponte,* for failure to state a claim. The Consumer Advocate does not argue, under Tennessee Code Annotated § 4-5-322(h) that the Authority's decision was in violation of constitutional or statutory provisions, in excess of its statutory authority, made by unlawful procedure, or that it is unsupported by substantial material evidence. Therefore we surmise that, by our statutory standard of review, the issue on appeal is whether the Authority's decision to decline to grant declaratory relief, decline to convene a contested case, and to dismiss the complaint for failure to state a claim was an abuse of the Authority's discretion.

The Consumer Advocate argues first that the Authority's order should be reversed because the Agency failed to provide a sufficient statement of the underlying facts to support its findings, as required by Tennessee Code Annotated § 4-5-314(c). The Consumer Advocate argues that the Authority failed to detail facts regarding why directory assistance is not a basic service as defined in section 65-5-208(a); what the terms usage, provision, or charges mean as they relate to local basic exchange service; whether the United Telephone-Southeast tariff in the Authority's prior decision was sufficiently similar to the BellSouth tariff so that the Authority's decision in that matter would be applicable in this case; the relevant issues and part of the decision in the two cases named by the Authority in its order related to this case; and why the 1995 agreement was not binding.

An agency, when issuing a final order, must provide a concise and explicit statement of the underlying facts supporting the agency's findings. Tenn.Code Ann. § 4-5-314(c). Findings of fact made by the agency should be based exclusively on the evidence of the record and on matters noted in the proceeding. Tenn Code Ann. § 4-5-314(d). Exactness in form and procedure is not required; rather, the findings based on the evidence need only be specific and definite enough so that a reviewing court may determine the pertinent questions of law and whether the agency's general findings should stand, particularly when the findings are material facts at issue. *See Levy v. State of Tennessee Bd. Of Exam'rs for Speech Pathology and Audiology,* 553 S.W.2d 909, 911-12 (Tenn.1977) (quoting *State Bd. of Med. Exam'rs v. Grandy,* 149 S E.2d 644, 646 (S.C.1966)). "The sufficiency of an agency's findings of fact must be measured against the nature of the controversy and the intensity of the factual dispute." *CF Industries v. Tennessee Pub. Serv. Comm'n,* 599 S.W.2d 536, 541 (Tenn.1980).

*5 Therefore, in order to comply with the requirements of section 4-5- 314, an agency need only set forth facts sufficient to support its legal conclusions and to afford the Court an effective review of its findings. In denying the Consumer Advocate's petition, the Authority asserted that there was no basis for issuing the requested declaratory order as to the applicability of sections 65-5-208 and 65-5-209 or for convening a contested case because the issues raised by the Consumer Advocate had been addressed by the Authority in prior decisions. The Authority stated that it had previously ruled in *United Telephone-Southeast* that directory assistance was classified as a non-basic service, rejecting the same argument the Consumer Advocate now advances in this proceeding, namely, that directory assistance is a basic service under the statutory term "usage." The Authority then dismissed the Consumer Advocate's claim for breach of contract, finding that it failed to state a claim, based on the following facts: that the proposed agreement had required, but never received, approval of the Commission; the Consumer Advocate's failure to preserve the docket which included the agreement; and the fact that the 1995 Tennessee Telecommunications Act expressly established what constituted basic and non-basic services and superseded any pre-existing agreement or tariff which classified services to the contrary. The Authority noted that since the agreement was not binding, it had no effect on BellSouth's proposed tariff. Under these circumstances, the Authority's decision was supported by a sufficient statement of the underlying facts that served as the basis for its decision.

We next address whether the Authority abused its discretion by refusing to issue the requested declaratory relief and by refusing to convene a contested case. The decision of whether to issue a declaratory order is within an agency's discretion. Tenn.Code Ann. § 4-5-223(a)(2) (1998) Upon an agency's refusal to issue a requested declaratory order, an affected person may file a lawsuit in the Chancery Court of Davidson County. Tenn.Code Ann. § 4-5-225 (1998).

As noted above, the Authority based its decision not to issue a declaratory order as to the applicability of sections 65-5-208 and 6-5-209 on the fact that the Consumer Advocate sought a ruling on issues

that had been addressed by the Authority in a previously contested case, *United Telephone-Southeast*. Under these circumstances, we cannot conclude that the Authority abused its discretion in refusing to issue the requested declaratory relief.

The Consumer Advocate also sought a declaratory order as to the applicability of the 1995 proposed settlement agreement between the parties. The Authority's refusal to grant declaratory relief as to the applicability of the proposed settlement stems largely from its determination that the proposed agreement was not binding on either party. The Authority found that the proposed agreement was contingent upon its approval by the Commission, approval which was never granted. The proposed agreement expressly contemplated acceptance by the Commission, and acknowledged that the Commission had the authority to "approve or disprove tariffs, rates, and related issues." Moreover, the classification of services in the 1995 Tennessee Telecommunications Act supersedes classifications in any prior agreements or tariffs. In addition, the proposed agreement did not survive the dismissal of the 1994 tariff docket. *See* Sandstrom v. Chemlawn Corp., 904 F.2d 83 (1st Cir.1990); *Frank Rudy Heirs Assoc. v. Sholodge*, 967 S.W.2d 810 (Tenn.Ct App .1997). The Consumer Advocate argues that the May 30th letter shows that BellSouth contemplated the sunset of the Commission and indicates that BellSouth would negotiate regarding future filings. Regardless, the proposed agreement was expressly contingent on the approval of the Commission. Consequently, we find no error in the Authority's dismissal of the Consumer Advocate's breach of contract claim for failure to state a claim, and we find no abuse of discretion in its decision not to issue declaratory relief as to the applicability of the proposed agreement on the 1999 tariff.

***6** Finally, the Consumer Advocate argues that the Authority erred in refusing to convene a contested case. The Authority has the discretion to decide whether to convene a contested case to consider complaints filed with the agency. *See* Consumer Advocate Div. v. Greer, 967 S.W 2d 759, 763-64 (Tenn 1998). The Authority's decision in this case was based on its finding that the issues presented by the Consumer Advocate in its petition had been previously decided by the Authority, and that the Consumer Advocate's breach of claim contract failed to state a claim because the proposed agreement was based on a contingency that never occurred. Under these circumstances, we find no abuse of discretion in the Authority's decision.

In sum, we affirm the Authority's decision to refuse to issue the requested declaratory relief, the dismissal of the breach of contract claim for failure to state a claim, and the decision to decline to convene a contested case. All other issues raised in this appeal are pretermitted.

The decision of the Tennessee Regulatory Authority is affirmed. Costs are taxed to the appellant, the Consumer Advocate Division and its surety, for which execution may issue if necessary.

Tenn.Ct.App.,2001.

Consumer Advocate Div. ex rel. Tennessee **Consumers** v. Tennessee Regulatory Authority

Not Reported in S.W.3d, 2001 WL 575570 (Tenn.Ct.App.)

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Not Reported in S.W.3d, 2003 WL 21878540 (Tenn.Ct.App.)
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
AMSOUTH ERECTORS, LLC,
v.
SKAGGS IRON WORKS, INC., et al.
No. W2002-01944-COA-R3-CV.
Assigned On Brief April 22, 2003.
Aug. 5, 2003.

Direct Appeal from the Chancery Court for Shelby County, No. CH-01-0585-2; Floyd Peete, Jr., Chancellor.
Richard D. Bennett, Collierville, Tennessee and Samuel C. Kelly and Cheri T. Atlin, Ridgeland, Mississippi, for the appellant, Amsouth Erectors, LLC.
Michael I. Less, Joseph T. Getz and John D. Willet, for the appellee, Peabody Place Centre, L.P.
John McQuiston, II, Memphis, Tennessee for the appellee, Tri-Tech Planning and Engineering, Inc.

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S , and HOLLY M. KIRBY, J., joined.

OPINION

DAVID R. FARMER, J.
***1** This appeal concerns a subcontractor's (AmSouth) claims for non-payment arising from the construction of the Peabody Place Retail and Entertainment Center in Memphis. The Appellees are the owner (Peabody), and the management firm they hired to oversee the project (Tri-Tech). The Appellant is a subcontractor in privity of contract with neither Appellee. The trial court granted summary judgment to Peabody on AmSouth's claims of Breach of Contract (under a Third-Party Beneficiary theory), Negligence, Negligent Misrepresentation, Unjust Enrichment/Quantum Meruit, and a claim to enforce a mechanics' and materialmen' s lien. Summary judgment was likewise granted to Tri-Tech on AmSouth's claims against it for Breach of Contract (under a Third-Party Beneficiary theory), Negligent Misrepresentation, and Negligence. [FN1] We affirm in part, reverse in part, and remand.

> FN1 While the negligence claim is not mentioned in the Order granting Tri-Tech summary judgment, the Order granting Peabody summary judgment stated that "all of AmSouth's claims against Peabody Place and against Tri-Tech, which are based on negligence and negligent misrepresentation are dismissed with prejudice."

The parties to this dispute were all involved in the construction of the Peabody Place Retail and Entertainment Center ("the Project") in downtown Memphis. Peabody Place Centre, L.P. ("Peabody"), the owner of the project, entered into a contract with Tri-Tech Planning Consultants, Inc. ("Tri-Tech") whereby Tri-Tech agreed to serve as the program manager on the Project. Peabody also entered into a contract with Skaggs Iron Works, Inc. ("Skaggs") whereby Skaggs agreed to serve as the prime contractor on the Project in the areas of structural steel fabrication and erection. Skaggs subsequently entered into a contract with AmSouth Erectors, LLC, ("AmSouth") whereby AmSouth agreed to provide the erection services for the project Neither Peabody nor Tri-Tech entered into a contractual agreement with AmSouth. [FN2] Despite this fact, AmSouth claims that it is a third-party beneficiary of both the Peabody/Tri-Tech contract as well as the Peabody/Skaggs contract. As such, AmSouth sued both Peabody and Tri-Tech for breach of contract asserting, *inter alia,* that Peabody's failure to pay Skaggs, per the Peabody/Skaggs contract, had resulted in Skaggs not paying AmSouth

FN2. AmSouth argues that since the Peabody/Skaggs contract was "incorporated herein and made a part of" the contract between Skaggs and AmSouth, that this bolsters their third-party beneficiary claim. We disagree. To the contrary, the effect of this provision was to bind AmSouth to the provision that "[n]othing contained in the Contract Documents or otherwise shall create any contractual relationship between the Owner [Peabody] and any subcontractor or sub-subcontractor."

Additionally, AmSouth exercised its rights to assert a mechanics' and materialmen's lien [FN3] against Peabody's property to secure payment for its performance. Peabody subsequently recorded a bond to indemnify against the lien, the effect of which was to discharge the lien. [FN4] AmSouth sought to enforce this lien as part of their claim. Peabody argued that, as the lien had been discharged, there was no lien to enforce and, therefore, the claim should be dismissed.

FN3. *See* Tenn.Code Ann § 66-11-101, *et seq.*

FN4. Tenn.Code Ann § 66-11-142(a) (Supp.2002).

AmSouth also claimed that both Peabody and Tri-Tech were guilty of negligence in the performance of their duties which caused damage to AmSouth. The Appellee's asserted that, as the damages claimed by AmSouth were economic damages only, the "economic loss doctrine" barred recovery. AmSouth asserted that they fell within an exception to the doctrine, in that they were claiming damages for negligent misrepresentation, not merely simple negligence. Appellees, while acknowledging this exception, insisted that AmSouth had failed to properly plead this cause of action.

***2** Finally, AmSouth asserted that, although they lacked privity of contract with Peabody, they were nonetheless entitled to recover for services performed which benefitted Peabody under the quasi-contractual theory of unjust enrichment. Peabody asserted that AmSouth could not seek recovery from them under this theory until AmSouth had exhausted its remedies against the party with whom they had contracted, Skaggs.

The trial judge granted summary judgment to the Appellees (Defendants below) on all the aforementioned claims. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

Standard of Review

As indicated, this is an appeal from a grant of summary judgment. The standard for review of a motion for summary judgment is set forth in *Staples v. CBL & Assocs.*, 15 S.W.3d 83 (Tenn.2000):

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *See Hunter v. Brown*, 955 S.W 2d 49, 50-51 (Tenn.1997); *Cowden v. Sovran Bank/Central South*, 816 S W.2d 741, 744 (Tenn 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See Anderson v. Standard Register Co.*, 857 S W.2d 555, 559 (Tenn 1993). The moving party has the burden of proving that its motion satisfies these requirements. *See Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn.1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See Byrd* [ ], 847 S.W 2d at 215.
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> To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmoving party's claim or exclusively establish an affirmative defense. *See McCarley v. West Quality Food Serv.*, 960 S.W 2d 585, 588 (Tenn.1998); *Robinson v Omer*, 952 S.W.2d 423,

426 (Tenn.1997). If the moving party fails to negate a claimed basis for the suit, the [nonmoving] party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. *See* McCarley [ ], 960 S.W.2d at 588; Robinson [ ], 952 S.W.2d at 426. If the moving party successfully negates a claimed basis for the action, the [nonmoving] party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

***3** The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See* Robinson [ ], 952 S.W.2d at 426; Byrd [ ], 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See* McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn.1995); Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn.1995).

Staples, 15 S.W.3d at 88-9 (footnote omitted).

Third-party Beneficiary Claims

Appellant asserts that "[w]hether AmSouth ... is a third-party beneficiary of the contracts [at issue] is a question of fact that should not have been decided on summary judgment." However, "[t]he question whether a contract was intended for the benefit of a third person is generally regarded as one of construction[,]" 17A Am.Jur.2d *Contracts* § 441 (1991), [FN5] and "[t]he ascertainment of the intention of the parties to a written contract is a question of law, rather than a question of fact." Hamblen County v. Morristown, 656 S.W.2d 331, 335-36 (Tenn.1983). The question presented, therefore, is one suited for disposition via summary judgment.

> FN5. "Whether a third-party beneficiary is merely an incidental beneficiary is a question of construction." Abraham v. Knoxville Family Television, Inc., 757 S.W.2d 8, 10 (Tenn.Ct.App.1988) (citing 17 Am.Jur 2d *Contracts* § 308).

In Owner-Operator Independent Drivers Ass'n v. Concord EFS, Inc ., 59 S.W.3d 63 (Tenn.2001), "[t]he leading case in Tennessee on the requirements for third-party beneficiary status[,]" *Nichols v.. Transcor America, Inc.*, No. M2001-01889-COA-R9-CV, 2002 Tenn.App. LEXIS 449, at *22 (Tenn. Ct.App. June 25, 2002), our Tennessee Supreme Court "restate[d] the analysis to be used in evaluating third-party beneficiary cases." Concord, 59 S.W.3d at 70. This restatement was intended "to provide an analytical framework which allows the contracting parties to control the terms of their agreement, yet which remains sufficiently broad to ensure that the rights of intended third-party beneficiaries in all cases will be protected." *Id.* The *Concord* court then announced a three prong test to be used in determining whether a "third party is an intended third-party beneficiary of a contract...." *Id.*

The *Concord* court instructed that, when determining whether a party is an intended third-party beneficiary, the "primary focus is upon the intent of the contracting parties" and, accordingly, "courts should honor any expression of intent by the parties to reserve to themselves the benefits of the contract." *Id.* Consistent with this focus on the parties' intent, the first prong of the test annunciated by the court provides that, in order for there to be an intended third-party beneficiary of any contract, "[t]he parties to the contract [must] have not otherwise agreed[.]" [FN6] *Id.*

> FN6. Appellant cites Moore Construction Co., Inc. v. Clarksville Department of Electricity, 707 S.W 2d 1 (Tenn.Ct.App.1985) for the proposition "that generally, on a complex construction project like this one, each of the contractors is a third-party beneficiary of the owner's
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> contract with other contractors on the same project." Appellant fails to note, however, that *Moore,* as well as *Concord,* allows for third-party beneficiary status only "*[u]nless the construction contracts involved clearly provide otherwise.*" Moore, 707 S.W.2d at 10 (emphasis added). Accordingly, AmSouth cannot claim intended third-party beneficiary status under either *Moore* or *Concord*

In the present case, the contract between Peabody and Skaggs provides that "[n]othing contained in the Contract Documents or otherwise shall create any contractual relationship between the Owner [Peabody] and any subcontractor or sub-subcontractor " Likewise, the contract between Peabody and Tri-Tech provides that "[n]othing contained herein shall be deemed to create a contractual relationship between or among Tri-Tech, Contractors, Architect, subcontractors or Consultants for the Project, nor shall anything contained herein be deemed to give any such party or any third party any claim or right of action against Owner or Tri-tech."

***4** The *Concord* court noted that, while the contracts at issue in that case contained statements that "weigh in favor of a finding that the parties intended to exclude third-party beneficiary claims[,]" such statements do not carry "the same dispositive weight ... that ... would ... an explicit statement in the contract that the parties intended to reserve to themselves the benefits of their agreement." *Concord,* 59 S W 3d 63 at 72. In the present case, each contract contains just such an "explicit statement ... that the parties intended to reserve to themselves the benefits of their agreement" which carry "dispositive weight" as to the parties "inten[t] to exclude third-party beneficiary claims[.]" *Id.* at 72. Accordingly, AmSouth is not a third-party beneficiary entitled to enforce either of the aforementioned contracts, and summary judgment on this issue was proper, as to both Tri-Tech and Peabody.

Negligence/Negligent Misrepresentation

The trial court granted summary judgment to both Peabody and Tri-Tech on AmSouth's claims of negligence and negligent misrepresentation. Summary judgment was proper on the negligence claims as the damages claimed were strictly economic and thus barred by the "economic loss doctrine." [FN7]

> FN7. "The economic loss rule [or doctrine], which is usually traced to *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309 (1927), refers to the prohibition against recovery in negligence or products liability for purely economic loss, as distinguished from loss traced to personal injury or property damage." Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss,* 82 Ky. L.J. 659, 660 n 6 (1994).

Tennessee, however, has recognized an exception to this general rule. A plaintiff may maintain an action for purely economic loss based upon negligent supervision or negligent misrepresentation. In such a case § 552 of the Restatement (2d) of Torts provides the standard to be applied, and privity between plaintiff and defendant is not required. *See John Martin Co. v. Morse/Diesel, Inc.,* 819 S.W.2d 428, 435 (Tenn.1991). AmSouth asserts that they fit within this exception and, therefore, the trial court erred in granting summary judgment. We cannot agree.

In order to come within the exception noted in *John Martin* a party must assert a claim for negligent misrepresentation. The initial complaint filed by AmSouth, as well as their amended complaint, allege only "negligence" by Peabody and Tri-Tech. [FN8] AmSouth's failure to title their pleading as one for negligent misrepresentation does not, however, prevent them from pursuing a claim for negligent misrepresentation for "[i]t is well settled that a trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought[,]" *Norton v. Everhart,* 895 S W.2d 317, 319 (Tenn.1995). In exercising this discretion the trial court shall give the pleadings "the effect required by their content, without regard to the name given them by the pleader." *State by Canale v. Minimum Salary Dep't of A.M.E. Church, Inc.,* 477 S.W.2d 11, 12 (Tenn.1972) (citations omitted).

> FN8. We are aware of Rule 15 02 which provides that issues not raised by the pleadings can be considered to have been properly pled where impliedly or expressly tried with the consent of the parties. Assuming that the term "tried" is sufficiently broad to cover pre-trial motions, we find this rule inapplicable in situations such as that presented here, where the movant's motion for summary judgment rests upon the Plaintiff's alleged failure to set forth a sufficient plea. (We are cognizant that *Trinity Indus. v. McKinnon Bridge Co.,* 77 S W.3d 159, 182, 183 (Tenn.Ct.App.2001), could be read as allowing a different conclusion. *Trinity,* however, does not provide the substance of the underlying

> motion for summary judgment.) To hold otherwise would result in the anomalous determination that, although the initial complaint did not sufficiently allege negligent misrepresentation, the movant's motion for summary judgment based on this fact, coupled with the non-moving party's answer and the subsequent determination by the trial court on this issue, would amount to the issue having been implicitly or explicitly tried, thus resulting in the claim "be [ing] treated in all respects as if [it] had been raised in the pleadings." Tenn. R. Civ. P. 15.02. Thus, the end result of a motion for summary judgment, premised upon an insufficient plea, would be to convert the deficient plea to a sufficient one. Such an absurd result runs afoul of
>
> our established practice of considering substance over form when construing a motion. *See Tennessee Farmers Mut. Ins. Co. v. Farmer,* 970 S.W.2d 453, 455 (Tenn.1998).

It is also true, however, that
[w]hile a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, it either must contain 'direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested ... by the pleader, or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.'
***5** Donaldson v. Donaldson,* 557 S.W.2d 60, 61 (Tenn.1977) (citing C. Wright and A. Miller, Federal Practice and Procedure, § 1216 at 121-123). Additionally, the Tennessee Rules of Civil Procedure provide that a pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief...." Tenn. R. Civ. P. 8.01.
As noted, where a party bases an action for economic loss upon a theory of negligent misrepresentation, "the applicable law in Tennessee, absent privity, is found in the Restatement (2d) of Torts § 552 (1977)[,]" *John Martin Co. v. Morse/Diesel, Inc.,* 819 S.W.2d 428, 431 (Tenn.1991), which provides:
One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in the obtaining or communicating of the information.
Id.
This Court has stated that, "even under today's relaxed rules of pleading, it is necessary to include enough facts in a complaint to articulate a claim for relief." *Rawlings v. John Hancock Mut. Life Ins. Co.,* 78 S.W.3d 291, 300 (Tenn.Ct.App.2001). AmSouth's claims, as pled, do not contain direct allegations that either Peabody or Tri-Tech "supplie[d] false information for the guidance of AmSouth" or that either party "failed to exercise reasonable care or competence in the obtaining or communicating of the information." Nor do we find them to "contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial." As "[t]here is no duty on the part of the court to create a claim that the pleader does not spell out in his complaint[,]" *Trau Med of America, Inc. v. Allstate Insurance Co.,* 71 S.W.3d 691, 704 (Tenn.2002) (quoting *Donaldson v. Donaldson,* 557 S.W.2d 60, 62 (Tenn.1977)), the grant of summary judgment as to this "claim" was proper and is, therefore, affirmed. [FN9]

> FN9. The trial court granted summary judgment in favor of Tri-Tech upon different grounds. We note, however, that "this Court will affirm a decree of the trial court correct in result, though rendered upon different, incomplete or erroneous grounds." *Hopkins v. Hopkins,* 572 S.W.2d 639, 641 (Tenn.1978).

Quantum Meruit/Unjust Enrichment

AmSouth, in essence, asserts two separate claims of unjust enrichment against Peabody: one arising from Skaggs' failure to pay AmSouth for work performed that benefitted Peabody per the

Skaggs/AmSouth contract, and another concerning work that AmSouth was requested to perform by Peabody, or its agents, in addition to that contained in the AmSouth-Skaggs contract. [FN10]

FN10. AmSouth's complaint alleges that "AmSouth was directed to perform extra or additional work not included in the original subcontract. This work was performed in accordance with express directions from Peabody, Tri-Tech and Skaggs. AmSouth has not been paid for this extra work."

The Tennessee Supreme Court has held that unpaid materialmen can assert an unjust enrichment claim against a property owner. *Paschall's, Inc. v. Dozier,* 407 S.W.2d 150, 155 (1966). The *Paschall* court conditioned this right, however, on the claimants demonstrating that it had exhausted its remedies against the contractor with whom they enjoyed privity of contract. [FN11] *Id.* In the present case, the trial court granted summary judgment to Peabody, finding that AmSouth had failed to exhaust its remedies against Skaggs.

FN11. The court held "that before recovery can be had against the landowner on an unjust enrichment theory, the furnisher of the materials and labor must have exhausted his remedies against the person with whom he had contracted, and still has not received the reasonable value of his services." *Paschall's* 407 S.W.2d at 155.

***6** The purpose behind the exhaustion of remedies requirement was discussed in *Window Gallery of Knoxville v. Davis,* No. 03A01-9906-CH-00225, 1999 Tenn.App. LEXIS 775, at *1 (Tenn. Ct. App ., filed Nov. 24, 1999) (*no perm. app. filed*), where the court stated "that the exhaustion of remedies defense 'is a judge-made doctrine whose purpose is to winnow out claims that are not ripe for adjudication.' " *Window Gallery,* 1999 Tenn.App. LEXIS 775, at *8 (quoting *Byrn v. Metropolitan Bd. of Pub. Educ.,* 1991 Tenn.App. LEXIS 46, No. 01A01-9003-CV-00124 (Tenn. Ct.App., filed Jan. 30, 1991)(*no perm. app. filed*)). The *Window Gallery* court then went on to state that [r]ipeness is a category of justiciability that questions whether the dispute has matured to a point that warrants a judicial decision. The central concern is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all. Determining whether a controversy is ripe enough to be justiciable involves a two-part inquiry. The court must first determine whether the issues are of the type that would be appropriate for judicial determination. Then the court must consider the hardship that declining to consider the case will have on the parties. The courts will decline to act in cases where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue *at a more appropriate time.*

Window Gallery, 1999 Tenn.App. LEXIS 775, at *9 (citations omitted) (alteration in original). "Whether or not a plaintiff ... has exhausted it remedies so as to allow it to pursue an unjust enrichment claim against a homeowner must be determined by the facts of each individual case." *Id.* In *Window Gallery,* as here, the plaintiff sued both the subcontractor and the owner to collect funds owed to them. [FN12] The plaintiff then moved for summary judgment against the owner, but not the subcontractor. The plaintiff prevailed, thus leaving the suit against the subcontractor pending at the time of the owner's appeal of the grant of summary judgment. Based on these facts, this court found that the grant of summary judgment against the owner was improper, for the plaintiff had failed to exhaust his remedies against the subcontractor. The court determined that "[t]here is nothing in this record before us that shows further pursuit by [plaintiff] of [the subcontractor] through its lawsuit would be futile. We hold that while [plaintiff] has taken some steps to attempt recovery from [the contractor with whom they enjoyed privity of contract], it has not exhausted its remedies against [that party] ." *Id.* at *10, 11.

FN12 The plaintiff in *Window Gallery* initially sued the parties in separate suits, which were consolidated.

In the present case AmSouth has taken the same steps as the plaintiff in *Window Gallery.* They have filed suit against Skaggs, but that suit is still pending. Accordingly, until such time as AmSouth receives a judgment against Skaggs and is unable to collect upon it, the cause of action against Peabody is premature. Accordingly, the grant of summary judgment in favor of Peabody, as far as it concerns the amounts owing on the AmSouth-Skaggs contract, is affirmed.

***7** This does not end our analysis, however, for the claims against Peabody which arise outside the AmSouth-Skaggs contract do not require that AmSouth exhaust its remedies against any other party in order to proceed. Accordingly, to the extent that such claims arise independent of the AmSouth-Skaggs contract, the grant of summary judgment was in error and is reversed.

Lien Claim

Peabody asserts that, upon acquiring a bond to discharge Appellants lien, as prescribed in Tenn Code Ann. § 66-11-142 (Supp.2002), Peabody was "no longer liable to the claimant" and, accordingly, it was proper for the trial court to dismiss AmSouth's claim seeking to enforce its lien. Peabody further asserts that only "the obligors on the bond are liable to the claimant." This is true. Peabody overlooks the fact, however, that as principal on the bond, Peabody is also an "obligor on the bond" [FN13] and, therefore, still liable to AmSouth for any judgment entered against it. The bond merely insures that AmSouth will be able to recover a judgment, either from Peabody, or in the case Peabody cannot meet their obligation, from the surety. It in no way reduces Peabody's potential liability to AmSouth.

> FN13. Black's Law Dictionary defines "obligor" as a "[p]erson obligated under a ... bond." Black's Law Dictionary 971 (5th ed.1979). The Bond referred to lists Peabody "as Principal[.]" *Black's* defines "Principal," as the term relates to the "Law of guaranty and suretyship [,]" to be "*[t]he person primarily liable,* for whose performance of *his* obligation the ... surety has become bound." *Id.* at 1073 (emphasis added). Clearly, the bond in no way altered the potential liability of Peabody.

Additionally, Peabody argues that AmSouth's attempt to enforce their lien cannot stand, as the lien has been replaced by the bond and, therefore, "AmSouth may maintain its cause of action directly against the bond." Peabody's use of the word "may" is correct, for the Code provides that "[t]he person asserting the lien [AmSouth] *may* make the obligors on the bond parties to any action to enforce the claim, and any judgment recovered may be against *all or any* of the obligors on the bond." Tenn.Code Ann. § 66-11-142 (Supp.2002) (emphasis added.). Clearly, the statute does not *require* AmSouth to make the surety a party to the suit The exercise of this option, to choose the parties to the suit, will, however, determine the procedural posture of the case, for

> [w]here a mechanic's lien has been discharged by the giving of a bond the lienor may do either one of two things. He may bring an action to foreclose the lien against the debtor alone, and if he recovers a judgment establishing the validity of the lien and its amount, then maintain an action against the surety on the bond; or he may bring an action in equity against the debtor and the surety on the bond and obtain therein a judgment establishing the validity and amount of the lien and a personal judgment against the judgment debtor and the surety on the bond.

Pierce, Butler & Pierce Mfg. Co. v. Wilson, 103 N.Y.S. 678 (1907) (internal citations omitted); *see also* 56 C.J.S. *Mechanics' Liens* § 269 (1992). In the present case AmSouth chose to pursue the first option which, considerations of judicial economy notwithstanding, was entirely proper.

In its order granting Peabody summary judgment, the trial court found that "[b]ecause Peabody Place has filed a bond ... to discharge AmSouth's lien ... the lien is hereby discharged and ... AmSouth is not entitled to further encumber and/or attach Peabody Place's real property." This statement is entirely correct, for the purpose and effect of the bond is to prevent AmSouth from looking to the real property to satisfy the judgment. The bond forces AmSouth to look instead to Peabody and its surety for payment of any judgment received. A determination that AmSouth would have been able to enforce its lien, absent the bond, does not result in an encumbrance of the property, but merely allows for an action on the bond.

***8** The propriety of the parties notwithstanding, in the present case the lien represents security for

funds owed to AmSouth for "steel erection work ... performed on behalf of [Peabody] by AmSouth pursuant to a written agreement between AmSouth and [Skaggs] " AmSouth also brought suit against Skaggs for breach of contract in an attempt to recover these funds. Accordingly, the lien secures any judgment which AmSouth may receive on its unjust enrichment/quantum meruit claim against Peabody. As that claim was properly dismissed, as having been brought prematurely, the suit to enforce the lien which secures any judgment received by AmSouth on the unjust enrichment claim must also fail for the same reason. Accordingly, summary judgment on this issue was properly granted and is, therefore, affirmed. This in no way affects AmSouth's ability to subsequently collect on the bond. [FN14]

FN14. "The lien shall continue for the period of ninety (90) days from the date of the notice in favor of the such subcontractor ... and until the final termination of any suit for enforcement brought within that period." Tenn.Code Ann. § 66-11-115(c) (1993). Thus, the dismissal of the action to enforce the lien makes an action to collect on the bond the only available means of future recovery.

Conclusion

For the foregoing reasons, we affirm the grant of summary judgment to both Tri-Tech and Peabody as to the breach of contract claims, as well as the negligence and negligent misrepresentation claims. We affirm the grant of summary judgment on AmSouth's claim to enforce its lien. We affirm the grant of summary judgment on the unjust enrichment claim, to the extent that it relates to funds owed under the AmSouth-Skaggs contract. We reverse the grant of summary judgment on the unjust enrichment claim to the extent that it relates to work performed outside the AmSouth-Skaggs contract, at the direction of Peabody or its agents. The costs of this appeal are taxed as follows: one-third each to the Appellees, Peabody and Tri-Tech, and one-third to the Appellant, AmSouth, and its surety for which execution, if necessary, may issue.

Tenn.Ct.App.,2003.

Amsouth Erectors, LLC v. Skaggs Iron Works, Inc.

Not Reported in S.W.3d, 2003 WL 21878540 (Tenn.Ct.App.)

END OF DOCUMENT

Not Reported in S.W.2d, 1998 WL 684536 (Tenn.Ct.App.), Util. L. Rep. P 26,665
SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
CONSUMER ADVOCATE DIVISION, Petitioner/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY; Nashville Gas Company, Respondents/Appellees.
No. 01A01-9708-BC-00391.
July 1, 1998.

Appeal No. 01-A-01-9708-BC-00391 Tennessee Regulatory Commission.
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OPINION

CANTRELL, J.
*1 This petition under Rule 12, Tenn. R.App. Proc., to review a rate making order of the Tennessee Regulatory Authority presents a host of procedural and substantive issues. We affirm the agency order.

I.

On May 31, 1996 Nashville Gas Company (NGC) filed a petition before the Tennessee Public Service Commission requesting a general increase in its rates for natural gas service. The proposed rates would produce an increase of $9,257,633 in the company's revenue. The Consumer Advocate Division (CAD) of the State Attorney General's office filed a notice of appearance on June 6, 1996 and Associated Valley Industries (AVI), a coalition of industrial users of natural gas, entered the fray on August 20, 1996.
The Public Service Commission was replaced on July 1, 1996 by the Tennessee Regulatory Authority (TRA), a new agency created by the legislature. By an administrative order, TRA laid down the procedure by which it would accept jurisdiction of matters previously filed before the Public Service Commission, and the parties successfully navigated the uncharted waters of the TRA to get the case ready for a final hearing on November 13, 1996.
At a scheduled conference on December 17, 1996, the TRA orally approved a general rate increase for NGC, effective January 1, 1997, that would produce approximately $4,400,000 in new revenue. When a final order had not been filed by December 31, 1996, NGC began charging the rates orally approved at the conference on December 17. On February 19, 1997 TRA filed its written order adopting the oral findings of December 17, 1996. The order allowed the increased rates "for service rendered on and after January 1, 1997."

II. The Procedural Issues

a.

Was the TRA required to appoint an administrative law judge or hearing officer to conduct the hearing?

The Tennessee Administrative Procedures Act provides that a contested case hearing shall be conducted (1) in the presence of the agency members and an administrative judge or hearing officer or (2) by an administrative judge or hearing officer alone. Tenn Code Ann. § 4-5-301(a). The CAD asserts that the TRA's order in this case is void because the agency did not follow the mandate of this statute.
The TRA, however, is also governed by an elaborate set of procedural statutes. *See* Tenn.Code Ann. § 65-2-101, et seq. Tenn.Code Ann. § 65-2-111 provides that the TRA *may* direct that contested case proceedings be heard by a hearing examiner, and we held in *Jackson Mobilphone Co. v. Tennessee*

Public Service Comm., 876 S.W.2d 106 (Tenn.App.1994), that the TRA's predecessor, the Public Service Commission, could conduct a contested case hearing itself *or* appoint a hearing officer. We think that decision is still good law and that it applies to the TRA.

b.

Did the TRA staff conduct its own investigation and improperly convey ex parte information to the TRA?

The CAD argues that the TRA violated two sections of the UAPA in the proceeding below: (1) the section prohibiting a person who has served as an investigator, prosecutor, or advocate in a contested case from serving as an administrative judge or hearing officer in the same proceeding, Tenn.Code Ann. § 4-5-303; and (2) the section prohibiting ex parte communications during a contested case proceeding, Tenn.Code Ann. § 4-5-304.

***2** As to the first contention, there is nothing in the record that supports it. The Regulatory Authority members sat as a unit to hear the proof in the hearing below. We have held that they were entitled to do so. There is no proof that any of them had served as an investigator, prosecutor, or advocate in the same proceeding.

As to the second contention, it is based on the CAD's suspicion that members of the TRA staff had taken part in an investigation of NGC, had prepared a report for the Authority, and had, in fact, continued to communicate with NGC and relay that information to the Authority members.

At the beginning of the hearing the Consumer Advocate moved to discover what he described as a report from the staff that augmented or boosted the position of one party or the other. He admitted that he did not know that such a report existed but that he believed it did, because of the past practice before the Public Service Commission.

The Authority chairman moved to deny the motion with the following explanation:

I believe that as a director I have a right to have privileged communication with a member of my staff for the purpose of understanding issues and analyzing the evidence in the many complicated proceedings that this Agency has to hear. I reject your allegation that I have abdicated my responsibility as a decision maker. I rely on my staff expertise as the law permits me to do so. Therefore, I move that your motion be denied.

The Agency members unanimously denied the CAD's motion.

On this part of the controversy we are persuaded that the TRA was correct. The TRA deals with highly complicated data involving principles of finance, accounting, and corporate efficiency; it also deals with the convoluted principles of legislative utility regulation. To expect the Authority members to fulfill their duties without the help of a competent and efficient staff defies all logic. And, we are convinced, the staff may make recommendations or suggestions as to the merits of the questions before the TRA. *See* Tenn.Code Ann § 4-5-304(b). Otherwise, all support staff--law clerks, court clerks, and other specialists--would be of little service to the person(s) that hire them. We are satisfied that any report made by the agency staff based on the record before the TRA was not subject to the CAD's motion to discover it.

The other part of the CAD's contention is more troubling. It contains an assertion that members of the TRA staff were passing along to the TRA evidence received from NGC. We would all agree that such ex parte communications are prohibited. *See* Tenn.Code Ann. § 4-5-304(a) and (c).

In support of his contention Consumer Advocate called the manager of the utility rate division who testified that he did an investigation of NGC under an audit. At that point the parties engaged in a general discussion about the Authority's prior ruling that the staff members' advice could not be discovered. A question about whether his advice was based on anything other than the facts in the record was excluded after an off-the-record discussion, and the witness was asked only one other question. He answered "yes" when asked if he had talked with the company or company officials since the time of the audit. There were no questions bearing on the nature of the conversations, or whether the witness received or disseminated any information pertinent to the NGC proceeding.

***3** We cannot find on the basis of the evidence in this record that the Agency received any ex parte communications that were prejudicial to the CAD's position. We would add only one further point: that administrative agencies should ensure compliance with the Administrative Procedures Act.

c.

Did NGC unlawfully put its new rates into effect on January 1, 1997?

The CAD argues that since no written order had been entered allowing the rate increase, NGC had no authority to start charging the increased rates, and the TRA's February order amounted to retroactive ratemaking.

The TRA has the power to fix just and reasonable rates "which shall be imposed, observed, and

followed thereafter" by any public utility. Tenn.Code Ann. § 65-5-201. But the statutory scheme--which is the same as it was during the existence of the Public Service Commission--recognizes that a public utility may set its own rates, subject to the power given to the TRA to determine if they are just and reasonable. Tenn.Code Ann. § 65-5-203(a). *See Consumer Advocate Division v. Bissell,* No. 01-A-01-9601-BC-00049 (Tenn.App., Nashville, Aug. 26, 1996). The increased rates may be suspended for an outside limit of nine months while the TRA conducts its investigation, *id.,* but after six months the utility may, upon notice to TRA, place the increased rates into effect. Tenn.Code Ann. § 65-5-203(b)(1). The authority *may* require a bond in the amount of the proposed annual increase. *Id.*

In this case, NGC filed its petition on May 31, 1996. Because the Public Service Commission was replaced by the TRA on July 1, 1996, NGC refiled the petition on July 29, 1996. The CAD argues that the petition, therefore, had not been pending for the six months period that would allow NGC to put the rates into effect.

Under the circumstances of this case, however, we think that argument exalts form over substance. The TRA had heard the proof, and in an open meeting had announced its decision to allow part of the rate increase to go into effect on January 1, 1997. While a written order had not been entered, NGC notified the TRA that it would put the approved rates into effect on the date specified in the TRA's oral decision.

In our view, the increased rates had been pending since May. The hiatus between May and July was caused by a massive overhaul of the state regulatory machinery, and that fact cannot be attributed to NGC. So, under the statutory scheme, NGC had the power to put the approved rates into effect on January 1, 1997.

In addition, Tenn.Code Ann. § 65-2-112 says "Every final decision or order rendered by the authority in a contested case shall be in writing, or stated in the record...." NGC could have used the TRA's oral decision as the basis for its action of putting the rates into effect. The decision had been "stated in the record" on December 17, 1996. We add this caveat, however. The statute goes on to say that either a written or oral decision "shall contain a statement of the findings of fact and conclusions of law upon which the decision of the authority is based." We do not express an opinion on whether the December 17 oral decision complies with that mandate. But we do agree that findings of fact and conclusions of law are a necessary requirement for a meaningful review of an administrative agency's decision. *See Levy v. State Bd. of Examiners for Speech Pathology & Audiology,* 553 S.W.2d 909 (Tenn.1977).

III. The Substantive Issues

a. Hearsay

***4** The CAD argues that some of the evidence offered by NGC's expert on the projected increase in company expenses was based on rank hearsay. We notice, however, that Tenn.Code Ann. § 65-2-109 allows TRA to admit and give probative effect to any evidence that would be accepted by reasonably prudent persons in the conduct of their affairs. The same statute relieves the TRA from the rules of evidence that would apply in a court proceeding.

The CAD does not address the question of whether the evidence it calls hearsay is, nevertheless, of the kind that would be relied on by reasonably prudent persons in the conduct of their affairs. NGC argues that the evidence was not hearsay because it was based on the company records that are kept in the ordinary course of business. *See* Tenn. R. Evid. 801, 803(6). We need not decide whether the proffered evidence was hearsay because we are satisfied that the evidence was reliable and could be considered by the TRA. The TRA heard the objections to the evidence and the CAD's argument that its evidence on the same subject should have been received. The TRA chose NGC's evidence as more reliable. We find no fault with the TRA's decision on this issue.

b. Advertising

This is an issue on which the briefs of the principal parties seem to be speaking different languages. The following explanation is the best we can glean from the record. In 1984 the Public Service Commission adopted a rule that disallowed as a recoverable expense by a utility any "promotional or political advertising." The prohibition covered advertising for the purpose of encouraging any person to select or use gas service or additional gas service. It did not cover (among other things) advertising informing customers how to conserve energy or to reduce peak demand for gas, or advertising promoting the use of energy efficient appliances. *See* former Rule 1220-4-5-.45, Tenn. Regis.

In a 1985 proceeding involving a rate increase application by NGC, the Commission deviated from the rule and allowed advertising expenses up to .5% of revenues. In March of 1996 the Commission repealed 1220-4-5-.45 and proposed a new rule that would allow a utility to recover "all prudently

incurred expenditures for advertising." Apparently the rule had not made it completely through the adoption procedure when the TRA heard this case below.
Nevertheless, based on proof of $1,486,000 in external advertising expenses, $800,000 in marketing personnel payroll and $300,000 in miscellaneous sales expenses, the TRA allowed the recovery of all but approximately half of the external advertising expenses The CAD urged disallowance of all the related expenses except approximately $647,000 and NGC claims that the TRA erred in reducing the external operating expenses because there was no proof that they were imprudently incurred.
We think the TRA was justified in its conclusion on this issue. Based on the testimony in the record that the advertising expenses were incurred to meet competition, to add new customers on existing mains, and to get existing customers to use more gas, the TRA concluded that the rate payers benefited from at least part of the external advertising.

c. The Long Term Incentive Plan

***5** The TRA allowed NGC to recover approximately one-half of the cost of its Long Term Incentive Plan. The CAD opposes the allowance of any of this expense on the basis that the plan encourages executives to seek growth through rate increases instead of through performance gains. According to the CAD, the plan does not promote improved service.
NGC offered evidence, however, that the plan had increased employee efficiency and had reduced the number of company employees per customer in Tennessee. The savings amounted to $7 million annually in wages and salaries. The same witness rebutted the CAD witness who testified that the plan encourages employees to seek rate increases rather than improved efficiency.
None of the parties to the appeal cited any authority governing the allowance of incentive payments in utility rate cases. The proof included some references to cases in other jurisdictions where that state's utility commission had allowed either 100% of the incentive payments or some fraction thereof. The consensus seems to be to look at each plan on a case by case basis and view each plan in the context of the utility's total compensation package.
We do not think the TRA erred in the treatment of the long term incentive plan in this case.

d. Rate of Return

NGC requested a rate of return on equity in the range of 13% to 13.25%. The CAD requested an 11% rate of return and offered expert testimony showing that monthly compounding of the company's income would raise the rate of return to 11.60%. The TRA set a rate of return of 11.5%.
We fail to see how either side could make much of a case on appeal. The TRA's findings and conclusions are supported by evidence in the record that is both substantial and material. *See* Tenn.Code Ann. § 4-5-322(h). A proper rate of return is not a point on a scale, *Tennessee Cable Television Ass'n v. PSC,* 844 S.W.2d 151 (Tenn App.1992), it covers a fairly broad range, as indicated by the testimony of the competing experts in this case. We affirm the TRA's decision on this point.
We take no position on the issue of the compounding effect of the company's receipts. It is a concept that is new to us in utility regulation, and its merits need to be explored more thoroughly than they have been in this record.

IV. The Rate Design

The intervenor, AVI, challenges the part of the TRA's order that raised the "tailblock" rate for gas supplied to NGC's largest interruptible customers. The tailblock rate is the lowest rate charged per unit and it applies to usage of over 9,000 decatherms per month. [FN1] NGC's petition did not seek any increase in the rates falling in this category. The CAD's proof proposed that any changes be spread to all customer classes, but the intervenor sought an overall rate decrease. AVI's witness testified that industrial rates were set well above costs and should not be increased The TRA's order increased the tailblock rate from $0.21 per decatherm to $0.228 per decatherm. The TRA said in its order:

> FN1. There are three other blocks in the interruptible industrial category of users Block one applies to usage of 1-1,500 decatherms per month; block two covers the 1,501-4,000 category, and block three applies to the 4,001-9,000 category.

***6** After careful consideration of the testimony and exhibits of the parties, the Authority finds that the rate increase approved herein should be spread equally to all customers It is the intent of the Authority to spread this increase to all ratepayers, including interruptible Sales customers,

Transportation customers, and Special Contract customers, in order to minimize the overall impact of this rate change. In addition, the Authority concludes that the residential customer charge should be increased from $6.00 per month to $7 00 per month.

We think the question of whether to spread the rate increase to all classes of users was within the discretion of the TRA. In *CF Industries v. Tenn. Pub. Serv. Comm.*, 599 S.W.2d 536 (1980), our Supreme Court said:

Specifically, there is no requirement in any rate case that the Commission receive and consider cost of service data, or what such data, if in the record, are to be accorded exclusivity. It is self-evident that cost of service is of great significance in the establishment of rates but is of lesser value in arriving at rate design. A fair rate of return to the regulated utility is one thing; the establishment of rates among various customer classes is quite another.

599 S W. at 542.

* * *

Thus, the Public Service Commission in rate making and design cases is not solely governed by the proof although, of course, there must be an adequate evidentiary predicate. The Commission, however, is not hamstrung by the naked record. It may consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence and specialized knowledge. Thus focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test--nothing more, nothing less.

599 S.W. at 543.

We think it would be a rare case where the court would interfere with a rate increase spread evenly over all classes of users. If the rate design is inequitable it was not established in this proceeding. Therefore, a request that the rate increase be applied unevenly is, in fact, a request to change the rate design--on which the intervenor would have the burden of proof. A change would have to be shown by a greater amount of proof than appears in this record.

The TRA's order is affirmed and the cause is remanded to the Tennessee Regulatory Authority for enforcement. Tax the costs on appeal to the Consumer Advocate Division.

CONCUR: HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, WILLIAM C. KOCH, JR., JUDGE.

Tenn.App.,1998.

Consumer Advocate Division v. Tennessee Regulatory Authority

Not Reported in S.W.2d, 1998 WL 684536 (Tenn.Ct.App.), Util. L. Rep. P 26,665

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